IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WAKI & KIAGE, JJ.A.)

CIVIL APPEAL NO. 141 OF 2014

BETWEEN

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION……..APPELLANT

AND

DAVID BENEDICT OMULAMA.....1ST RESPONDENT

ANDREW W. MAKWAGA……...2ND RESPONDENT

BENARD AMUCHIZI MUKAISI…….……3RD RESPONDENT

ANDRIANO MUKALO…….....4TH RESPONDENT

WYCLIFFE SORE…….5TH RESPONDENT

SEVERIO MASIKA…….….6TH RESPONDENT

LILLIAN INGUTIA……...….7TH RESPONDENT

EFELI A. NANDI…….....8TH RESPONDENT

JAMES AMATONYE……..…9TH RESPONDENT

THE REGISTRAR OF TRADE UNIONS……..…10TH RESPONDENT

*(Being an appeal from the Judgment/Orders/Decree of the Industrial Court of Kenya at Nairobi (**Monicah Mbaru, J**.) dated the 11th day of February, 2014*

in

Industrial Cause No. 7 of 2011)

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JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of Industrial Court now renamed the, Employment and Labour Relations Court, allowing the appeal of the 1st to 9th respondents against the decision of the Registrar of Trade Unions (10th Respondent) refusing to register The Kenya Export Floriculture, Horticulture and Allied workers Union (KEFHAU).

[**2**] The current law relating to the registration of trade unions is contained in the **Labour Relations Act No. 14 of 2007 (Act**) which commenced on 26th October 2007. The Act by section 54(1) repealed the Trade Unions Act and the Trade Disputes Act which previously governed the registration of trade unions and industrial disputes. Five steps in the registration of a trade union can be discerned from the Act.

(**2.1**) The first step is for promoters of the proposed trade union to apply to the Registrar of Trade Unions (Registrar) for a certificate which permits the promoters to recruit members of the proposed union (Section 12(2)]

The application has to satisfy the criteria specified in section 12(2). The Registrar has discretion to issue or not to issue the certificate.

(**2.2**) If the certificate is issued, the second step is to apply for registration of the union in the prescribed form. The application for registration is required to be made within six months of receiving the certificate - (section 13). The nine requirements for registration are stipulated in section 14(1) of the Act. The requirement in section 14(1) (d) (i) is relevant for purposes of this appeal. It stipulates that a trade union may apply for registration if;

"no other trade union already registered is –

(i) in case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration."

It is also a requirement that the name of the trade union should not be the same as that or an existing trade union or sufficiently similar so as to mislead or cause confusion [(s. 4(1) (f)] and also that the decision to register the trade union was made at a meeting attended by at least fifty members of the trade union [s.4(1)(g)].

By section 18(1) of the Act, the application for registration must be accompanied by the prescribed fees, certified copy of the constitution of the trade union and a certified copy for the attendance register and the minutes of the meeting at which the trade union was established.

(**2.3**) The third step is for the Registrar in accordance with the proviso to s.14(1)(d) to notify any registered trade union which appears to represent the same interest as the applicants of the receipt of the application and to invite such trade union to make any objections in writing within a specified period to the registration. The notification is required to be made by notice in the Gazette and in one national daily newspaper with wide circulation.

(**2.4**) The fourth step is the evaluation of the application by the Registrar during which he may call for further information and give an opportunity to the applicant to rectify the application (s.18(3) and (4).

(**2.5**) the fifth step is the decision making by the Registrar. Section 19(2) of

the Act provides:

"If the Registrar is satisfied after consulting the Board that a trade union, employers organization or federation that has applied for registration meets the requirements of the Act,

the Registrar shall register that trade union, employers organisation or federation and shall –

(a) Issue a certificate of registration in form B set out in the second schedule.

(b) Enter the name and details of the trade union … in the appropriate register…"

The Board referred to in section 19(1) is the National Labour Board established under section 5 of the Labour Institutions Act, Act No. 12 of 2007 whose function is to advise the Minister for Labour on various matters including the registration of trade unions. The Board is composed of various members including the general secretary of the most representative federation of trade unions, the chief executive of the most representative federation of employers' organizations and registrar of Trade Unions.

(**2.6**) By section 20 of the Act, if the Registrar is not satisfied that a trade union meets the requirements for registration and refuses registration, he or she is required to advise the trade union of the refusal and by section 30, an appeal against the decision of the registrar lies to the Industrial Court – Section 17(2) of the Industrial Court Act – now Employment and Labour Relations Court which restricted appeals to only matters of law was deleted by Act 18 of 2014 with the result that appeals to this Court lie on matters of fact and law.

[**3**] On 17th July 2009, the 1st and 2nd respondents made an application to the Registrar for the establishment of a trade union (KEFHAU). Upon receipt of the application the Registrar issued a certificate dated 21st August 2009. Thereafter, by an application dated 20th December 2009 in the prescribed form which was received by the Registrar on 16th February, 2010, the 1st to 9th respondents applied to the Registrar for the registration of the union. The Registrar acknowledged the receipt of the application by a letter dated 25th March 2010 and notified the applicants that the application would be placed before the National Labour Board for consideration.

[**4**] The Registrar by a letter dated 26th October 2010 notified the General Secretary of Kenya Plantation & Agricultural workers union (appellant) and invited any objection. The appellant raised an objection by a letter dated 28th

October 2010 which stated in part:

"As earlier indicated to your office, there is no farm within the Floriculture and Horticulture industry which deals exclusively with exports.

Rule No. 3 of the Kenya Plantation and Agriculture Workers Union constitution on the objectives clearly define KPAWU areas of jurisdiction Floriculture and Horticulture activities included, and therefore the registration of the Kenya Export Floriculture Horticulture and Allied Workers Union would create disharmony and confusion within the Floriculture and Horticultural industries which has enjoyed good relations in the past. The application for registration of the proposed union is a clear contravention of section 14(d) of the Labour Relations Act No. 14 of 2007 Laws of Kenya."

Thereafter, the Registrar sent a letter dated 30th August 2011 to the interim secretary of the proposed union enclosing a notification of refusal of registration dated the same day. The ground of refusal was stated in the notification thus:

"There is already registered trade union, sufficiently representative of the whole or of substantial proportion of the interest in respect of which the applicants sought registration namely:

1. Kenya Plantation and Agricultural workers union"

[**5**] The appeal to the Industrial Court was based on several grounds but it was essentially based on the

Bill of Rights more specifically on Articles 36(1) and 41 of the Constitution. By Article 36(i) every person has a right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind and by Article 41(2)(c), every worker has a right to form, join or participate in the activities and programmes of a trade union. The 1st to 9th respondents stated in the grounds of appeal, *inter alia*, that:

> (i) The Registrar failed to note that section 14(d) of the Act was enacted pursuant to section 80(d) of the Repealed Constitution and has now to be construed with adaptations, qualifications and exceptions necessary to bring it in conformity with the Constitution.
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> (ii) In basing his refusal to register the trade union on ground of existence of another trade union pursuant to section 14(d) of the Act, the Registrar was introducing a nonexistent limitation to rights and freedoms guaranteed by Articles 36 and 41 of the Constitution.

[**6**] The learned judge considered the provisions of the constitution of the appellant relating to the sector the union represents and stated in para 33 of the judgment:

> ***"This is the inquiry supposed to have been undertaken by the respondent and outlined in the notification of refusal of registration of the appellant. This should have formed the basis of the decision to reject or allow the registration. Failure to give or outline the reasons as to why the Registrar of Trade Unions arrived at the decision to reject registration of the appellants' application is contrary to the expectations placed on this office and thus can be termed to be subjective viewed in the light of the provisions of Article 47 of the Constitution, where an administrative action must be based on a sound finding of fact or law. That is what is fair and reasonable."***
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> The learned judge proceeded to find that:
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> > (I) The registrar's decision was largely based on the provisions of the repealed Constitution and the limitation under Article 24 did not apply to the now 1st – 9th respondents.
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> > (II) There is a fundamental difference between that which comprises plantations and agricultural industry in the appellant constitution and floriculture and horticulture.
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> The High Court concluded thus:
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> ***"This court finds that the refusal by the respondent to register the appellant is not justified or reasonable in the circumstances of this case as the interest to be addressed by the proposed Kenya Export Floriculture, Horticulture and Allied Workers Union is clearly defined. The membership will be from floriculture and horticulture sectors and thus not interfering with the plantations and agricultural sectors represented by the interested party."***

The High Court issued three substantive orders. The first reversed the decision of the Registrar. The second stated that the union is "**hereby registered as a trade union**" and the third ordered the Registrar to immediately issue a registration certificate.

[**7**] The appeal is based on six grounds. It is convenient to deal first with grounds 2 and 3 which raise substantive issues of law.

The 2nd ground states that the learned judge erred in fact and in law in holding that the decision of the Registrar was largely based on the repealed Constitution without considering the fact that the appeal itself arose out of an application for registration made a year preceeding the 2010 Constitution.

The 3rd ground states that the learned judge failed to recognise the fact that the rights to form and join

trade unions and associations are not absolute and are limited by Article 24 of 2010 Constitution. The appellant's counsel, **Ms. Guserwa** submitted that the applicable law at the time of granting the interim certificate was the old Constitution and that the parameters that were considered by the Registrar were those set out in the old Constitution and the Trade Unions Act.

The learned counsel relied on **Angaha and Others v. Registrar of Trade Unions [1973] EA 297** for the proposition that the provision for refusal of registration of a proposed trade union, where there are registered unions which sufficiently represent the interests of the proposed union is not *ultra vires* the Constitution.

On his part, the 1st respondent submitted in essence that whereas section 80(d) of the repealed Constitution limited the right to form a trade union if another registered trade union is sufficiently representative of the interests of the proposed union, Article 24 of the current Constitution does not limit the rights under Articles 36 and 41.

[**8**] Section 16(1)(d) of the repealed Trade Unions Act (1952) like section 14(1)(d)(i) of the Labour Relations Act provided that a trade union could apply for registration if no other trade union already registered is sufficiently representative of the whole or substantial proportion of the interests in respect of which the applicants seek registration.

Section 80(1) of the repealed Constitution, 1963, protected the freedom of assembly and association including the right to form or belong to trade unions. However, Section 80(2) (d) provided that it was not a contravention of that right to the extent that the law in question makes provision, *inter alia*, for imposing reasonable conditions including conditions whereby registration may be refused on the grounds that another trade union already registered is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union is sought.

[**9**] Thus, the repealed Constitution validated the limitation to registration of a trade union stipulated in section 16(1)(d) of the Trade Unions Act. That is the basis on which the High Court in **Angaha's case** (supra) held that the condition or limitation was not *ultra vires* the Constitution.

The 1st respondent seems to contend that the right of every person to form a trade union and the right of a worker to form and join in the activities of a trade union are not at all limited by Article 24(1) of the Constitution which provides:

> ***"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –***
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> ***(a) The nature and extent of the limitation;***
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> ***(b) The importance of the purpose of the limitation;***
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> ***(c) The nature and extent of limitation;***
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> ***(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others; and***
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> ***(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."***

[**10**] The limitation of rights and freedoms under Article 24(1) is in general terms and contextual. As Article 24(3) provides, the onus is on the state or a person seeking to justify a particular limitation to demonstrate to court that the requirements of the Article have been satisfied. The court will then decide whether the particular limitation is reasonable and justifiable in an open and democratic society.

In relation to the facts of this case, there is already a law – section 14(1)(d)(i) of the Labour Relations Act - limiting the right to form or join a trade union. As Clause 7(1) of the Sixth Schedule to the Constitution provides, that law continues in force but has to be construed in conformity with the Constitution.

In paragraph 30 of the judgment, the learned judge referring to the rights under Article 36 and 41 said in part:

> ***"These rights cannot be faulted. However, it must be appreciated that the duty vested upon the Registrar of Trade Unions is to ensure a balance between fragmentation, chaotic and proliferation of trade unions in the realization of the rights as under Article 36 and 41 and nonetheless avoid trade unions duplication and industrial unrest."***

[**11**] Generally speaking the regulation of registration of trade unions and imposition of reasonable conditions for their registration are not unconstitutional limitations of the right and freedoms to form and join a trade union nor is the specific limitation that a trade union is not qualified to be registered if there is in existence another trade union which is sufficiently representative of the whole or a substantial proportion of the interest sought to be protected by a proposed trade union. The latter condition has existed since 1952 and has achieved stability in industrial relations and fostered economic stability. It is a reasonable and justifiable condition in an open and democratic society.

As we understand the judgment of the learned judge, the court did not hold that the limitation in section 14(1)(d)(i) was an unconstitutional limitation to form and join a trade union. On the contrary, what the learned judge held was that the Registrar construed the condition subjectively in relation to the facts of the case without appreciating that the interest to the proposed union were fundamentally different from the interests covered by the appellant. The concluding sentence in para 34 of the judgment which deals with the freedom of choice to form or join a trade union leaves no doubt of the Judge's construction of Articles 36 and 41.

> The learned Judge stated:
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> ***"That is what is contemplated under Article 36 and 41 of the Constitution. Where there exists a genuine and legitimate need, a formation will arise. Where the drive to form is based on self-interest, personal ambition, that is illegitimate, the union will not form or will collapse as a pack of card of dominos (sic)."***

[**12**] Although the application for registration was made before the promulgation of the current Constitution; the decision of the Registrar refusing registration was made on 30th August 2011, slightly over one year after the current Constitution commenced. The applicable law at the time the decision was made was the Labour Relations Act and the current Constitution. Since we have made a finding that the condition imposed by section 14(1)(d)(i) of the Labour Relations Act is not an unconstitutional limitation of the right to form and join a trade union and since the Industrial Court did not find otherwise, the complaints that the High Court applied the wrong law and failed to recognise that the rights are limited have no merit.

[**13**] The 4th ground of appeal states that the learned judge erred in fact and in law in holding that the refusal to register the trade union was unjustified and unreasonable without giving adequate reasons. The Registrar supported the appeal and submitted in essence, he made a fair and reasonable decision based on evidence. The vital question in this appeal is whether the condition in section 14(1)(d)(i) was applied reasonably in relation to the facts of the case.

> The 1st to 9th respondents relied in the High Court on the decision of Rika, J. in **Kenya Union of Export, Import and Allied Workers Union & Others vs. The Registrar of Trade Unions - Industrial Court Civil Appeal No. 1 of 2010** where the learned Judge said at para 14:
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> ***"Genuine persons with genuine, legitimate and useful aspirations to form trade unions must however not be limited in the exercise of the basic right of association. There is a tendency***

among some established trade unions to unreasonably curtail the right of association of new players for fear of competition. These trade unions do so with the aid of the government and employers with whom they have become cosy owing to their long years of familiarity. The need to check proliferation and encourage real pluralism must not be a pretext by established social partners, to frustrate the legitimate endeavors of new players. Perceived rivals need to be protected in exercise of their basic right of association from established and apprehensive players"

That passage illuminates graphically the threat to freedom to form and join trade unions as enshrined in the Constitution.

[**14**] The 1st to 9th respondents in their grounds of appeal in the High Court enumerated cases where new unions have been registered in the same sector despite the existence of other registered trade unions in the same sector.

In the instant case, the Registrar merely reproduced the statutory condition for registration as the reason for refusal of registration, without, as the High Court stated, giving reasons why the appellant substantially represented the whole or a substantial portion of the interests that the proposed union intended to protect. The learned judge considered the relevant part of the constitution of the appellant, the dynamic growth and diversification of the economy and in particular the horticultural and floriculture industry and formed the opinion that there was no fundamental justification why the right to form the proposed union should be limited.

The appellant is a general and giant trade union. The proposed union sought to protect the interest of workers in specialized and critical sector of the economy. We are satisfied that the learned judge gave valid reasons why registration should not have been refused.

[**15**] The 1st and 5th grounds of appeal relate to the form of order that the learned judge made. It is contended that the learned judge erred in law in registering the union and in essence usurping the role of the Registrar. The 1st to 9th respondents submitted that the judgment of the court was perfected by the Registrar in that the proposed union was registered and a certificate of registration granted on 17th

February, 2014. However, the implementation of the decision was stayed pending the outcome of this appeal. The 1st to 9th respondents say that they filed **Civil Appeal No. 248 of 2014** against the order of stay.

It was correctly submitted that a court should not assume any role in the registration of a trade union that being the statutory duty of the Registrar of Trade Unions. The second order was not elegantly drafted but the Registrar understood it and implemented it. The court had jurisdiction to order registration and the registration of the proposed union by the Registrar cured any defect in the order.

The Industrial Court did not make any order as to costs. There is no cross appeal against the order as to costs. The Registrar did not appeal against the decision. It is the existing trade union that opposed the registration and has perpetuated these proceedings. It is just that the appellant should pay the costs of the appeal to 1st to 9th respondents.

[**16**] For the foregoing reasons, the appeal is dismissed. The appellant shall pay the costs of this appeal to the 1st – 9th respondents.

Dated and Delivered at Nairobi this 12th day of May, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR