



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NO. 3 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 3<sup>rd</sup> October, 2018)**

**JOEL MBUTHIA.....1<sup>ST</sup> APPELLANT**

**SAMSON O. ONGERA.....2<sup>ND</sup> APPELLANT**

**STEVE O. HANGALA.....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

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

**AND**

**KENYA UNION OF COMMERCIAL**

**FOOD AND ALLIED WORKERS.....INTERESTED PARTY**

**JUDGEMENT**

1. The Appellants filed the appeal on 13<sup>th</sup> March, 2017, wherein they appeal against the decision of the Registrar of Trade Unions for refusing to register the proposed union, National Union of Shops – Retailers and General Merchants Workers, vide her communication contained in Form D dated 20<sup>th</sup> April, 2016 issued pursuant to section 20 of the Labour Relations Act, 2007.

2. The Appeal is based on the grounds that:

*1. The Respondent (Registrar of Trade Unions) erred in law and fact when she communicated to the promoters the refusal of the registration of their proposed Trade Union as contained in Form D dated 2<sup>nd</sup> April, 2016, when she illegally considered unsubstantiated factors that ought to have been taken into consideration during the Issuance of the Promoters ' Certificate on 2nd June 2015.*

*2. The Respondent (Registrar of Trade Unions) erred in law and fact when she considered without empirical data that the Kenya Union of Commercial Food and Allied Workers (KUCFAW) had adequately and sufficiently representative of the interests of the retail sector, that the appellants had made an Application for the registration of the Proposed Trade Union without the presentation of empirical data and tangible evidence to support the allegation.*

*3. The Respondent (Registrar of Trade Unions) failed to appreciate and not that wholesalers, retailers, general merchants and the over 600 Retail-Chain Stores (Supermarkets) are viable industries within the Retail Sector within the Republic of Kenya, that the objector, KUCFAW only represents less than 2% of the estimated total number of employees, who over eighty thousand (80 000).*

*4. The Respondent (Registrar of Trade Unions) 's actions are openly biased; she has allowed KUCFAW one of the oldest Trade Union in Kenya to continue operating by overlapping almost every sector of economy, KUCFAW covers a colossal area of representation. It is in civil service, food processing, distributive, watchmen, banking, Home guards, farmers, exports & Imports, warehousing, Independent Commissions, Hospitals, Religious Institutions and People's Homes. Its wide reaching constitution enables it, to recruit in all areas of the Kenyan economy. It has had very convoluted demarcation disputes with other Unions.*

*5. The Respondent (Registrar of Trade Unions) has terribly failed to persuade the Appellants, the People of Kenya why KUCFAW is given preferential treatments by her office, "there can be no justification for trade union, KUCFAW to control, or*

wish to control, entire sectors of the economy from the foundation to the roof” The structure of KUCFA W is such as that it enables it to bestride the Labour Market like a colossus. KUCFAW’s constitution is nebulous. Unfortunately, KUCFAW has not amended its constitution to bring it to conform to the thinking of a succession of modern trade union regime, focusing on a main area of representation, opting instead to fervently defend its multiple turfs, whenever a dispute arises.

6. The Respondent (Registrar of Trade Unions) erred in law and fact, when she failed to stop KUCFAW, a generalist trade union from claiming to be sufficiently representative of any area they claim to represent. It is a fact that Members are recruited and organized around the theme of ‘community of interests.’ There is no ‘community of interests’ represented by generalist trade union, waiters and priests, seen together as a unit, and it is hard to see how KUCFAW would be sufficiently representative of any of them. Trade Unions, unless in the mould of Federation of Trade Unions, are organized with specific orientation. It is not possible for Trade Unions to espouse a generalist orientation, and expect that a smooth run, and expect the assertion that such Trade Union can be sufficiently representative The Respondent (Registrar of Trade Unions) failed in law and fact to appreciate and acknowledge the dynamism in the economic sector, innovations, changes in the supply chains and to appreciate the expansion in the economy and very many entries of both employers and employees and to the extent that a Trade Union (Kenya Union of Commercial, Food and Allied Workers (KUCFAW)) that existed in early 60s cannot allege to fully control the Market, Commerce and Trades as purported and captured in its constitution. And that the name of the Kenya Union of Commercial, Food and Allied Workers (KUCFAW) is not in conformity with the current requirements for the registration of a Trade Union.

7. The Respondent (Registrar of Trade Unions) failed to appreciate that employees who were initially represented by the Kenya Union of Commercial, Food and Allied Workers (KUCFAW) have since formed several Trade Unions and the respondent has failed to direct the Kenya Union of Commercial, Food and Allied Workers (KUCFAW) to amend its constitution to remove from its objectives those industries, sectors and employees who are now covered and represented by the other Trade Unions, and even after directing all Trade Unions with the word “Allied” in their names to remove the word “Allied”. The Kenya Union of Commercial, Food and Allied Workers (KUCFAW) has continued to hold on to the “Allied” word, with impunity, so as to encroach into all sectors of economy at the disadvantage of other Trade Unions.

8. The Respondent (Registrar of Trade Unions) erred in law and fact, when she misled the National Labour Board to look into the constitution of only the “Kenya Union of Commercial, Food and Allied Workers (KUCFAW)” without giving the constitutions of the other Trade Unions whose objectives are also covered in the constitution of the “Kenya Union of Commercial, Food and Allied Workers (KUCFA W)” to enable the Board reach at a fair, just and reasonable decision.

9. The Respondent (Registrar of Trade Unions) erred in law and fact, when she failed to provide empirical figures of the actual employers/employees in the area which the proposed Trade Union (National Union of Shops-Retailers and General Merchants Workers) was contemplated to cover, so as to satisfy the provisions of Sections 12 and 14 which bars her from registering another trade union in a sector or industry where there existed a Trade Union that sufficiently represents the interest of those employees.

10. The Respondent (Registrar of Trade Unions) erred in law and fact, when she only considered what the Constitution of the “Kenya Union of Commercial, Food and Allied Workers (KUCFAW)” provided for, instead of simply complying with the provisions of Sections 12,14 and 18 of the Labour Relations Act, 2007.

11. The Respondent (Registrar of Trade Unions) erred in law and fact, when she failed to appreciate that Section 4 of the Labour Relations Act, 2007, gives employees right to form a Trade Union and the same rights are provided as bill of Rights under Articles 36 and 41 of the Constitution of Kenya, 2010 and can only be limited to the extent as provided under the Labour Relations Act, 2007.

12. The Respondent (Registrar of Trade Unions) erred in law and fact by rejecting an Application made by the Appellants on account that there existed a Trade Union that sufficiently represents employees working in the intended Sector within the Republic of Kenya without proving the aspect of sufficiency to the Appellants and the Board.

13. The Respondent (Registrar of Trade Unions) erred in law and fact, when she failed to interpret “sufficiency” to apply it to mean majority as opposed to a mere existent of the “Kenya Union of Commercial’, Food and Allied Workers (KUCFAW)” in the said area/industry and/or sector for which the Appellants sought registration.

14. The Respondent (Registrar of Trade Unions) failed to provide empirical evidence to the National Labour Board as required by Sections 12 and 14 of Labour Relations Act, 2007 of the visibility of the Kenya Union of Commercial, Food & Allied Workers” in the area for which the Appellants sought registration to enable the Board be properly advise in terms of empirical facts, data and tangible evidence as a technical person in that office to enable the Board arrive at affair decision in accordance with Section 19 of the Labour Relations Act, 2007, Section 5 of the Labour Institution Act, 2007 and overall failed to give effect to Articles 19 and 20 of the Constitution of Kenya and thereby infringing on the rights of the Appellants.

15. The Respondent (Registrar of Trade Unions) abdicated her statutory function and mandate under Section 18 of the Labour Relations Act, 2007 and Section 31 of the Labour Institutions Act, 2007, by completely relying on decision from a general body dominated by industry players with vested interests, he Respondent erred, by donating the powers conferred upon her by Section 31 of the Labour Institutions Act, to the National Labour Board. The powers conferred on the Registrar of Trade Unions are exclusive, not to be shared with any other authority.

16. As a consequence, the Respondent (Registrar of Trade Unions) has fundamentally and substantively violated the rights of the Appellants to exercise their rights as provided under Articles 36 and 41 of the Constitution of Kenya and breached the provisions of Sections 12, 14, 18 and 19 of the Labour Relations Act, 2007 and similarly has acted in breach of the statutory mandate conferred upon her office to discharge, fairly, reasonable and not whimsically, capriciously, frivolously and callously.

17. *The errors made by the Respondent to camouflage under the guise of the National Labour Board is self-defeatist and was meant to breach the rights of the appellants to form a Trade Union as provided under article 41 of the constitution of Kenya, 2010, the right of Freedom of Association as provided under article 36 of the constitution of Kenya, 2010 and the right to enjoy a Fair Administrative Action as provided under article 47 of the constitution of Kenya, 2010.*

18. *It is imperative to note that the Respondent (Registrar of Trade Unions) has failed to stop the Kenya Union of Commercial, Food and Allied Workers (KUCFA W) from covering a wide sector of economy, and with no capacity to represent employees working in Retail-Chain Stores (supermarkets), wholesalers Workers, malls, general shops, and General Merchants Workers.*

19. *It is imperative to note that the “Kenya Union of Commercial, Food & Allied Workers (KUCFAW)” seem to cover sectors of the entire enterprises of all trades and span on every sector of economy, and in the context, the “Kenya Union of Commercial, Food and Allied Workers (KUCFAW)” is not a Trade Union within the meaning of Trade Union. The “Kenya Union of Commercial, Food and Allied Workers (KUCFAW)” can only be described as an amorphous, anomalous union.*

20. *The Appellants have complied with sections 12, 13, 14, 18 and 19 of the Labour Relations Act, 2007.*

21. *The Respondent (Registrar of Trade Unions) failed due diligence when she allowed the “Kenya Union of Commercial, Food and Allied Workers (KUCFAW) to amend its constitution to cover and include several sectors of economy in the same constitution.*

22. *The Respondent (Registrar of Trade Unions) in exercising her discretion as provided under section 14(2) failed to give reasons as to why the Kenya Union of Commercial, Food and Allied Workers had to cover several sectors while the intention of drafters of the substantive statute provided that a Trade Union should not be multi-sectoral.*

23. *The Application made by the Appellants/promoters and dated 7th July, 2015 is a fundamental right given to them by article 41(2) (c) of the Constitution of Kenya, 2010, and properly presented to the Respondent.*

24. *The Labour Relations Act, 2007 at section 4(l)(a),(b)&(c) gives the Appellants unalienable rights as emphasized under Article 41(2)(c) of the Constitution of Kenya, 2010, to form a Trade Union. The formation of a Trade Union can only be limited pursuant to the law. Under Section 12 and 14 of the Labour Relations Act, 2007, the limitation is specific. Such specific limitations do not apply to the Appellants as rejected by the Respondent (Registrar of Trade Unions).*

25. *Any limitation touching on workers fundamental rights should be read along the provisions of Article 24(l)(c) & (e) and (3) of the Constitution of Kenya, 2010.*

26. *The Respondent (Registrar of Trade Unions) in exercising her discretion should do so and to the extent that she does not give majority or / and all sectors to a single Trade Union as the same is not what was contemplated under Section 14(2) of the Labour Relations Act, 2007, which is her statutory function under Section 31 of the Labour Institutions Act, 2007.*

27. *In justifying that employees in supermarket, malls, general shops, wholesales, and General Merchants are sufficiently represented under the provisions of Section 14(l)(d) of the Labour Relations Act, 2007, the Respondent (Registrar of Trade Unions) failed to exercise her judicial mind to look into the construction of Section 14(2)(c) of the Labour Relations Act, 2007 “subject to subsection (2),only members in a sector specified in the construction qualify for membership of the trade union, the purposive interpretation of this subsection therefore, the intention of the drafters or legislatures was not to allow a Trade Union to be registered to represent multi sectors.*

28. *The people, or/and all employees in Kenya or elsewhere are working in commercial enterprises or sectors, whether agriculture or otherwise. It therefore follows that the “Kenya Union of Commercial, Food and Allied Workers (KUCFAW) as its name is constructed, will be the only Trade Union registered by the Respondent (Registrar of Trade Unions) to represent all workers in Kenya.*

3. The Appellants seek for the following orders:

1. *An order of declaration that the Respondent (Registrar of Trade Unions) decision contained in Form D and dated 24<sup>th</sup> April, 2016 is illegal, unlawful, frivolous, ultra vires and the same be quashed.*

2. *An Order of declaration that the fundamental Rights and Freedom of Association of the Appellants were substantively breached by the Respondent (Registrar of Trade Unions) communication contained in Form-D and dated 26<sup>th</sup> April, 2016.*

3. *An Order of Injunction to compel the Respondent (Registrar of Trade Unions) to register the Application as contained in Form (‘A’ of the Proposed Trade Union (National Union of Shops-Retailers and General Merchants Workers), dated 7th July, 2015.*

4. *An Order of Injunction to compel the Kenya Union of Commercial, Food and Allied Workers (KUCFA W) to comply with directive of the Respondent (Registrar of Trade Unions) as contained in a Notice dated 18.10.2011, to delete the word “allied” and to amend its constitution to remove any / all objectives that are now functions of the other Trade Unions.*

5. *Any other reliefs that the court may deem fit to grant.*

**6. Costs of this appeal be borne by the Respondent and the Kenya Union of Commercial, Food and Allied Workers (KUCFAW).**

4. The Respondent filed a Replying Affidavit through one Elizabeth N. Gicheha being the holder of the office of the Respondent wherein she avers that the Appellants lodged an application for a certificate of recruitment of National Union of Shops-Retailers and General Workers vice their letter dated 27<sup>th</sup> May, 2015.
5. That on 2<sup>nd</sup> June, 2015, the Appellants were issued with a certificate of recruitment and on 7<sup>th</sup> July, 2015, the Appellants lodged a formal application for registration with the Respondent. Following the Application the Respondent caused the application to be gazetted in the Kenya Gazette on 21<sup>st</sup> August, 2015.
6. She avers that thereafter the Kenya Union of Commercial Food and Allied Workers objected to the registration on 8<sup>th</sup> September, 2015, which registration was forwarded to the interim General Secretary for comments on 16<sup>th</sup> September, 2015 who responded to their concerns by a letter dated 24<sup>th</sup> September, 2015.
7. Thereafter the application was placed before the National Labour Board at its meeting held on 7<sup>th</sup> and 8<sup>th</sup> April, 2016. The National Labour Board observed that there existed another registered trade union namely Kenya Union of Commercial Food and Allied Workers which represents the sector targeted by the Appellants proposed union and advised the Respondent to refuse the registration.
8. She states that the Appellants were informed of the rejection on 20<sup>th</sup> April, 2016, but did not appeal against the decision within 30 days as required by law. That the Appellants then proceeded to Court seeking leave to file the appeal out of time.
9. She further avers that under Sections 14(d) of the Labour Relations Act, it is legally wrong to register a trade union where another trade union already registered is sufficiently representative of the whole or substantial proportion of the interests in respect of which the Appellants seek to represent as this will lead to duplication and the trade union rivalries as the unions compete for membership leading to constant work disruptions and confusion which the Respondent should not be seen to promote.
10. That the Appellants are not members of the National Labour Board and should not purport to know what transpired in the Board's meeting like the Respondent misleading the Board, not providing certain data in their allegations when the onus of proving such empirical data lies with the Appellants.
11. That the orders sought by the Appellants are against public interest and public policy and will if granted occasion grave hardship to the Respondent and affect the constitutionally granted mandate of the Respondent. Further that the orders sought are directed to the Kenya Union of Commercial Food and Allied Workers, which is not even a party herein.
12. That the appeal is baseless, lacks merit and should be dismissed with costs to the Respondent.
13. On 12 June, 2017, the Interested Party was enjoined to the suit and they filed a Preliminary Objection and a Replying Affidavit in opposition to the appeal. The Court dismissed the Preliminary Objection and ordered that the appeal to proceed for determination on its own merits.
14. The Replying affidavit of the Interested Party is sworn by Boniface Kavuvi, its Secretary General wherein he avers that under the membership clause of the Interested Party, they are entitled to represent all employees engaged or employed in supermarkets, shops, retail and wholesale outlets, distribution and supply companies among others.
15. He avers that the Interested Party has recruited and represents a large number of employees from the various shops, supermarkets across Kenya who are members of the union as such the sector of employees the appellants are purporting to represent are sufficiently represented by the Interested Party herein.
16. That the Appellants through the persons who were litigating on their behalf had filed before this Honourable Court other appeals being Appeal **No. 3 of 2014; Laban Mokuia & Others vs Registrar of Trade Union and the Kenya Union of Commercial Food and Allied Workers** which appeal was struck out and **Appeal No. 18 of 2014 Charles Solano & 9 Others vs Registrar of Trade unions and the Kenya Union of Commercial Food and Allied Workers** which appeal was also dismissed.
17. That the Appellants have only appealed the decision in **Nairobi ELRC Appeal 18 of 2014** which appeal was dismissed with costs. That the Appellants have never appealed the ruling of the Honourable Court in Nairobi ELRC Appeal 3 of 2014 or Nyeri ELRC No. 52 of 2016 but instead filed another application before the Registrar of Trade Unions and subsequently filed the present appeal.
18. The Interested Party contend that they have membership and have entered into Recognition Agreement with several supermarkets and have also successfully negotiated and concluded Collective Agreements with the said supermarkets. They therefore contend that there is no vacuum in Trade Union representation in the supermarket industry as the Interested Party is sufficiently representative of all employees the Appellants seek to represent.
19. It is also their position that the constitutional right pleaded under Article 41 is not absolute and is subject to certain exceptions as set out under Article 24. Further, that the appeals being mounted by the Appellants year in year out constitute an abuse of the Court process and this Court should declare so.
20. That the Appellants have not made out a case to warrant the issue of the orders sought in the Memorandum of Appeal dated 10<sup>th</sup> March, 2017. The Interested Party pray for the appeal to be dismissed with costs.

## **Appellants' written submissions**

21. The Appellants submit that the Respondent's action infringes on the right to associate/formation of a trade union. It is the Appellants submission that their right to associate is a Fundamental Constitutional right in terms of Article 36 and Article 41 of the Constitution of Kenya 2010, Section 4 of the Labour Relations Act and the ILO Convention No. 87.

22. That the said provisions expressly give an employee(s) or worker(s) a right to form a Trade Union, which right is conferred upon the Workers in Kenya to protect and negotiate their terms and conditions of work. It is submitted that the procedure for registration of a trade union is provided under the, Labour Relations Act, 2007, which the Appellants have adhered to and are eligible for registration.

23. That the Appellants' proposed union will only focus on retail sectoral interests, which the Appellant have demonstrated its representation. The constitution of the proposed union is coached to conform to the requirements set out in LRA 2007, Sectoral Interests representation, which in the appellants view is not the case on the side of the Interested Party.

24. The Appellants further submit that, the Application in Form A dated 7<sup>th</sup> July 2015, fulfilled/satisfied all the procedural requirement set out under the LRA 2007, regarding formation and registration of union. Sections 4, 12, 13, 14, 18 & 19 of Labour Relations Act, 2007 which were fully satisfied. As a result, the Appellants are equally enjoined and entitled to enjoy the same constitutional fruits fairly.

25. It is submitted that Form D dated 20<sup>th</sup> April 2016, declining registration of the Appellants' proposed union negates, and threatens the validity of the Constitution of Kenya, 2010, and this Court must find so.

26. It is further submitted that refusing registration of the Appellants' proposed union by conveying to the appellants what the Board noted in respect of the Appellants application dated 7th July 2015, the Respondent abdicated his statutory duty and subordinated her office to the National Labour Board. Further, the decision as contained in Form D and dated 20<sup>th</sup> April 2016, is in bad faith and the same amounts to unfair refusal to exercise statutory power judiciously. The same decision in Form D dated 20<sup>th</sup> April 2016, suffers from lack of independence.

27. It is submitted that the reasons for refusal as contained in Form D dated 20th April 2016, are as follows:-

***“The Board noted that workers in this sector can join the existing union of Kenya Union of Commercial, Food & Allied Workers (KUCFAW), which adequately represents the sector targeted by your proposed union. KUCFAW represents employees engaged in warehouses, Merchandizes, Supermarkets, Shops, retail, and wholesale outlets, distribution and supply companies, among others. It was noted that this is the same sector you are seeking to represent hence, registration would lead to a duplication in the representation”.***

28. That the grounds for refusal of registration application of the Appellants' proposed union in Form A dated 7th July 2015, as contained and communicated in Form D are not persuasive in all its forms, and offends the Constitution of Kenya 2010. The Board neither made any reference to any provision of any law nor invoked any provision of law or the Constitution of Kenya 2010.

29. The Appellants further submit that the Respondent did not act reasonably, justifiably and within the ambits of the law. The right to form and join a Trade Union and freedom of association are constitutional rights. They rely on the case of **Scientific Research International Technical & Allied Workers Union vs. Kenya Agricultural Research Institute & Another (2013) eKLR**, where it was held:-

***“Recognition of Trade Unions rests on freedom of association. Employees have the right to join and leave Trade Unions. Recruitment is a continuous process. Even where an Employer has formally granted Trade Union recognition, employees belonging to that recognized Trade Union are not barred by any law from shifting allegiance to another Trade Union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate; just as the right of recognition includes the right of de-recognition. Employees look at the Trade Union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any trade union.”***

30. The appellants' application was made to represent the sectoral interests in industries within the retail sector, which are experiencing misrepresentation and non-representation. The Interested Party has not tendered any documents to show that it is also representing other industries within the retail sector like, the wholesalers, the retailers, general merchants, Hardwares, general shops, small manufacturers among others.

31. It is submitted that the Interested Party's allegation that by representing seven supermarkets, the employees employed within these chains are sufficiently represented is unfounded as the appellants have countered this by tendering a list of registered supermarkets with the Registrar of Businesses and Registrar of Companies who are not represented by the interested party.

32. That the Interested Party is an Omnibus Union /Generalist Union. It is now a settled law that generalist trade unions can never claim sufficiency in representation of any union interest as was held in the matter of, **Japheth Anyira Agura & 6 others v Registrar of Trade Unions [2014] eKLR**.

33. Finally, the Appellants submit that they have fully demonstrated and shown that they have a meritorious Case/Appeal against the Respondent. They therefore humbly urge the Honourable Court to grant Appellants' reliefs as sought in their Appeal dated 10<sup>th</sup> March, 2017.

## **The Respondent's submissions**

34. It is submitted that the area of interest by the proposed union is adequately represented by two registered trade unions and its registration would be contrary to section 14(1)(d) of the Labour Relations Act.

35. It is further submitted that the presentation of resignation letters relied on by the appellants in support of the appeal were never brought to the attention of the Respondent during the whole process of the application as required by Section 31(3) of the Labour Relations Act to act on the advice of the National Labour Board while exercising its powers relating to the registration and regulation of trade union and under the provisions of Article 259 (11) of the Kenyan Constitution, the Respondent is bound to act on such advice.

36. It is also submitted that the enjoyment of freedom of association by the appellants as enshrined in the constitution is not absolute to the extent that their enjoyment shall not be prejudicial to others. That the resignation letters of the appellants proposed union in the memorandum of appeal is evidence that the employees that the appellant's proposed union wishes to recruit, were members of one of the registered unions and the Respondent avers that the appellants dissatisfaction with the trade unions, is not a legitimate reason to register a rival union.

37. That a trade union belongs to members and they have the capacity and mandate to correct the shortcomings within the existing structures within the union through the provisions of their union constitution. That the registration of the proposed union if granted will open a Pandora's box of applications by the remaining categories of employees and consume a lot of management time on negotiations. They cite the case of **Civil Appeal No. 12 of 2014 Felix Musyoka Sammy and Others** appealing as promoters on behalf of **Kenya Public Schools Non-Teaching Staff (KEPUSNTESU) Vs Registrar of Trade Unions and Another** where it was held:

*“It's therefore inappropriate to introduce constitutional arguments in what is purely policy and administrative issues. Indeed that Article 36 and 41 of the constitution read together protects the freedom to form and join the trade union of one's choice. However, the exercise of this freedom is not absolute. It must be exercised in cognizance and conformity with the policies and best practices in the labour movement. Limitation of the right to form and join a union of one's choice in recognition of policies and best practices which have been tested over time is reasonable and justifiable in an open and democratic society.”*

38. It is further submitted that the Respondent was exercising the mandate vested upon her by law and hence declining registration and any award of costs will be putting fetters in the performance of her mandate. They urge the Court to dismiss the matter with costs to the Respondent.

#### **Interested Party's submissions**

39. It is submitted that the Respondent's decision is well grounded in law and the Respondents have failed to demonstrate that the said decision was erroneous. That the Interested Party represents employees who work in supermarkets, shops and all those engaged as general merchants as per rule 5 of the Interested Party's constitution.

40. That it would have been wrong for the Respondent to grant registration knowing well that the Appellants do not meet the mandatory requirements under the Labour Relations Act, 2007. Further that the area sought to be represented by the Appellants proposed union is well represented by the Interested Party and urge the Court to adopt the decision in **Frank Esevwe & 6 Others (being proposers and promoters of universities service workers union) vs Registrar of Trade Unions (2018) eKLR** and the Court of Appeal decision in **Charles Salano & 9 Others vs the Registrar of Trade Unions and Kenya Union of Commercial Food and Allied Workers CACA No. 19 of 2016**.

41. That the requirement for registration and refusal of registration of a trade union under the Labour Relations Act, 2007, it is submitted that it is a process that is clearly sanctioned under the law and is therefore justifiable in an open and democratic society. They thus pray for the appeal to be dismissed with costs.

42. I have examined all averments by both parties. It is true that Article 41(2) (c) of the Constitution provides for a right to form and join a trade union as follows:-

*c) “to form, join or participate in the activities and programmes of a trade union”.*

43. This right is however not absolute as envisaged under Article 24(1) of the Constitution which states as follows:-

*1. “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:-*

*a. the nature of the right or fundamental freedom;*

*b. the importance of the purpose of the limitation;*

*c. the nature and extent of the limitation;*

*d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

*e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

44. It is true therefore, that in considering whether the Appellant's right to join and form a trade union can be considered in light of the

constitutional provisions above.

45. Under (e) above, the relation between limiting the right to join the envisaged trade union vis a vis whether there are restrictive means to achieve the purpose must be considered. The purpose here is to enjoy the formation and membership of a trade union.

46. The Respondents have averred that the proposed union will be superfluous, as there exist other unions, which are able to cater for the available members.

47. Indeed the constitution of the Interested Party shows that they deal with retailers, who may be targeted by the Appellants herein.

48. It is my position that the fact that there is another union catering for the Retailers should not bar formation of another union, which would deal specifically with retailers as applied for. I am however guided by the Court of Appeal's decision in **Charles Salano & 9 Others vs Registrar of Trade Unions and Kenya Union of Commercial Food and Allied Workers CA No. 19 /2016** where the Court opined as follows:-

**“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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall have costs before this Court and in the Employment and Labour Relations Court”.*

49. In the circumstances and being guided by the Court of Appeal decision, I find that there are other trade unions who are able to cater for members who are in the Retail Industry as seen above and in order not to proliferate the trade unions in existence and weaken them, it is my finding that the 1<sup>st</sup> Respondent was properly guided in rejecting the registration of the Appellants herein.

50. I therefore find the Appeal without merit and I therefore dismiss it accordingly with costs.

**Dated and delivered in open Court this 3<sup>rd</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gathanjia holding brief for Nyabena for Interested Party – Present

Motende for 1<sup>st</sup> Respondent – Present

Ongera for Appellants