



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**

**CAUSE NUMBER APPEAL 10 OF 2016**

**WILLICE O. OKELLO.....1<sup>ST</sup> APPELLANT**

**MILLICENT OGILA .....2<sup>ND</sup> APPELLANT**

**SOLOMON A. OCHARE.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REGISTRAR OF TRADE UNIONS.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LABOUR BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appellants herein contended that they came together and discovered that within the labour markets, there was a particular constituency that had been left out by the existing unions which needed to be addressed and represented by a union that would champion their interest. This constituency was the Export Processing Zone (EPZ).

2. The EPZs according to the appellant were established around 2000 and were born out of the African Growth and Opportunity Act (AGOA). The Act offered tangible incentives for African Countries to continue their efforts to open their economies and build free markets. The appellant therefore having looked at the constitution of existing Trade Unions in the industry discovered that workers in this industry were not adequately represented by the said unions. The appellant therefore in exercise of their right under article 41(1) and (2) of the constitution applied to the 1<sup>st</sup> respondent for a certificate to establish the proposed union.

3. The interested party herein raised their objection to the registration of the proposed union and the respondent called upon the appellants to respond to the concerns raised. The appellant prepared and filed an appropriate response with the respondent. However, on 19<sup>th</sup> April, 2016 the 1<sup>st</sup> respondent wrote a letter to the appellants informing them that their application for registration had not been approved by the National Labour Board.

4. According to the appellant, under section 19(1) of the Labour Relations Act, the mandate to register trade unions is given to the 1<sup>st</sup> respondent and at no time does the onus to approve or disapprove registration of a proposed union lie with the National Labour Board. The appellant further contended that under section 7(1) (0) of the Labour Institutions Act, the function of the National Labour Board is to

advise the Minister on the registration suspension and deregistration of Trade Unions and employers organizations. According to the appellant therefore, the mandate of the board is only to advise the Registrar on registration or deregistration of Trade Unions.

5. However according to the letter from the 1<sup>st</sup> respondent dated 19<sup>th</sup> April, 2016 the 2<sup>nd</sup> respondent seemed to have usurped the powers of the 1<sup>st</sup> respondent and that the 1<sup>st</sup> respondent ceded her mandate under the law to the 2<sup>nd</sup> respondent. In this respect

the appellant relied on the case of **Union of Cooperative Staff Vs Registrar of Trade Unions** where the court observed that from the provisions of the Act, it was clear that the statutory duty to register and regulate Trade Unions lies with the Registrar and the role of the National Labour Board is advisory.

6. The appellant further argued that under article 36(1) of the constitution they have a right to freedom of association which included the right to form, join or participate in the activities of an association of any kind and further under article 41(2) (c ) every worker had the right to form, join or participate in the activities and programs of a Trade Union. The appellant contended that in her letter, the Registrar gave reasons for refusal by the National Labour Board to register the appellant's intended trade union and advised that the appellant join the interested party. This according to the appellant went against the provisions of the Bill of Rights which prohibits compulsion to join an association of any kind.

7. In this regard the appellant sought reliance on the case of **Seth Panyako & 5 others Vs Attorney General and 2 Others [2013] eKLR** where the court held that the registrar failed to balance the enjoyment of the right to form and join a trade union of choice with the prejudice if any, the enjoyment of the right would occasion. According to the appellant the Registrar in her communication of the reason for refusal to register the appellant union did not disclose any prejudice that would be suffered by the interested party if the proposed union was registered.

8. The Attorney General for the 1<sup>st</sup> respondent on its part submitted that section 31(3) of the Labour Institutions Act provided that the 1<sup>st</sup> respondent shall in exercise of his powers relating to registration and regulation of Trade Unions act in the advice of the Board (2<sup>nd</sup> respondent). The advice of the Board was that the registration be refused as this sector was already represented elsewhere as demonstrated. According to the AG section 14(1)(a) of the Labour Relations Act limited the powers of the 1<sup>st</sup> respondent to register trade unions in circumstances where there is in existence another trade union which is sufficiently represented.

9. The interested party on its part submitted that the appellants were never denied the right to form a trade union since there application requesting the 1<sup>st</sup> respondent to be allowed to form and promote the activities of a trade union with sole purpose of registering it was considered by the 2<sup>nd</sup> respondent on parameters set out in law. Further, the appellants had a right to form a trade union but this right was not absolute within the meaning of article 25 of the constitution which constitutes a class of rights and freedoms that may not be limited.

10. Under article 41 (1) (c) of the Constitution, every person has the right to form, join or participate in the activities and programmes of a trade union. This right falls under chapter 4 rights which are titled the bill of rights. Under article 24, 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 the nature of the right or fundamental freedom the importance of the purpose of the limitation and so on.

11. The legal policy and rationale of regulating the registration of trade unions is to ensure that trade unions have reasonable numbers to sustain themselves through members' subscriptions and avoidance of duplicity in representation. It is in this sense that section 14 of the Labour Relations Act gives parameters which the Registrar takes into account before registering a trade union. One of the considerations is that no other union is already registered that is sufficiently representative of the whole or a substantial portion

of the interests in respect of which the applicant seeks registration.

12. In this particular case, the Registrar upon consulting with the National Labour Board became of the view that the interested party and Kenya Union of Export and Import workers (KUEIA) were sufficiently representative of the whole or a substantial portion of the interests in respect of which the appellant sought registration. The promotion of the appellant was premised on AGOA. An American legislation that accorded products from Africa mainly textile access to US markets. Most of the prospective members of the appellants would have therefore been largely drawn from tailors and textile workers and those in companies and organizations involved in import and export business. These workers were already represented by the interested party and KUEIA. Apart from invoking AGOA, the appellant did not demonstrate to the satisfaction of the Registrar any interest which was not sufficiently or substantially represented by the already existing two unions. To this extent the court upholds the decision of the Registrar and dismisses the appeal with costs.

13. The appellant however raised an interesting issue that by informing the appellant that the National Labour Board had declined the registration of the appellant, the Registrar had ceded her legal mandate to the Board. To put it the other way the board had usurped the powers of the Registrar. Section 19 of the Labour Relations Act provides that the Registrar if satisfied after consulting the Board shall register a trade union. Section 7 of the Labour Institutions Act provide for the functions of the Board. They include advice on any matter relating to labour relations and trade unionism. The Board under section 6 of the said Act comprises of among others a Chairperson who must be experienced and has expertise in labour relation matters, general secretary of the most representative federation of trade unions, the chief executive of the most representative federation of employers' organization, the Director of Employment and so on. These are no doubt experts and experienced persons on labour relations issues. The registrar is a member too.

14. Where a statute requires a person to consult, the consultation has to be done and the advice taken. The Registrar of Trade Unions is not lone an expert on trade unionism. She must rely on the advice of the Board which comprises of experts and experienced people on labour relations issues. Their advice would be akin to expert opinion over which the Registrar has very little room for qualification. Therefore while the ultimate duty to register a union lies with the Registrar, the advice of the Board is binding on the Registrar.

15. Whereas the 1<sup>st</sup> respondent in communicating the refusal to, the appellant appeared to have been communicating the decision of the Board and not hers, the decision of the Board was more or less binding on her. While the court agrees with the appellant that the communication was inappropriately crafted, no prejudice was occasioned to the appellant since the appellant was in no doubt that the registration had been refused.

16. In conclusion, the court finds no merit in the appeal and it is hereby dismissed.

17. It is so ordered.

Dated at Nairobi this 22<sup>nd</sup> day of September, 2017

**ABUODHA J. N.**

**JUDGE**

Delivered this 22<sup>nd</sup> day of September, 2017

**NDERI NDUMA**

**JUDGE**

In the presence of:

.....for Claimant

.....for Respondent