



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**APPEAL NO. 16 OF 2018**

**CHARLES OGUTU OOKO**

**BERNARD OWUOR ODONGO**

**(suing on their own behalf and on behalf of the proposed) KENYA UNION OF**

**FACTORIES OF MOLLASES BRIQUETTES AND ALLIED WORKERS ...APPELLANTS**

**V**

**REGISTRAR OF TRADE UNIONS .....RESPONDENT**

**JUDGMENT**

1. On 10 May 2018, an advocate acting on behalf of Charles Ogutu Ooko and Benard Owuor Odongo (Appellants) wrote to the Registrar of Trade Unions (Respondent) seeking to reserve and apply for the registration of a trade union known as *Kenya Union of Factories of Molasses Briquettes & Allied Workers* (the proposed union).
2. The Respondent replied on 22 June 2018 informing the Appellants that workers in the sector they had proposed to cover were already represented by the *Kenya Union of Sugar Plantation & Allied Workers*.
3. The Respondent further informed the Appellants that the Kenya Union of Sugar Plantation & Allied Workers represented workers in both sugar factories and plantations, and that in order to avoid duplication, she had declined to approve the application to register the proposed Union.
4. The Appellants were dissatisfied and on 17 August 2018 lodged this Appeal on the following grounds
  1. That the Respondent erred in law and fact by failing to find that the profession of the Appellants is unique as it deals with manufacturing of raw materials and not sugar plantation thus it is different, therefore deserves protection and representation by a trade union that is specific to the needs of workers making briquette, sugar, bagasse and molasses.
  2. That the Respondent erred in law and fact by failing to find that the existing registered Kenya Union of Sugar Plantation & Allied Workers (KUSPAW) do not adequately represent the interest of the Appellants fellow co-workers working with Trans-Mara Company Limited who are factory specialised cadre of molasses and briquettes workers as opposed to the plantation workers.
  3. That the Registrar of Trade Unions misdirected herself in law and fact in failing to find and hold that the trade union known as Kenya Union of Sugar Plantation & Allied Workers which she suggested represents the Appellants interests did not have any interest in the Appellants and their colleagues since 2011 when the Appellants company Trans-Mara Sugar Company Limited was established and the Appellants have not joined the Union the Respondent wants them to join as attempts to recruit them to Kenya Union of Sugar Plantation & Allied Workers ( KUSPAW) between the 9<sup>th</sup> to 13<sup>th</sup> April 2018 failed.
  4. That the action of the Respondent is discriminatory to the Appellants and amounts to selective application of the law contrary to the Constitution of Kenya 2010 Article 41(2).
  5. That the Respondent erred in both law and fact in failing to find that the Constitution, statutory law and various international treaties that Kenya has ratified entitled individuals to freedom of association, which includes right to form, belong to and participate in trade unions of their choice and the decision appealed from is a violation of this fundamental right.

6. That refusing registration of the proposed union, the Respondent proceeded without granting the interim officials of the proposed union a fair hearing contrary to law and the rules of natural justice.
7. That in refusing the registration of the proposed union, the Registrar failed into account relevant factors and proceeded on the basis of irrelevant facts.
8. That the decision to deny registration was against the Appellants legitimate expectation to fair, reasonable and lawful administrative action.
9. That the decision to deny registration of the proposed union is unreasonable, in bad faith and amounts to unfair refusal to exercise statutory power.
10. That on the whole, the decision of the Respondent does not adduce sufficient reasons to justify the act of refusal to register the proposed union and is unjustifiable and unsupportable by the facts and the law relevant to the matter.

5. When served with the *Record of Appeal*, the Respondent filed a replying affidavit in opposition to the Appeal on 17 October 2018.
6. When the Appeal came up for directions on 17 September 2019, the Appellants sought for leave to file a further affidavit.
7. The Court directed the Appellants to file and serve the further affidavit together with submissions on or before 18 October 2019. The Appellants filed 2 further affidavits on 3 October 2019 while the submissions were filed on 30 October 2019.
8. The Respondent filed her submissions on 14 November 2019.
9. The Court has considered the *Record of Appeal*, the affidavits filed and the submissions.
10. The Appellants identified 3 Issues as arising for the Court's determination in their submissions.

#### **Whether decision of the Respondent was lawful/justified**

11. Article 41(2) of the Constitution, 2010 assures every worker of the right to form, join or participate in the activities and programmes of a trade union.
12. However, in terms of Article 24 as read with Article 25 of the Constitution, the right can be limited through legislation.
13. Although predating the Constitution, 2010, the Labour Relations Act, 2007 in sections 12, 14 and 18 circumscribes the circumstances and/or requirements a proposed trade union has to meet to be registered.
14. In the present Appeal, the Appellants contended that the Respondent gave an injudicious construction of section 14(1)(d)(i) & (f) of the Labour Relations Act by not considering that no other union shared a name with the proposed Union and that the cadre of workers it sought to represent were involved/employed in the manufacture of bagasse, molasses and briquettes, which is distinct from the workers in the industry represented by the *Kenya Union of Sugar Plantation & Allied Workers*.
15. The Appellants also submitted that the *Kenya Union of Sugar Plantations & Allied Workers* represented workers in plantations, and was therefore not sufficiently representative of the interest of the workers it proposed to cover (who are involved in the manufacture of bagasse, briquettes and molasses).
16. To buttress their case, the Appellants relied on a passage (by this Court differently constituted) in *Seth Panyako & 5 Ors v Attorney General & 2 Ors* (2013) wherein the Court stated that it is the Court's considered opinion that the provisions of section 14(1)(d)(i) as read with section 14(2) of the Labour Relations Act, No. 14 of 2007 do not limit the Constitutional right of workers to form, join and participate in a union of their choice in that the provisions do not clearly and specifically limit the said right and do not define the nature and extent of the limitation as required by Article 24(2)(b) of the Constitution.
17. In her defence, the Respondent countered that the *Kenya Union of Sugar Plantation & Allied Workers* was sufficiently representative of the workers involved in the sector the proposed Union wanted to operate in, and that in terms of sections 14(1)(d)(i), her decision was lawful, and was meant to serve the purpose of avoiding duplicity of union representation in the sector and ensure industrial harmony.
18. The Respondent drew the attention of the Court to the interpretation given sections 12, 13 and 14 of the Labour Relations Act by the Court of Appeal in *Charles Salano & 9 Ors v Registrar of Trade Unions & Ar* (2017) eKLR.
19. In the said authority, the Court of Appeal called for a conjunctive interpretation of the aforesaid statutory provisions and the application of the principle that there should be no duplicity in trade union representation in order to safeguard industrial harmony.
20. The Respondent also relied on the same authority to urge that the rights under Articles 36 and 41 of the Constitution could be limited, and therefore her decision declining to approve the registration of the proposed Union on account of the existence of a sufficiently representative union in the sector the proposed Union intended to join was lawful.

21. The Appellants did not file in Court a copy of the application they sent to the Respondent. A copy of the constitution of the *Kenya Union of Sugar Plantations & Allied Workers* was also not filed in Court.

22. The Court will therefore take it as deposed by the Respondent that the constitution of the Kenya Union of Sugar Plantations & Allied Workers provides for membership for workers engaged in the sugar and allied industries.

23. The Court was not informed of the raw materials used in the manufacture of bagasse, briquettes and molasses but the Court suspects that the bottom-line is sugar cane which is grown in plantations.

24. Further, it cannot be gainsaid that the workers the proposed Union intended to cover work in factories where the predominant raw material is sugar cane.

25. In the view of the Court, apart from the failure by the Appellants to provide sufficient facts, the decision of the Respondent was not unlawful or arbitrary.

26. The Appellants were also furnished with the reasons for rejecting their application and the Court is unable to find violation of the right to fair administrative action or rules of natural justice.

27. This Court is of the view that the principle set out by the Court of Appeal in the *Salano* case is more applicable in the circumstances of this case instead of the observation in the *Seth Panyako* case.

28. The decision of the Respondent, in the view of the Court, had lawful foundation in the fact that workers in the sector the proposed Union intended to cover were sufficiently represented or could be represented by the Kenya Union of Sugar Plantations & Allied Workers.

### **Whether Appeal was filed out of time**

29. The Appellants asserted that they received the decision of the Respondent declining registration on 31 July 2018, and that the Appeal was filed on 17 August 2018, within the prescribed 30 days.

30. It was not disputed that the decision of the Respondent was dated 22 June 2018. The Respondent contended that it was sent through post on 11 July 2018 but did not provide proof of postage.

31. The assertion by the Appellants that the decision was received on 31 July 2018 is therefore probable.

32. The Court consequently declines to find that the Appeal was filed outside the prescribed 30-day window.

### **Conclusion and Orders**

33. From the foregoing, the Court finds no merit in the Appeal, and orders it dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 31<sup>st</sup> day of January 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellants Ongengu & Associates Advocates

For Respondent Hon Attorney General

Court Assistant Lindsey