



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**APPEAL NO. 3 OF 2017**

**IN THE MATTER OF APPEAL AGAINST THE DECISION OF THE REGISTRAR OF TRADE UNIONS**

**BETWEEN**

**ELIUD MWANGI MBITHI**

**IBRAHIM OKACHA KUTAYI**

**ELIZABETH WAMBUI MUTURI**

**JOHN MAINA KAMANJA**

**KEZIAH MUTHONI KAMAU**

**GEORGE OMONDI OOKO**

**PAUL MALEKYA KIMILU (All suing as the promoters of Kenya Plumbing,**

**Decoration, Mouldings and Signs Workers Union).....APPELLANTS**

**AND**

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

**KENYA BUILDING, CONSTRUCTION, TIMBER AND FURNITURE INDUSTRIES**

**EMPLOYEES UNION.....INTERESTED PARTY**

**JUDGMENT**

1. The Appellants are the proposers of a trade union in the offing by the name Kenya Plumbing, Decoration, Mouldings and Signs Workers Union filed the appeal against the decision of the Registrar of Trade Unions who is the Respondent herein. They had applied for registration of the proposed union under Section 12 of the Labour Relations Act no. 14 of 2007. The application for registration was rejected by the Respondent on 30<sup>th</sup> October 2017 having gone through all the legal procedures necessary under the Labour Relations Act 2007. The Appellants were aggrieved prompting the appeal. The grounds of appeal can be collapsed into three.

1. The Registrar of Trade Unions is not independent in making her decisions as the National Labour Board is comprised of the General Secretary of COTU (K) and the Chief Officer of FKE (both of whom each have an additional nominee apiece), the departmental heads in the Labour Department and includes the Registrar of Trade Unions.

2. That the General Secretary of COTU (K) and the Chief Officer of FKE have a direct involvement in the matter of registration, suspension and deregistration of trade unions and their participation in the process attracts conflict of interest; that they have over many years exercised their vested interest over the years and are bent on closing out new entrants into the trade union movement in Kenya hence the refusal to register the proposed union.

3. That the refusal to register the proposed union is not reasonable and justifiable in an open democratic society based on human

dignity, equitability and freedom.

2. The Appellants cite the decisions of Nduma Nderi J. in Appeal No. 9 of 2016 – **Peterson Wachira and George Gibore v Registrar of Trade Unions & Another** and Appeal No. 11 of 2015 **Nahason Ndimae & 9 Others v The Registrar of Trade Unions**. The Appellants filed submissions in addition to the affidavits and statements adduced in support of the Appeal. The submissions by the Appellants were to the effect that having satisfied the requirements of the provisions of Section 12 and 18 of the Labour Relations Act (hereinafter ‘the Act’), the Respondent did not call for further information in terms of Section 18(3)(a) and (b) of the Act for purposes of evaluating the application nor did she request the change of name in terms of Section 18(4) of the Act. The Respondent placed adverts in the newspapers as required and an objection was made by the Interested Party asserting that the proposed trade union would bring confusion to the entire building and construction industry. The Appellant submitted that the objection not being accompanied by a resolution of the interested party supporting the objection was invalid. The Appellants assert that there is a demarcation on the areas of coverage for the proposed trade union and the Interested Party. They argue that the intention of Article 41 of the Constitution is to advance the rights and fundamental freedoms of the employees rather than highlighting the limitation in exercise of those rights and freedoms. The Appellants surmise that the provisions of Section 14(1)(d) as read with Section 14(2) of the Act do not limit the Constitutional rights of workers to form and to participate in a union of their choice. They argue that the provisions do not clearly and specifically limit the rights and did not clearly define the nature of the limitation as required by Article 24(2) of the Constitution of Kenya. The Appellants submit that the Respondent failed to note the areas of coverage by the proposed union are mainly plumbing, piping, decoration, moulding and sign writing which are different from building and construction activities and that the membership of the proposed union consists of employees working in more than one sector. They argue that the Respondent should have considered in terms of Section 14(2) of the Act that the constitution of the proposed union contained suitable provisions which protect and promote the respective sectorial interests of the employees and the grounds given by the Respondent in declining registration could not be justified under the Constitution. The Appellants relied on the case of **Justus Oloo Ogeka & 6 Others (as Interim officials of Kenya National Union of Cooperatives Staff) v Registrar of Trade Unions & 2 Others [2016] eKLR**. It was submitted that there is a perception that other players are barred from established trade unions and other industry players are wielding their power at the National Labour Board to frustrate registration of new trade unions and those who have built a dominant position tend to use all means to suppress any move that threatens their hegemony as held by Ndolo J. in the case of **David Benedict Omulama & 8 Others v Registrar of Trade Unions & Another [2014] eKLR**. The Appellants urge the court to rescind the decision of the Registrar of Trade Unions to refuse the registration and direct her to register the proposed union and issue a certificate of registration to the Appellants.

3. The Respondent filed an affidavit in opposition and in her replying affidavit stated that prior to notifying the Appellants of her refusal to register the proposed union, the application for registration underwent all the legal procedures necessary and as required under the Act. It was the Respondent’s position that the provisions of Section 14(1)(d)(i) of the Act prohibits the registration of a trade union where other trade unions are already registered and are sufficiently representative of the whole or a substantial proportion of the of the interests in respect of which the proposed union seeks to represent. It was argued that the Respondent in exercising her mandate under Section 20 of the Act rejected the Appellants application on the grounds that there is in existence other trade unions namely the Kenya Building, Construction, Timber and Furniture Industries’ Employees Union (the Interested Party herein) and the Kenya Concrete, Structural, Ceramics, Tiles Wood Plys and Interior Designs Workers Union. It was the Respondent’s position that the Registrar is mandated under the Act to ensure due diligence while performing her duties in order to ensure justice to all and safeguard industrial peace and harmony which is critical in the country’s development. She argues that she was required by the provisions of Section 31(3) of the Act to consult or seek advice of the National Labour Board while considering registration of new trade unions. She sought and obtained the advice which she asserts she was bound to accept pursuant to Article 259(1) of the Constitution. It was the Respondent’s position that Article 36 and 41 of the Constitution are not absolute and are subject to the limitations imposed Article 24 of the Constitution. She stated that she acted within the confines of the law and her decision to refuse to register the proposed union should be upheld by the court as the appeal was baseless and amounts to an abuse of the court process and that it ought to be dismissed with costs to the Respondent. In the submissions made by the Respondent the case of **Charles Salano & 9 Others (Proposers & promoters of Kenya Supermarkets Union (KESMWU) v Registrar of Trade Unions & Another [2017] eKLR** where the Court of Appeal held that the limitation of the Appellants rights under Article 36 and 41 of the Constitution are reasonable and justifiable in an open and democratic society because the Appellants interests are sufficiently represented by an existing trade union.

4. The Interested Party also threw its hat in the ring. A replying affidavit and submissions were filed. In the affidavit, it was stated that the Interested Party objected to the registration upon the advertisement by the Respondent. In the objection, the Interested Party stated that its opposition was because the artisans who are employed in the building and construction industry which includes plumbers, decorators, masons, painters, fitters, joiners and carpenters are well catered for by the Interested Party. In its submissions it argued that the communication from the Respondent denying registration of the proposed union was upon consultation of the National Labour Board pursuant to Section 20 of the Act. It was their position that the Respondent has to consult the National Labour Board and consider the advice as well as give reasons for her refusal. The Interested Party submitted that the Respondent did consult the National Labour Board as required by law and gave reasons in the letter of refusal. It was therefore the Interested Party’s position that the Registrar did not merely communicate the decision of the National Labour Board but made her decision after consultation. The Interested Party submitted that the promoters of the proposed trade union had not petitioned the Minister to disband the Board or remove some members for abuse of office. It was asserted that the refusal was justifiable in an open and democratic society. The case of **Frank Esevwe & 7 Others v The Registrar of Trade Unions & Another Civil Appeal No. 16 of 2017** (unreported) where Ongaya J. held that refusal to register where another trade union already exists with sufficient representation of interests of the group in question. They urged the Appeal be dismissed with costs.

5. The appeal against the decision of the Registrar of Trade Unions must be viewed in the prism of the intent of the Constitution and the Labour Relations Act 2007. Under the Act, the Registrar has the mandate to process the request for registration of a trade union. In the case of the Appellants, they sought to register a trade union whose name mirrors some of the objects of coverage in its constitution. The Kenya Plumbing, Decorators, Mouldings and Sign Workers Union sought to cover the workers who do the actual plumbing, the manufacturers of plumbing accessories, painting, landscaping, glass work, moulds, murals, picture shapes, decoration of walls, sign writing and graphic created to display information on the streets and roads, inside or outside of shops arenas and stadiums etc e.g. banners posters, branding of cars and so on. The plain reading of the objects is clear. The range of workers to be covered is broad. In this broad spectrum there are many nuances that the Registrar must consider in the decision to either register or deny registration. Under Section 20 of the Act, the Registrar is required to consult the National Labour Board. The Appellants accuse the Board of being Machiavellian due to ‘vested’ interests. In matters trade union, there are social partners. It is a triumvirate that one could mistake for what it is not. On one side there is labour (employees represented by unions or individually), on the other is capital (the employers and federations of employers) and last but not least, the

government (inclusive of the Ministry, Parliament and the Court – the 3 arms of government). The social partners are driven by their own interest and in dialogue to resolve the issues, each brings to bear their interests and the parties negotiate for an outcome that will lead to progress and the manufacture, enterprise and productivity assuring industrial harmony. The Registrar plays a role in this. The present Registrar is E. N. Gicheha, an advocate of the High Court. She is accused of being intimidated by the CEO of the federation of employers (FKE) and the Secretary General of COTU (K) to refuse registration. In the reasons advanced on her letter refusing to register the Appellants proposed trade union, she did not state that she was acting for the so called industry players. She articulated her reasons for refusal noting that she had consulted the National Labour Board prior to the decision she arrived at. Articles 36 and 41 of the Constitution give certain rights. As many rights offered under the Constitution, these rights are not absolute. They can be limited in an open and democratic society. Indeed, one may be tempted to think that the sphere is saturated with too many unions, one representing nurses, another doctors and another workers in hospitals. Will we have one representing morticians and another representing prenatal care workers? The proposed union was denied registration as there exists sufficient unions for the workers to join. The craft unions exist where the artisans can fit as do the ones for those in construction and building. In my view, considering all the facts availed and the law, the proposed union is surplus to requirement, it is unnecessary. I uphold the finding of the Court of Appeal in the case of **Charles Salano & 9 Others (Proposers & promoters of Kenya Supermarkets Union (KESMWU) v Registrar of Trade Unions & Another** (*supra*). I am not persuaded by the authorities cited where my peers have permitted the bifurcation of representation and allowed the registration of other trade unions. In this case, the limitation on registration the Registrar gave is permissible and I uphold her refusal to register the superfluous union. The appeal before me is entirely devoid of merit and is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of September 2018**

**Nzioki wa Makau**

**JUDGE**