



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE, & KANTAI, J.J.A.)

CIVIL APPEAL NO. 19 OF 2016

BETWEEN

CHARLES SALANO & 9 OTHERS (PROPOSERS

& PROMOTERS OF KENYA SUPERMARKETS

WORKERS UNION (KESMWU).....APPELLANTS

AND

THE REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

FOOD AND ALLIED WORKERS UNION.....2ND RESPONDENT

*(An appeal against the Judgment and Decree of the Employment and Labour Relations Court at Nairobi
(Abuodha, J.) dated 20th November, 2015*

in

H. C. ELRC No. 18 of 2014)

JUDGMENT OF THE COURT

CHARLES SALANO, TERESIA A. OMOLO, BENEDICT NZIOKI, MAURICE NYAKWAKA, LINET ALIVIZA, MARK AGEYO FEDHA, DAVID O. ODUNGA, HILLARY U. MUTULI, JEREMIAH NJAU and ELIZABETH N. OHUNGA (hereinafter ‘the appellants’) all being desirous of registering a Trade Union known as the **KENYA SUPERMARKET WORKERS UNION** (hereinafter ‘**KESMWU**’) approached the office of the Registrar of Trade Unions (hereinafter ‘the 1st Respondent’) to facilitate their aforesaid collective intention. **DAVID O. ODUNGA** and **HILLARY U. MUTULA** (hereinafter ‘the applicants’) acting for and on behalf of the appellants lodged an application for issuance of a **CERTIFICATE OF ESTABLISHMENT OF A TRADE UNION** at the 1st Respondent’s office on **13th October, 2014** vide a letter (**REF: KESMWU / APP / EST / TU / 1 / 2014**) dated **13th October, 2014**. The letter was signed by the applicants in their respective capacities as Interim Chairman and Interim General Secretary of the proposed union. For the avoidance of doubt, the appellants clearly indicated in the said letter that their application was predicated upon **Section 12 (1) of the Labour Relations Act-No 14 of 2007** (hereinafter ‘the Act’).

On her part, the 1st Respondent duly considered the appellant's application and gave feedback vide her letter (**Ref: ML / TU / R / 134 / 2** dated **3rd November, 2014** whose tenor was that the application in question was unmeritorious. The principal reason cited for the said decision was that there was already a union in existence, that is, the **KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS (hereinafter 'KUCFAW')** whose constitution gave coverage to its membership comprised of employees working in Supermarkets, Retail and Wholesale outlets and Distribution and Supply companies. Accordingly, the 1st Respondent invoked the provisions of **Section 12** as read with **Section 14 (1) (d)** of the Act and declined to issue a **Certificate of Establishment of a Trade Union** to the appellants.

Aggrieved by the 1st Respondent's decision, the appellants lodged an appeal at the Industrial Court (now the Employment and Labour Relations Court).

The Industrial Court heard the appellants and the 1st Respondent and in turn affirmed the decision of the 1st Respondent thereby triggering the present appeal wherein the appellants have set out 6 grounds in the Memorandum of appeal whose tenor was that:-

The learned Judge erred in law by failing to appreciate the applicability of Section 12 of the Labour Relations Act, No 14 of 2007 to the current case.

The learned Judge erred in law by failing to consider the mandatory requirements provided for under Sections 13 and 14 of the Labour Relations Act, No 14 of 2007 with regard to any objections to the registration of a trade union.

The learned Judge erred in law by ignoring to apply the principles laid down under Articles 24, 35, 36 and 41 of the Constitution of Kenya as relates to representation, access to information, freedom of association and labour relations.

The learned Judge erred in law by failing to consider the provisions of the ILO Convention No 87 and the Industrial Relations Charter as referred to by the appellants which encourage growth of industrial trade unionism.

The learned Judge erred in law by allowing the interested party to come on board prematurely before Section 14 of the Labour Relations Act, No 14 of 2007 was complied with.

The learned Judge failed to consider the totality of the evidence, law precedents and submissions filed by the appellants.

At the plenary hearing before us, **Miss Minyiri** held Mr. Mandala's brief and appeared for the appellants, while **Mr. Kioko** and **Mr. Nyabena** appeared for the 1st Respondent and the interested party respectively. Miss Minyiri got the appeal underway by submitting that the appeal related to the rejection of an application by the appellants by the 1st respondent for the issuance of a Certificate of Establishment of a Trade Union. She submitted that the 1st respondent's decision was unlawful, illegal and in contravention of **Sections 12 and 13** of the **Labour Relations Act**. In particular that Section 12 of the Act provides:

"S 12

(1) No person shall recruit members for the purpose of establishing a trade union or employers' organization unless that person has obtained a certificate from the Registrar issued under this section.

(2) An application for the certificate referred to in sub-section (1) shall

(a) be signed by two persons who are promoting the establishment of the trade unions or employers' organization;

(b) specify the name of the proposed trade union or employers' organization; and

(c) contain any other prescribed information.

(3) The Registrar shall issue a certificate within thirty days of receiving an application unless -

(a) the application is defective; or

(b) the name of the proposed trade union or employers' organization is the same as that of an existing trade union or employers' organization or is sufficiently similar so as to mislead or cause confusion.

(4) A certificate issued under sub-section (3) shall specify that -

(a) the promoters may undertake lawful activities in order to establish a trade union or employers' organization; and

(b) an application for the registration of the trade union or employers' organization shall be made to the Registrar within six months of the date of issue of the certificate.

(5)

"S 13 A trade union or employers' organization shall apply to the Registrar for registration within six months of receiving a certificate issued under Section 12".

Learned counsel submitted that the 1st respondent was mandatorily required to issue the Certificate of Registration as per **Section 12 (3)** before inviting any trade union to raise an objection. She cited **Section 14 (1) (d)** of the **Act** which provides that:

"Provided that the Registrar shall by notice in the Gazette and in one national daily newspaper with wide circulation, notify any registered trade union, federation of trade unions or employers' organization which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organization concerned to submit in writing within a period to be specified in the notice, any objections to the registration".

According to her, the appellant's application was not defective, (**Section 12 (3) of the Labour Relations Act**), and neither was it similar in form or manner as that of an existing trade union.

In conclusion, it was the learned counsel's submission that the 1st respondent's actions were in total contravention of **Articles 24, 35, and 46** of the Constitution and further that it was in contravention of the **ILO Convention No. 87** and the **Industrial Relations Charter** which encourages the growth of industrial trade unionism.

On his part, **Mr. Nyabena** for the interested party whilst relying on his written submissions dated 28th April, 2017, submitted that the interested party represents employees who work in supermarkets in Kenya. To this end, the interested party has entered into a number of recognition agreements with supermarkets and named Nakumatt, Ukwala, Tuskys, Chandarana as some of the supermarkets that have signed Recognition Agreements with the 1st respondent. It was the interested party's position that apart from the recognition agreements, some supermarkets have gone further to sign Collective Bargaining Agreements with the 1st respondent.

On behalf of the 1st respondent, submissions filed on 26th April, 2017. counsel's contention that the power **Mr. Kioko** elected to rely wholly on his In the submissions, it was the learned vested upon the 1st respondent was discretionary and that the 1st respondent could refuse to register another trade union that

sufficiently represents the interests of a group in existence, which in this case, was the interested party herein.

We have perused the record of appeal, the impugned judgment of **Abuodha, J.**, the grounds of appeal, the written as well as oral submissions by respective counsel the authorities cited, and the law. The appeal before us is a first appeal and we are at liberty to delve into matters of fact as well as law and make our conclusions therefrom. See **Section 17 (1)** of the **Employment and Labour Relations Court Act** (hereinafter 'the ELRC Act') and the timeless case of **SELLE -VS- ASSOCIATED MOTOR BOAT &CO [1968] E.A.** where the predecessor of this Court pronounced itself thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (ABDUL HAMEED SAIF -VS- ALI MOHAMED SHOLAN [1955], 22 E.A.C.A. 270)”.

With the foregoing principles in mind, and having carefully perused the record of appeal, the learned Judge’s judgment, and given due consideration to both written and oral submissions tendered by respective counsel, and the law; we are of the view that this appeal turns on the letter and spirit of **Sections 12, 13 and 14** of the Act. We say so as the sole issue in controversy herein is whether the 1st Respondent can decline to register a proposed trade union. Ancillary to the foregoing provisions are **Sections 18 (1), (3), (4), 19 (1), (2) and 20** of the Act.

Firstly, in its preamble, the **Act** provides that its purpose is to:-

(A) to consolidate the law relating to Trade Unions and trade disputes to provide for the registration, regulation, management and democratization of Trade Unions and employers organizations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective Collective Bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and connected purposes.”

Suffice to state that the Act came into existence for purposes of “regulation” and “management” of Trade Unions.”

Accordingly, for a proper interpretation of **Sections 12, 13 and 14** of the Act to be arrived at, the said provisions ought to be read conjunctively. We say so as any party desirous of registering a trade union cannot comply with either of the said provisions in isolation. Five steps in the registration of a trade union can be discerned from the **Act**:-

The first step is for promoters of a 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.

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.

An important qualifier for the registration of a prospective trade union can be found at **Section 14 (1) (d) (i)** to wit:-

“14. (1) (d) no other trade union already registered is-

(i) in the 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; or

(ii)”

It is also a requirement that the name of the trade union should not be the same as that of an existing trade union or sufficiently similar so as to mislead or cause confusion (**Section 14 (1) (f)**) and that the decision to register the trade union was made at a meeting attended by at least fifty members of the trade union (**Section 14 (1) (g)**). By dint of **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 of the attendance register and the minutes of the meeting at which the trade union was established.

Thirdly, the Registrar is required in accordance with **Section 14 (1) (d)** of the Act to notify any 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. Fourth, 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 (**Section 18 (3) and (4)**).

Fifth is the decision making by the Registrar. **Section 19 (1)** 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 organization or federation and shall-

(a) Issue a certificate of registration in Form B set out in the second schedule; and

(b) ...”

We have set out the provisions of the Act in extenso to demonstrate that it is a fallacy to argue that the 1st respondent is obligated to issue a certificate of registration within 30 days of receiving an application absent a defect or the existence of another group that sufficiently represents the interests of a group. If the registration was to be automatic as the appellant would like us to believe, one can foresee registration of a multiplicity of unions covering groups with similar interests. This cannot, by any stretch of imagination be said to be proper regulation and management of trade unions. We reject the invitation by the appellant that the 1st respondent was mandatorily obligated to issue a certificate of establishment of a trade union within 30 days in the absence of a defect and/or in the absence of a similar name. We are of the considered view that the 1st respondent in refusing to grant the establishment of a trade union rightly cited **Section 14 (1) (d) (i)** as the qualifier of whether to issue a certificate of establishment of a trade union.

Further, we are not convinced by the appellants’ submissions on the application of **Article 36** and **41 (2) (c)** of the **Constitution** which provides for freedom of association and the right to labour relations, for two reasons:- Firstly, the alleged breach of the appellant's rights do not fall within the confines of **Article 25** of the **Constitution** which expressly sets out fundamental rights and freedoms which may not be limited; and secondly, **Article 24 (1)** of the **Constitution** sanctions the limitation of fundamental rights and freedoms in the following terms:-

“ 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-[Emphasis added]

(a) The nature and extent of the limitation;

(b) The importance of the purpose of the limitation;

(c) ...

(d) ...

(e) ...”.

In our view, we find and hold the limitation of the appellants’ rights under **Article 36** and **41** of the **Constitution** to be reasonable and justifiable in an open and democratic society. This is because the appellants interests are already sufficiently represented by an existing trade union and creation of a rival trade union would create confusion in the area that the appellant intended to represent.

As we conclude we turn to **ILO Convention 87** which was cited by the appellants’ in their submissions. Whereas the general rules of International Law have since received constitutional sanction as part of the law of Kenya vide **Article 2 (4)** of the **Constitution**, we are of the considered view that the same cannot be gratuitously applied without reckoning with the constitutional imperatives laid out by the Kenyan Constitution. **ILO Convention 87** resonates with **Article 36** and **41 2 (c)** of the Constitution which we have already found to be subject to limitation in accordance with **Article 24 (1)** and **(3)** of the **Constitution**. Accordingly, the said Convention is of no utility herein and we find and so hold.

The upshot of the foregoing is that we find no merit in this appeal and hereby dismiss the same, and affirm the judgment and decree of the Employment and Labour Relations Court. The 1st and 2nd Respondents shall have costs before this Court and in the Employment and Labour Relations Court. It is so ordered.

Dated and delivered at Nairobi this 28th day of July, 2017

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original