REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

APPEAL NO. 4 OF 2017

JOHN GITHUA MBATE, STEPHEN OTUNDOH MORIASI,

ONESMUS NZUVE NDIVO (Suing as Interim officials of

Kenya Teachers Congress).....APPELANT

VERSUS

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Appeal before me is against the decision of the 1st Respondent from registering the proposed union Kenya Teachers Congress. The Appellants are the promoters of the proposed union and call themselves interim officials of the proposed union. The appeal is to the effect that the Registrar's decision of 30th October 2017 refusing registration of the Kenya Teachers Congress was *ultra vires* the Constitution and in abridgment of the Appellant's rights to representation by a trade union of their choice. The Appeal had 12 grounds, which could be collapsed into the following:-

1. The Registrar erred in rejecting the registration of the proposed union

2. The Registrar by refusing the registration is denying the appellants the right to join a trade union of their choice

3. The denial of registration is an affront to Articles 36, 41 of the Constitution and Section 14(d)(i) of the Labour Relations Act

The Appellants have attached to their appeal the letter forwarding the refusal by the Registrar of Trade Unions dated 30th October 2017. The refusal is contained in Form D duly executed by the Registrar of Trade Unions. It has 8 points or reasons. The appeal was opposed by the Respondents who filed a Replying Affidavit sworn by E. N. Gicheha. She deponed that the 1st Respondent refused registration of the proposed union and Appellants duly informed. She stated that the respondent exercising, and it, rejected application on the grounds that there were in existence other trade unions, namely the Kenyan National Union of Teachers (KNUT), the Kenya Union of Post Primary Education Teachers (KUPPET), Kenya Union of Pre-Primary Education Teachers (KUNOPET) and Kenya Union of Special Needs Education Teachers (KUSNET) already representing the category of teachers the proposed union in proposed to represent. She deponed that Section 14(1)(d) of the Labour Relations Act prohibits the registration of a trade union where there is a trade union already registered and which sufficiently represents the whole or a substantial portion of the interest of which the proposed union seeks to represent. She stated that the regulation of trade unions is one where she has to strike a very delicate balance between identifying gaps in representation and/or over representation by a proposed union. She asserts that Article 36 and 41 are not absolute but are subject to the limitations imposed under Article 24 of the Constitution of Kenya. She stated that the registration of the proposed union would occasion interference with the rights of others and would be improper as the proposed union is driven by self-interest and personal ambition which are not legitimate basis for registration. She thus urged the dismissal of the appeal.

The parties opted to have the appeal resolved on the basis of the material before the court and the submissions of parties. The Appellants filed submissions on 7th March 2018 while the Respondents filed their submissions on 12th March 2017. In their submissions the appellants assert that the 1st Respondent has the ultimate responsibility on registration though she is required to consult the National Labour Board. The Appellants argue that in forming the proposed trade union the Appellants and other teachers were exercising their right of association enshrined in Articles 36 and 41 of the Constitution. It was submitted that the article 3 of the proposed union provided that membership to the union would be open to all registered teachers, certified, licensed or authorized to teach and of high moral standing. The Appellants submitted that the issues for determination were:

a. Whether the refusal to register the proposed union amounts to an infringement of the Appellants' constitutional rights;

b. Whether the interest intended to be covered by the proposed union are adequately covered by other registered trade unions;

c. whether the Registrar of Trade Unions subordinated her statutory duty to the National Labour Board;

d. who should bear the cost

The Appellants submit that the refusal to register the proposed union was an affront to their rights under Articles 36 and 41 of the Constitution. Emphasis was laid on Article 36(1) and (2) as well as Article 41 (2)(c). It was argued that since the expression "freedom of association" is not defined in the Constitution and given the paucity of Kenyan jurisprudence on the same, the Appellants cited the case of **Collymore *v* Attorney General [1970] AC 532** at 546 where Wooding CJ defined freedom thus: *"Freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objectives of the associating group.* The Appellants submitted that the Court of Appeal in **Trinidad Islandwide Cane Farmers Association Inc. *v* Seereeram [1975] WLR 329** that the freedom of association also included the freedom not to associate at all. The Appellants argued that the reading of Article 24 of the Constitution which was cited by the 1st Respondent as a imposing a limit on the rights claimed by the Appellants, it was clear that a bill of rights such as the freedom of association can only be limited by law and that the limitation should be reasonable and justifiable based on human dignity, equality and freedom. The Appellants posed the question as to whether the decision to refuse registration of the proposed union is a justifiable limitation of the Appellants' right. The Appellants argued that the decision to refuse registration on the basis of there being other trade unions namely, KNUT, KUPPET, KUSCONET begs the question as to whether the said unions sufficiently represent the interests of teachers. The Appellants submitted that the need to form another union to represent their interests was prompted by the fact that the members of the proposed union felt that their erstwhile unions did not represent their interest. They relied on the case of **Kenya Concrete, Structural, Ceramics, Tiles, Wood Plys and Interior Designs Workers Union *v* Registrar of Trade Unions *&* Another [2013] eKLR** where Rika J. held that *there is no hard and fast rule as to what is sufficiency of representation. In the view of the court, sufficiency of representation is not merely to be read from the constitution of the already registered trade union. Sufficiency of representation must include what the High Court in Civil Appeal 176 of 1996 characterized as real and practical representation of the interests of the members. This should include how well and visibly such trade union represents its members in courts, be it on disputes relating to rights or interests. Sufficiency of representation must be seen in the quality and number of Collective Bargaining Agreements concluded, and within the context of a devolved state, the geographical reach of the trade union. It is not an open and shut case for the Registrar to point at the constitutional reach of the particular trade union; most constitutions are phrased in a manner that gives the trade unions far and extremely wide reach. Sufficiency of representation must be seen as qualitative not quantitative. The Appellants assert that the unions they belonged to were entrusted with the responsibility of negotiating their terms and conditions of service including their earning a living wage, decent conditions at work such as provision of housing; medical services; sanitation, rest and leave days; salary increments favourable terminal benefits; favourable grievance and disciplinary procedures and codes among others which they feel the present union has failed to address. They relied on the case of **Seth Panyako & 5 Others v Attorney General & 2 Others [2013] eKLR** where Nduma J. held that "…the extent of limitations is not absolute for the reasons the registrar is granted discretion to register a new trade union notwithstanding the existence of a rival trade union in a sector in terms of Section 14(1)(d)(i) aforesaid. This exception is couched as follows:-*

> "Notwithstanding the provisions of subsection (1)(d) the Registrar may register a trade union constituting persons working in more than one sector if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote the respective sectoral interest of the employees."

The Appellants argue that the court in evaluating the reasonableness and justifiability the court should consider the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure the enjoyment of the rights by any individuals does not prejudice the rights of others, and; the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. They submit that Section 14(1)(d)(i) as read with Section 14(2) of the Labour Relations Act does not limit the constitutional right of workers to form, join and participate in a union of their choice and that the provision does not clearly and specifically limit the said right and do not clearly define the nature and extent of the limitation as required by Article 24(2)(b) of the Constitution. The Appellants rely on the case of **David Benedict Omulama *&* 8 Others *v* Registrar of Trade Unions *&* Another [2014] eKLR** where Mbaru J. was of the opinion that Section 14 of the Labour Relations Act was based on Section 80(2)(d) of the former Constitution and that Section 14(1)(d) is *ultra vires* Sections 32, 33, 36, 37 and 41 of the Constitution. The Appellants argue that the Registrar failed to show the other trade unions sufficiently represent the interest of teachers and the decision was based on biasness since there has been evidence of registration of different unions. The Appellants feel that the Registrar of Trade Unions subordinated herself to the Labour Board as her communication of the refusal suggests that the decision was left to the National Labour Board and all she did was communicate the decision of the Board. The Appellants argue that Section 19(1) of the Labour Relations Act is clear that the registrar is to consult the Board not to be a surrogate of it. The Appellants cite the cases of **Justus Aloo Ogeka *&* 6 Others (as interim officials of Kenya National Union of Co-operative Staff) *v* Registrar of Trade Unions *&* 2 Others [2016] eKLR** and **Kenya Concrete, Structural, Ceramics Tiles, Wood Plys and Interior Designs Workers Union *v* Registrar of Trade Unions *&* Another** (supra) to buttress their argument that the Registrar of Trade Unions is overwhelmed at the National Labour Board by other members and therefore unable to make an independent decision. The Appellants thus submit that the decision not to register the proposed union was not exercised reasonably and cannot be justifiable in an open and democratic society. The Appellants submitted that they have proved beyond a reasonable doubt that the limitation of their right to form, join and participate in activities of an association of their choice was not reasonable and justifiable limitation and as such should be awarded the cost of the appeal.

The Respondents submitted that the Registrar of Trade Unions communicated the refusal of registration of the proposed trade union vide a letter and the notification of refusal (Form D) both dated 30th October 2017. The Respondents submitted that vide Form D, the Registrar of Trade Unions gave the following grounds for refusal:

> 'That the intended sector of coverage being all registered teachers, certified, licenced, or authorized to teach, is already sufficiently represented by other registered trade unions. These are the Kenya National Union of Teachers (KNUT), Kenya Union of Post Primary

Education of Teachers (KUPPET), Kenya Union of Pre-Primary Education Teachers (KUNOPPET), and Kenya Union of Special Needs Education Teachers (KUSNET).

Under the KNUT constitution, membership is open to every registered teacher, certified, licenced or authorized to teach. This is a replica of your sector of coverage.

KUPPET on the other hand, represents all teachers in secondary and tertiary institutions, of good conduct and reputation, certified, licenced or authorized to teach. This is a substantial portion of your intended sector of representation.

KUNNOPET on the other hand represents all teachers in early childhood education (ECD), of good conduct and reputation, certified, licenced or authorized to teach. This union therefore also represents a portion of your intended scope of coverage.

KUSNET represents every trained and on training teachers working as special needs teachers.

Arising from the above, the Board noted that teachers are already sufficiently represented by the existing registered unions.

The Respondents submitted that Section 14(1)(d)(i) makes provision that a trade union may apply for registration if no other trade union already registered, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicant seek registration. The Respondent was of the view that the issues for determination were two:-

1. Whether or not the 1st Respondent exercised her mandate properly in accordance with the law in refusing to register the Kenya Teachers Congress.

2. Who is to bear the costs of this appeal?

The Respondents submit that the preamble of the Labour Relations Act, 2007 is clear that the purpose of the Act was to provide for the registrations, regulation, management and democratisation of trade unions and employers organisations or federations. The Respondents argue that the Registrar of Trade Unions is not obligated to issue a certificate upon the application for registration being made and cites Section 19 of the Labour Relations Act which clearly shows that the Registrar of Trade Unions shall consult the Board. The Respondents further argue that the law provides for the consultation and that in consulting, the Registrar of Trade Unions did not subordinate her statutory duty to the National Labour Board as alleged by the Appellants. The Respondents cited the letter she wrote which communicated her decision stating: *I wish to inform you that the National Labour Board (NLB) at its meeting held on 17th October 2017,* ***advised*** *against the registration of the above referenced proposed trade union.* The Respondents submitted that the wording of the letter was a confirmation that she followed due procedure as per Section 19(1). The Respondents urged the court to follow the decision in **Charles Salano & 9 Others (proposers & promoters of Kenya Supermarkets Workers Unions KESMWU) *v* The Registrar of Trade Unions & Another [2017] eKLR** where the Court of Appeal held as follows:-

> 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.

The Respondents thus urge that from the foregoing, the refusal by the Registrar of Trade Unions to register the Kenya Teachers Congress did not amount to a violation of the Appellants' constitutional rights under Articles 36 and 41 as alleged. The Respondent was of the view that the appeal lacks merit and should thus be dismissed with costs.

The issues that lend themselves for determination in this appeal are:

1. Whether the Registrar of Trade Unions subordinated herself to the National Labour Board in the refusal to register the proposed union

2. Was the refusal by the Registrar of Trade Unions tantamount to a denial of the Appellants rights under Articles 36 and 41 of the Constitution and therefore unconstitutional and invalid?

3. Who is to bear the costs of the appeal?

It is undisputed that the Appellants application for registration of a proposed trade union namely the Kenya Teachers Congress, was rejected by the Registrar of Trade Unions vide her letter and Form D dated 30th October 2017. The Appellants were aggrieved by that decision and made this appeal. They argue that their right to association and their constitutional right to form, join and participate in a trade union of their choice were infringed by the decision of the Registrar. In the case of **Kenya Concrete, Structural, Ceramics, Tiles, Wood Plys and Interior Designs Workers Union *v* Registrar of Trade Unions & Another** Rika J. held that *there is no hard and fast rule as to what is sufficiency of representation. In the view of the court, sufficiency of representation is not merely to be read from the constitution of the already registered trade union. Sufficiency of representation must include what the High Court in Civil Appeal 176 of 1996 characterized as real and practical representation of the interests of the members. This should include how well and visibly such trade union represents its members in courts, be it on disputes relating to rights or interests. Sufficiency of representation must be seen in the quality and number of Collective Bargaining Agreements concluded, and within the context of a devolved state, the geographical reach of the trade union. The learned judge went on to state that it was not open to the Registrar of Trade Unions to simply refuse to register a union on the basis there were other unions in place. In the case of* **Kenya Union of Medical Professionals And Allied Staff (KUMPAS) Represented By Its Promoters (Seth Panyako & 7 Others) *v* Registrar Of Trade Unions & Another [2016] eKLR** Nduma J. stated that

> 'In **Wesly Tomno & 97 others *v* Registrar of Trade Unions, Employment and Labour Relations Court Petition 61 of 2014** (Unreported) Justice Nzioki Wa Makau on page 16 and 17 states that:- "*the ILO convention sets the bar; the municipal law of Kenya brings it to life. The union that the petitioner proposes is one that would be superfluous or surplus to requirements. The health professionals who are proposed members of the Respondent are already catered for in the existing trade unions. If that were not so each craft would have a union. There is therefore justification to refuse registration of a union that is intended for a sector that is adequately represented……*"

The learned judge declined to grant the appeal sought stating that the reasoning in *Wesley Tomno & Others* applied *mutatis mutandis* to the matter before him.

It is clear that the Registrar of Trade Unions is by law required to seek counsel of the National Labour Board. The said counsel cannot, in my view, be one that usurps her role as the Registrar of Trade Unions. Did she subordinate herself to the Board? A careful reading of the letter forwarding her refusal suggests that she consulted the NLB and the decision the Board reached was on 17th October 2017. It would seem that decision was not communicated immediately. If she was merely a rubber stamp, why did she wait for 13 days to issue her refusal? It is clear the Registrar of Trade Unions bears the burden and responsibility for the acceptance or rejection of an application for registration. In my view, she did not subordinate herself to the NLB. The decision as far as can be discerned was hers. On the second issue, Articles 36 and 41 of the Constitution give rights which can be loosely referred to as labour rights. It was argued before me that the refusal amounted to a violation of the rights while the counter argument was that the refusal was in keeping with the limitations imposed by Article 24 of the Constitution. Without belabouring the point, labour rights are not absolute. They are not akin to the rights to life. They are capable of limitation in a democratic society such as ours. What would be the parameters for limitation? The Labour Relations Act, though enacted prior to the Constitution of Kenya 2010 sets out some limitations on registration. Under Section 14(1)(d)(i), there is a limitation that has found succour in the wise words of the Court of Appeal. In the case of **Charles Salano & 9 Others (proposers & promoters of Kenya Supermarkets Workers Unions KESMWU) *v* The Registrar of Trade Unions & Another** Kariuki SC, Sichale and Kantai JJA, held that the rights under Article 36 and 41 were limited by the provisions of Article 24(1) since the right to associate, form and join a trade union of ones choice is not a fundamental freedom that cannot be curtailed. I agree with the reasoning of the Court of Appeal and assert that the Appellants right to associate or disassociate cannot be the beginning and the end. It is to be construed within the narrow confines of the Constitution and the Labour Relations Act. I find that the decision to refuse to register the proposed union was the correct one and one that was guided by sound reasoning. Teachers are well represented and should the Appellants feel that their views are not taken into account they should take up leadership roles and advance what they feel is not being done. Using the test Rika J. set, it is clear there is sufficiency of representation if the myriad cases filed by KUPPET, KNUT and other such unions are anything to go by. One only need to look at the cause lists of this court to discern that teachers are extremely well represented in court, in collective bargaining agreements registered and in the cycle of industrial upheavals (read strikes) that we see. The appeal lacks merit and I dismiss it with costs to the Respondents.

It so ordered.

Dated and delivered at Nyeri this 20th day of March 2018

Nzioki wa Makau

JUDGE