



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

APPEAL NO. 1 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th April 2016)

DICKSON MAGAK OMWAGA1ST APPELLANT

EDWARD KIPKORIR SIGILAI 2ND APPELLANT

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

THE REGISTRAR OF TRADE UNIONS.....2ND RESPONDENT

KENYA COUNTY GOVERNMENT

WORKERS UNION3RD RESPONDENT

AND

EVANS WAFULA MAKOKHA INTERESTED PARTY

JUDGMENT OF THE COURT

1. The Appellants filed their Memorandum of Appeal on 11.01.2016, through the firm of Orende & Associates being an appeal arising from the decision of the 2nd Respondent declining to register the amendments to the 3rd Respondent's constitution and it is based on the following grounds:

- a. *On 11th January, 2014, the 3rd Respondent held a National Delegates Conference and adopted the current constitution to enable the 3rd Respondent to carry out its functions in line with the new devolved structures and the Constitution of Kenya.*
- b. *Vide Minute 4 of the minutes of the National Delegates Conference held on 11th January, 2014, the Appellants and the 3rd Respondent's members resolved that the said constitution would be subject to amendments for purposes of carrying out the next union elections.*
- c. *The 3rd Respondent's constitution has never been used as an instrument for purposes of carrying out the union elections.*
- d. *On 12th August, 2015, the 3rd Respondent's members wrote a letter to the 3rd Respondent's*

General Secretary reminding him that a Special National Delegates Conference ought to be convened for purposes of amendment of the constitution.

- e. **On 16th October, 2015, the 3rd Respondent convened a special Delegates Conference at the Machakos University College pursuant to Article 4 of the 3rd Respondent's Constitution.**
- f. **The main agenda of the said Delegates Conference was the amendment of the 3rd Respondent's current constitution as empowered on the National Delegates Conference.**
- g. **The process of Amendment of the 3rd Respondent's constitution is guided by Section 27 of the Labour Relations Act and Article 4(3) (a) (v), 4 (3) (c) and Article 24 (a) of the 3rd Respondent's constitution.**
- h. **Pursuant to the said meeting the following resolutions and/or amendments were made by the 3rd Respondent's National Delegates Conference with a view of betterment of the Constitution:**
 - i. **The members amended Article 3 of the current Constitution to bring in a new and lean organizational structure comprising of National Delegates Conference, National Executive Committee, National Secretariat, Branches and Sub-Branchees as opposed to National Delegates Conference, National Executive Committee, National Secretariat, County Executive Committee, County Secretariat, Shop Stewards Council, Shop Stewards Executive Committee, Shop Stewards Secretariat, Gender Committee.**
 - ii. **Article 7(4) of the current Constitution makes provision for the position of the Assistant National General Secretary. Article 7 (4) (a) of the same provision ought to expound on the qualifications and functions of the Assistant National General Secretary. However, the said provision expounds on the qualifications and functions of a Deputy General Secretary and not for the position of Assistant General Secretary. This discrepancy has caused a conflict amongst the members as to whether both offices exist in the current constitution. This is cured and amended by introducing posts, qualifications and functions under Article 7 (2) (4) with separate and distinct roles to play.**
 - iii. **Article 12 (7) (a) of the current constitutions makes provision for elections of shop stewards after every two (2) years in contravention of section 34 (2) (b) of the Labour Relations Act which is explicit that elections of officials shall take place within five (5) years. This has been amended by dint of Article 5 (6)**
 - iv. **Article 8 (6) makes provision for the County and Deputy County Secretary (each of the 47 county branches has a County Secretary and a Deputy) to serve on a full time basis. This translates to 94 full time county officials earning approximately Shs. 100,000/= (under the current union's remuneration scales.) This is not tenable as the monthly recurrent expenditure of Shs. 9.4 Million against the 3rd Respondent's income of approximately Shs. 5 Million. The provision has been amended such that all county officials work on a part time basis.**
- i. **On 27th October, 2015, the 3rd Respondent through the General Secretary forwarded the requisite documents to the 2nd Respondent to wit: form 1 as set out in the 2nd schedule of the Labour Relations Act, copy of the 3rd Respondent's Constitution signed by the 3rd Respondent's members, extract of the minutes form the 3rd Respondent's previous National Executive Council meeting on the amendment of the Constitution.**
- j. **The said documents were forwarded to the 2nd Respondent for purposes of registration of the Amended Constitution and issuance of a Certificate of Change of the Constitution pursuant to section 27 (2) of the Labour Relations Act.**

- k. *The requisite documents were received by the 2nd Respondent on 28th October, 2015, and she issued a twenty one (21) day notice in the Gazette and advertised the same in the daily newspapers....*
- l. *On 25th November, 2015, the 2nd Respondent issued a Notice to the 3rd Respondent and other Trade Unions with directives that the 3rd Respondent carries out its elections at the Branch and National levels by 30th March, 2016, and 30th June, 2016, respectively. The Notice was only served on the 3rd Respondent on 7th December, 2015.*
- m. *The 2nd Respondent further directed that no new applications for amendments of the 3rd Respondent's Constitution would be processed until after the elections.*
- n. *On 22nd December, 2015, the 2nd Respondent issued a Notice dated 9th December, 2015, to the 3rd Respondent informing it that the amendments that had been forwarded the month earlier could not be registered as it was time barred by the circular issued on 25th November, 2015.*
- o. *On 24th December, 2015, the 3rd Respondent's General Secretary issued a Notice to all County Branch Secretaries directing them to issue notices for Branch elections on 4th January, 2016. The said elections would be held from 25th January, 2016.*
- p. *The 3rd Respondent's Branch secretaries have since issued notices for the elections.*
- q. *The Petitioners aver that they are candidates in the next Union elections. By the 3rd Respondent's passing the resolution in the National Delegates Conference on 16th October, 2015, and complying with all the legal requirements as encompassed in the law, they had a legitimate expectation that the said amendment would be registered by the 2nd Respondent prior to the next national, county and shop floor elections and thus feel aggrieved by the 2nd Respondent's decision to stay the registration of the amendment.*

2. They pray for the following:

- a. *The Honourable Court be pleased to quash the decision of the Registrar of Trade Unions vide a letter of Notice dated 9th December, 2015.*
- b. *The Honourable Court be pleased to issue an Order prohibiting the 3rd Respondent by themselves, agents, servants, officials and /or any other person action under them from carrying out its intended national, county and shop floor level elections using the current constitution of the 3rd Respondent.*
- c. *The Honourable Court do issue a mandatory injunctive Order compelling the 2nd Respondent to forthwith register the 3rd Respondent's amendments to the current constitution and issue a certificate of change of constitution n of the 3rd Respondent's constitution.*
- d. *The Honourable Court do issue a mandatory injunctive Order compelling the 2nd Respondent to reasonably consider the 3rd Respondent's application for amendment of the constitution and issue a certificate of change of constitution of the 3rd Respondent's constitution*
- e. *Costs of the appeal*
- f. *Any other relief that the Court may deem fit to grant.*

3. In Response to the Appeal, the 1st and 2nd Respondent have filed an Affidavit sworn by one Elizabeth N. Gicheha – the Registrar of Trade Unions in Kenya where she states that:

“the 2nd Respondent is mandated to register and regulate Trade Unions, Employers Organization and/or Trade Union Federations. She states that she received an application to amend the 3rd Respondent’s constitution and the same was gazetted and advertised as required under Section 27 (14) of the labour Relations Act”.

4. That on 10.11.2015 and 25.11.2015 one John M. Ndunda the Nakuru County Branch Secretary and one Evans Wafula objected to amendment of the Constitution.

5. That on 25.11.2015, the 2nd Respondent issued a circular letter to all Trade Unions, Employer Organizations or Federations directing them to hold General Elections between January and June 2016. By virtue of the said circular registration of new branches and amendments to the constitutions of all registered Trade Unions was suspended and the amended constitution of the 3rd Respondent was as a result not registered pending elections.

6. The 2nd Respondent avers that the decision on registration of the 3rd Respondent’s amended Constitution is yet to be made and that their existing constitution is still in force.

7. That the directive to hold elections was issued to all Trade Unions and the 3rd Respondent should not be treated differently just because its constitution is not registered. She also states that there are other constitutions of other Trade Unions whose registration has been halted until elections are held.

8. In response to the Memorandum of Appeal the 3rd Respondent filed a Response on 26.2.2016 where they admit holding a National Delegates Conference, adopted the current constitution and resolved that the said constitution would be subject to amendment for the purposes of carrying out the next union elections.

9. They also admit that in light of the Kenya Constitution 2010 which introduced administrative changes, the current constitution of the 3rd Respondent would not be the proper tool for use in the upcoming union elections.

10. They state that the organizational structure in the current constitution is broad and overstretched as it provides for nine (9) administrative organs which greatly impede decision making in the union. The 3rd Respondent amended Article 4 of their constitution to introduce a lean organizational structure of four organs: The National Delegates Conference, the National Executive Committee, the National Secretariat, Branches and sub-branches, at Article 5 of the Amended constitution.

11. The third Respondent admits amendment to Articles 7 (4) and 12 (7) of their constitution stating that it was necessary in order to correct an apparent error in the constitution’s drafting and to bring the 3rd Respondent’s operations in compliance with statutory provisions especially section 34 (2) (b) of the Labour Relations Act. The 3rd Respondent states that they had hoped in complying with all the legal and procedural requirements the 2nd Respondent would allow its application for amendment and accordingly register the amendments.

12. The 3rd Respondent agrees with the grounds in the appeal and pray that it be allowed.

13. The interested party was enjoined to the proceedings by Orders of 18.2.2016 by virtue of being a member and official of the 3rd Respondent from its Uasin Ngishu branch and in his response to the appeal he states that he is aware that while passing the 3rd Respondent’s Constitution members of the 3rd Respondent expressed their intentions of amending it upon being registered. He however states that he is not aware of the National Delegates Conference of the 3rd Respondent held on 11th January, 2014, where

it was resolved that amendment of the constitution was for the purpose of enabling the 3rd Respondent's members conduct the next election.

14. He further states that although the 3rd Respondent's constitution has never been used to conduct elections, it cannot be concluded that the same is incapable of directing the Union's elections since it sets out the body to supervise the elections and its composition, the eligibility of persons to be elected as members of the elections board, the appointing body is also specified. Further the composition of the National Executive Council is therein set out.

15. He admits that the union's members communicated to the Secretary General reminding him to convene a special National Delegates Conference for the purpose of amending the current constitution to include a proposal that the election of shop-stewards to be held after five (5) years so as to be in consonance with the National and Branch elections. Any other proposals contained in the letter of 12.8.2015 he alleges are inaccurate and do not reflect the proposals made by the membership.

16. He further states that he was present during the National Delegates Council convened on 16.10.2015 at Machakos University College to discuss the proposed amendments. That while the discussions were going on the Union's national secretary general arrived in Company of his private security individuals and took over the meeting from the national chairman. He purportedly read out his proposed amendments to the Constitution and seconded them himself without giving any of the delegates an opportunity to be heard on the same subsequently chaos erupted and no discussion on amendments took place on that day.

17. He disputes the list of members attached to the Appeal stating it is just a list showing the officials and delegates who attended the Machakos National Delegates Council and not a list of people who approved the amendments. That members could not exercise their rights as envisaged by sections 27 of the Labour Relations Act and the Union's constitution.

18. It is also the Interested Party's contention that in protest of the national secretary general's actions he together with majority of the delegates in Machakos appealed to the Registrar of Trade Unions not to register the proposed amendments. The Registrar wrote back stating that as at 23.10.2015, she had not received any communication regarding the change in the Union's constitution and she advised that objections could only be raised after gazettelement of the proposed amendments.

19. That the 2nd Respondent failed to meet the threshold set out in section 27 (4) of the Labour Relations Act which in his opinion reeks of bad faith and meant to conceal information from the Union members. The interested party further states that he filed an objection with the 2nd Respondent but were advised that it was premature and that they could only raise an objection after the proposed amendments had been received and gazetted.

20. He states that he never saw the gazette notice because of the clandestine manner in which it was done and only learnt of it after Court ordered that he be served with the appeal.

21. That the Registrar was duty bound to issue the notice of elections irrespective of the Union's unresolved issues and the hurried manner in which the Appellants want the amendments to the constitution effected is evidence that they want to give the incumbent secretary general an unfair advantage over his opponents and/or lock out popular aspirants from contesting for the position.

22. That no party will be prejudice if the appeal is disallowed since the current constitution is sufficient to ensure smooth running of the elections at all levels and that the said appeal be dismissed. In the alternative he prays that the Court:

- a. ***Issue an Order stopping the appellants and or any person from compelling the 2nd Respondent to register and issue a certificate of the proposed amendments/constitution until such a time when the proposed amendments are legally and properly adopted by the union members;***

- b. ***Issue an Order directing the Special National Delegates Conference (SNDC) to convene immediately to establish the Elections Board to conduct and supervise the union's scheduled elections at all levels and/or that the union's elections at all levels be managed and/or supervised by the labour office.***
- c. ***Issue an Oder directing that once the election board is formed, it must prepare a proper time table for the 3rd Respondent's elections providing for the date, time, and place where the 3rd Respondent's national branch and shop floor elections are to be held and the timetable to be published in at least three newspapers of national circulation; and***
- d. ***Issue and Order directing that the Secretary General to notify all the 3rd Respondent's members of the contemplated National, Branch and Shop floor level elections vide a proper notice as per the 3rd Respondent's constitution and/or published in at least three newspapers with national circulation.***

23. The Appellants in their submissions state that the 3rd Respondent followed the procedure set out in Section 27 of the Labour Relations Act. All the requisite documents were forwarded to the 2nd Respondent which were received on 28.10.2015 and the Registrar proceeded to issue a 21 days' notice in the Gazette and advertised the same in the daily newspapers.

24. The Appellants state that if the interested party were really acting in good faith, they ought to have raised their objection within the 21 days. If this had been the case the Registrar would then have investigated the complaint and then take any of the steps set out in section 27 of the Labour Relations Act which are:

- a. ***Refer to the Industrial Court***
- b. ***Refuse or accept the proposed amendments***
- c. ***Make any Order as they may deem fit in the circumstances.***

25. If a member is dissatisfied with the decision of the Registrar that is when they can appeal to the Court for a remedy.

26. The Appellants further contend that on 22.12.2015 approximately 56 days after receipt of the Application for amendment, the Registrar issued a Notice dated 9.12.2015 to the 3rd Respondent informing them that the amendments could not be registered as it was overtaken by the circular of 25.11.2015 whereas the application for registration was done on 27.10.2015. They cite verbatim the reason in the said circular:

"...no amendments will be processed from the date of the circular which is dated 25th November, 2015, until after the elections."

27. This they state was not a reason as envisaged under section 27 (4) (a) and as such the Registrar's actions offend the Appellants 'constitutional rights set out under Article 47 on administrative action. They rely on the case of **David Benedict Omulama & 8 Others Vs Registrar of Trade Unions and Another (2014) eKLR**; where it was held:

"Failure to give and or outline the reasons as to why the Registrar of Trade Unions arrived at the decision to reject registration of the appellants' application is contrary to the expectations placed on this office and thus can be termed as subjective viewed in the light of the provisions of Article 47 of the Constitution where an administrative action must be based on a sound finding of fact or law that is what is fair and reasonable."

28. The Appellants state that after they had complied with the provisions of section 27 of the Labour Relations Act, they had legitimate expectation that the 2nd Respondent would effect registration of their constitution. They believe that the Court has jurisdiction to grant the prayers sought and rely on the case

of **R Vs Greater London Council ex parte Blackburn (1976) 3 ALL ER 184** where Lord Denning stated:

“I regard it a matter of high constitutional principle that if there is a good ground for supposing that a Government Department or public authority is transgressing the law, or is about to transgress it, in a way that offends or injures thousands of her majesty’s subjects, then any one of those offended or injured can draw it to the attention of the Courts of law and seek to have the law enforced, and the Courts in their discretion can grant whatever remedy is appropriate.”

29. The Appellants have also raised the issue of whether the circular of 25.11.2015, had retrospective effect to applications made prior to its issuance. The submit that the circular did not have retrospective effect and rely on the case of **Overseas Private Investment Corporation & 2 Others Vs the Attorney General (2013) eKLR** where Court cited the case of **Municipality of Mombasa Vs Nyali Limited (1963) E.A. 371** where Newbold J.A. stated:

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.”

30. The Appellants have also stated that the Court has no jurisdiction to determine the issues raised by the interested party for the reason that jurisdiction of the Court is conferred by Section 27 which is to the effect that:

“Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court against that decision within thirty days of the decision.”

31. They state that the issues that have been raised by the interested party with regard to the 3rd Respondent’s elections, the manner in which the elections were carried out, are issues that ought to have been raised by the interested party to the Registrar at the objection stage and not at an appellate stage. They rely on the case of **Justus Aloo Ageka & 6 Others Vs Registrar of Trade Unions (2014)eKLR** where Nderi Nduma J stated:

“The jurisdiction of the Industrial Court in matter of union registration is appellate in nature. Specifically, Section 30 of the Labour Relations Act provides that any person aggrieved by a decision of the Registrar of Trade Unions may appeal against the decision to this Court within thirty days thereof. In exercising its jurisdiction in this regard, the Court is expected to evaluate the decision taken by the Registrar of Trade Unions.”

32. The interested party has also sought prayers in their affidavit which the Appellants contend cannot be granted for the reason that the affidavit offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules 2010. The Appellants state that paragraphs 30 and 31 of the Interested Party’s affidavit are beyond the scope of law and should be struck off since an affidavit is not a pleading but evidence. Further, they contend that the Affidavit offends Rule 13 of the Industrial Court Rules since a Response to the appeal is what ought to have been filed instead.

33. They pray that the appeal be allowed.

34. The 1st and 2nd Respondent submit that she is a public officer bound by the constitution when undertaking duties of registration, suspension and deregistration of trade unions, employer organizations

and federations as provided for under section 31 of the Labour Institutions Act.

35. She admits having received the application for amendment of the 3rd Respondent's Constitution on 28.10.2015 and on 10.11.2015 and 25.11.2015 she received objections to the amendment from the Nakuru County Secretary and one Evans Wafula. She states that it is the 2nd Respondent's duty to look into objections and see if they have merit but at this point the investigations have been halted pending the election of new office holders.

36. The 2nd Respondent states that after receiving and the application for amendment of the constitution and the ensuing objection she made orders that she deemed fit in the circumstances as provided under Section 27 (4)(c) of the Labour Relations Act. The 2nd Respondent thus prays for the Court's Directions in regards to the Application.

37. The 3rd Respondent submits that the 2nd Respondent's decision of not registering the amendments of the constitution violates Article 10, 41 and 47 of the constitution in that the current constitution contains anomalies that if not resolved prior to the elections may give rise to protracted disputes between the officials and members since it will not be able to conduct elections in the manner unanimously agreed by its members. They cite the decision of Radido J in **James Kinyunzu Kisaku & Another Vs National General Secretary of the Dock Workers Union & Another (2014) eKLR** where it was held:

“The Court wishes to emphasise and note that Article 41(4) of the Constitution has guaranteed a trade union the right to determine its own administration, programmes and activities and unless there are clear breaches of a trade union's constitution or statutory provisions, the Courts and other entities should not interfere. The Courts must be cautious to give trade unions leeway and a margin of appreciation to run their activities and programmes the way they wish unless they are not in compliance with the laws of the country or their constitutions.”

38. They thus submit that the amendments are lawful and necessary for the administration of the union and the decision of refusing to register the amendments is both unlawful and unprocedural.

39. They also state that the decision of the 2nd Respondent negatively affects each member of the 3rd Respondent union. The constitution of Kenya 2010 requires that decision as in the instant case be expeditious, efficient, lawful, reasonable and procedurally fair. They rely on the case of **Severine Luyali Vs Ministry of Foreign Affairs & International Trade & 3 others (2014) eKLR**, Mbaru J stated:

“Article 47 of the Constitution has various ingredients that need to be observed any time a public body or public/state officer takes an administrative action which are that administrative action ought to be delivered expeditiously, efficiently, lawfully, reasonably and following fair procedure. Where a fundamental right is likely to be adversely affected by an administrative action, that person has a right to be given reasons for the action... The Court can intervene when an administrative decision is made either illegally, irrationally or fraught with procedural impropriety, unfair, unconstitutional or for any other justifiable reason that has been embraced in the rapidly developing administrative law.”

40. They state that the decision of the 2nd Respondent contravenes Article 47 for the following reasons:

1. It is being applied retrospectively seeing as the application for registration was done on 27.10.2015 and the circular refusing registration is dated 25.11.2015. They cite the case of **CFC Stanbic Bank Ltd Vs Kenya Revenue Authority & Another (2014) eKLR** where the Court held that where a law is introduced for the first time it ought not to change the character of past transactions carried on upon the faith of the then existing law unless by express words or necessary implication it appears was the intention of the legislature.

2. The 2nd Respondent's reason for failing to register the amendment of the 3rd Respondent's constitution does not fall within the law and is therefore an irrelevant consideration.

41. The 3rd Respondent submits that the 2nd Respondent ought to be compelled to register the 3rd Respondent's constitution for infringing on the 3rd Respondent's legitimate expectation since there are no rational grounds advanced for failing to register the amendments. Further they also hold the view that the current constitution as it is untenable and it would be an exercise in futility to proceed with elections based on the same.

42. It is the 3rd Respondent's contention that the prayers sought by the interested party cannot be granted for the reason that they seek actual remedies whereas they are not party to the suit as was held in the case of **Joseph Leboo & 2 others Vs Director of Kenya Forest Services & Another (2013)eKLR**. They also rely on the case of **Communications Commission of Kenya and 4 Others Vs Royal Media Services Limited and 7 Others (2014) eKLR**; where the Court held:

"...an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause... a party could be enjoined in a matter for the reasons that:

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;***
- ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law.***
- iii. Joinder to prevent a likely course of proliferated litigation."***

43. In conclusion, the 3rd Respondent submits that they complied with all the requisite conditions under Section 27 of the Labour Relations Act in respect of amendment of their constitution. The decision to decline to register the 3rd Respondent's constitution infringes on the constitutional rights and freedoms of the 3rd Respondent and its members. They pray that the Court grants the reliefs sought in the Appeal.

44. Having considered the submissions of the parties, this Court sets down issues for determination as follows:

- 1. Whether proposals for amendment to the 3rd Respondents Constitution were done as per law.***
- 2. Whether the process of the amendment was received within the requisite time by the 2nd Respondent.***
- 3. Whether the 2nd Respondent had valid reasons to reject the amendments proposed and registration of new Constitution.***
- 4. Whether the proposed amendments in the Constitution are prejudicial or beneficial to the parties.***
- 5. What remedies to given in the circumstances.***

45. From the submissions of the appellant, the 3rd Respondent's current Constitution was adopted on 11.1.2014 by the 3rd Respondents National Delegations Conference.

46. Under Minute 4 of the said meeting it was resolved that the Constitution be amended "subject to amendments".

47. On 16.10.2015, the 3rd Respondent convened a Special Delegates Meeting at the Machakos

University College pursuant to Article 4 of the 3rd Respondents Constitution. The meeting was attended by several members and the list of members who attended is attached at Appendix 8.

48. From the minutes:

“After the members were taken through the proposed amendments, the delegates proposed and seconded that the amended draft Constitution be adopted as the substantive Union’s Constitution for submission to the Registrar of Trade Unions in accordance with the law”.

49. From that point, it is apparent that the 3rd Respondent intended that the current Constitution be amended and be submitted to the Registrar of Trade Unions for Registration.

50. Under Section 27 of the Labour Relations Act:

“(1) A trade union, employers’ organization or federation may resolve to:

- a. ***change or replace its constitution; or***
- b. ***change its name.***

(2) A registered trade union, employers’ organization or federation may apply to the Registrar to approve a change of name or an amendment to its constitution and rules by submitting to the Registrar:-

- a. ***a notice in Form I or Form J as the case may be set out in the Second Schedule duly completed and signed by the secretary;***
- b. ***a copy of the resolution containing details of the change; and***
- c. ***a certificate signed by the secretary stating that the resolution was passed in accordance with the constitution and rules.***

(3) Notice of the change specified in subsection (2) shall be submitted to the Registrar within fourteen days of any resolution to change the name or constitution.

51. Under Section 27(3) above, this notice shall be submitted within 14 days of the resolution. The Appellants forwarded their submissions to the Registrar of Trade Unions on 27.10.2015 which is within the requisite time as the resolutions were made on 16.10.2015. This is evidenced by Appendix 5 (page 14) of Appellants documents and this was received on 28/10/2015.

52. I can therefore find that the resolution to amend the 3rd Respondent’s Constitution was done within the law and proposals forwarded as envisaged under the Labour Relations Act. This answers issue No. 1 and 2 above that, the proposals for amendment were done and submitted to the 3rd Respondent as envisaged by law.

53. On the 3rd issue, the 2nd Respondent avers that upon receipt of the proposal to amend the Constitution, she issued a Gazette Notice (Appendix 6) at page 147 on 13.11.2015 informing the members of the changes and asking anybody with an objection to do so within 21 days. 21 days from 13.11.2015 expired on 5/12/2015.

54. The 2nd Respondent also avers that there were objections to the amendments to the Constitution on 10.11.2015 and 25.11.2015, by one John Ndunda and Evans Wafula.

55. I have looked at the letter apparently written objecting to the registration of the amended Constitution and one from Evans Wafula is dated 15/12/2015 and not 25/11/2015 as submitted by the 2nd Respondent.

56. The other letter objecting by John Ndunda of 10.11.2015 is not annexed and even if it were to exist it will serve little purpose as the gazettment was done on 13.1.2015 giving 21 days notice for any objections. An objection dated 15/12/2015 was outside the 21 days period which expired on 5/12/2015 and was inconsequential thereof.

57. Under Section 27 (4) of the Labour Relations Act:

“Upon receipt of the notice of change of name or constitution, the Registrar shall give a notice of at least twenty-one days in the Gazette and in three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union and where any such objection is raised, the Registrar shall investigate the complaint and the grounds relied upon and may:-

- a. ***refer the matter to the Industrial Court;***
- b. ***refuse to accept the proposed amendments; or***
- c. ***make any orders that he may deem fit in the circumstances”.***

58. It is envisaged that there was no objection to the registration of a new Constitution, the objection having been received 10 days late and therefore as provided under Section 27(5) and (6) of the Labour Relations Act, the 2nd Respondent was obliged to register the new changes after 5/12/2015 and if the change was not registered, the Registrar of Trade Unions was obliged to inform the parties why as provided under Section 27(9) of the Labour Relations Act which states as follows:

“Where the Registrar refuses to approve a change under this section, the Registrar shall give written notice of that decision and the reasons for the refusal.

59. In apparent refusal to register the new Constitution for the 3rd Respondent, the 2nd Respondent wrote a letter dated 9.12.2015 to them (Appendix 8) page 152 indicating that she had already issued a circular on the election of trade unions and so was not going to register any amendments until after the elections.

60. This is apparently reflected in her circular dated 25/11/2015. This is undermining the spirit of democracy and free operations of union as the union – 3rd Respondent had already submitted their request to amend their Constitution on 27.10.2015 and the circular by the Registrar Trade Unions could not operate retrospectively in relation to the applications already submitted.

61. It is this Court’s finding that refusal by the 2nd Respondent to register proposed amendments to the 3rd Respondents Constitution was made without valid reasons and is an infringement of the Appellants rights and even 3rd Respondents right to Article 41 (4) of the Constitution which provides that:

“Every trade union and every employer organization has the right to:

- a. ***Determine its own administration, programmes and activities.***
- b. ***To organize and***”

62. The 2nd Respondent could not therefore refuse the 3rd Respondent its right to change its Constitution which its right to determine its administrations and to organize itself. Under Art 47 of the Constitution:

”1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”.

63. The action taken by the 2nd Respondent is also not fair given the reasons given for refusing the

registration of a new Constitution for the 3rd Respondent and therefore denying it a right to organize itself.

64. It is therefore this Court's finding that the 2nd Respondent had no valid reason to reject amendments proposed and registration of a new Constitution for 3rd Respondent.

65. On 4th issue, the 2nd Respondent has confirmed that the amendments proposed are valid in view of the Kenya Constitution 2010 which introduced administrative changes and that the current Constitution would not be the proper tool for use in the upcoming union elections.

66. The 2nd Respondent also confirmed that the organizational structure in the current Constitution is broad and overstretched and therefore there is need to correct the apparent error in the Constitution and bring the 3rd Respondents operation in compliance with statutory provisions especially Section 34(2)(b) of the Labour Relations Act. The 3rd Respondents agrees with the grounds of appeal and wants the appeal allowed.

67. Having found as above, this Court finds that the Constitution amendments proposed in 3rd Respondent's Constitution are not prejudicial to the parties but are instead beneficial and should therefore be allowed.

68. In the circumstances, this Court finds for the Appellants and allow the appeal. The Court directs the 2nd Respondent, Registrar of Trade Union to immediately register the amendments proposed in the 3rd Respondent's Constitution as submitted on 27.10.2015 and received on 28.10.2015. This registration should be done within 7 days from today.

69. The decision of the Registrar Trade Union dated 9.12.2015 is hereby quashed. I also direct that the 3rd Respondent shall hold their elections within the ambit of the new Constitution with the new changes to be registered. The 3rd Respondent may now proceed with its elections as will be decided by its officials after issuance of new time lines in line with the Trade Union National Elections.

70. The 1st and 2nd Respondent to pay costs of this appeal.

Read in open Court this 15th day of April, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mwenga holding brief for Orende for Appellants – Present

Otieno for 3rd Respondents – Present

Makhanu for Interested Party – Present

No appearance for 1st and 2nd Respondent