



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

APPEAL NUMBER 10 OF 2011

BETWEEN

KENYA CONCRETE, STRUCTURAL, CERAMICS

TILES, WOOD PLYS AND INTERIOR DESIGNS

WORKERS UNION [Represented by its PROMOTERS

1. DISHON ANGOYA

2. DANIEL IRUNGU KAMAU

3. JOSPHINE NJOKI NDINGU

4. CHRISTOPHER MUYELA

5. EUNICE NJERI MAINA

6. MARY WAITHERA KAMAU

7. EVANS AMWANZO EDOLE].....APPELLANTS

VERSUS

THE REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

KENYA BUILDING, CONSTRUCTION, TIMBER,

**FURNITURE AND ALLIED INDUSTRIES EMPLOYEES UNION.....INTERESTED
PARTY**

Rika J

CC. Leah Muthaka

Mr. Enonda instructed by Enonda, Makoloo, Makori and Company Advocates for the Appellants

The Registrar of Trade Unions, Mr. W.K., Langat for the Respondent

Mrs. J. Guserwa instructed by M/S J.A.Guserwa and Company Advocates for the Interested Party

JUDGMENT

1. The Appellants filed their Memorandum of Appeal on 4th November 2011. They followed this up with the filing of the bundle of documents on 20th September 2012. The Respondent filed a Statement of Reply on 10th July 2012, while the Interested Party filed a Statement of Reply on 24th February 2012. The Appeal was argued on 8th May 2013. Parties were advised the Judgment of the Court would be delivered on Notice. Regrettably the Court has not been able to prepare and deliver this decision timeously, owing to supervening circumstances. The Court must at the outset sincerely apologize to the Parties for the delay.

2. The Appeal arises out the decision of the Respondent, declining registration of the Kenya Concrete, Structural, Ceramic Tiles, Wood Plys and Interior Design Workers Union. The decision was communicated to the Interim General Secretary of the Union in a letter dated 30th August 2011. The ground for refusal of registration was stated to be:-

There is already a registered trade union, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants sought registration namely: Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union.

3. Mr. Enonda submitted that the Appellants were issued with the provisional certificate under Section 12 of the Labour Relations Act on 3rd February 2011. They were directed by the Respondent to apply for registration of their Trade Union within six months of 3rd February 2011, as required by the law. They made this application on 18th March 2011. They forwarded to the Respondent Form 'A', the Trade Union Constitution, and Minutes of the meeting at which their Trade Union was established. They paid to the Office of the Registrar of Trade Unions the requisite application for registration fee at Kshs. 15,000. They complied fully with the formal registration prerequisites outlined under Section 18 of the Labour Relations Act 2007.

4. The Respondent placed a notice in the Kenya Gazette calling for objection from any trade union, to the registration of the Appellants' Trade Union. The Appellants enquired from the Respondent if any objection had been lodged; they were informed on 20th April 2011 that the Interested Party had indeed made an objection. The Interested Party alleged that Rule 2[c] of its Constitution allows it to represent the entire building and construction industry. According to the Interested Party, the Appellants' Trade Union would be duplicating the role being exercised by the Interested Party. Most employees sought to be represented by the new Trade Union are adequately represented by the Interested Party.

5. The Appellants wrote to the Respondent in answer to the objection raised by the Interested Party on 3rd April 2011. The Appellants emphasized their right under the Constitution of Kenya and under the Labour Relations Act, to associate. Workers in the sector had joined, or intended to join the Appellants' Trade Union. These workers desired a more effective and representative Trade Union. The Interested Party, according to the Appellants is too large to effectively represent the Industry. The Appellants told the Respondent that the Interested Party does not even know what the Interested Party stands for. Workers

from certain construction companies such as Twiga Construction had opted to join the more representative Appellants' outfit. The Interested Party itself purported to represent workers represented by other Trade Unions such as those in the Railways, Quarry, Mining, and Electrical Industries. There was no overlap or confusion occasioned by the new Trade Union's Constitution. The Appellants took issue with the step taken by the Interested Party to issue a copy of its objection letter to the Federation of Kenya Employers and COTU (K). It was felt by the Appellants that the Interested Party was soliciting for the backing of these Institutions in its objection, contrary to the Labour Relations Act. The Respondent did not react to this letter from the Appellants.

6. The Appellants submitted that soon thereafter, the National Labour Board met and the Registrar issued the refusal of registration of the Appellants' Trade Union. Mr. Enonda stated that the Appellants' Trade Union and the Interested Party have a clear demarcation line. The Interested Party does not cover Ply Wood, Compost Timber, Tiles and Interior Designs. Section 14 [1] [d] [i] of the Labour Relations Act which mandates the Registrar to disallow registration if there is already in place a registered Trade Union, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicant seeks registration, is taken from Section 80 of the retired Constitution of Kenya. Article 41 of the current Constitution makes no such limitation; it does not allow the Registrar to refuse an applicant registration on the ground that there is already registered a trade union, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration. The ground given by the Respondent in declining the Appellants' application could therefore not be justified under the current Constitution.

7. The current Constitution espouses competitive trade unionism. There is no restriction based on sectors and trades. Paragraph 4 of the Respondent's Statement in Reply stated he was communicating the decision of the National Labour Board. This should not be the case; the Respondent is not an agent of the National Labour Board and is bound by the law to exercise discretion. He issued a notice refusing registration the day after the meeting of the National Labour Board. It signified lack of independence of the Registrar in exercising his role. He alleged the Appellants' right is subject to that of the Interested Party. This is not so, limitation being only to the extent that is reasonable in a democratic society. The Registrar formed the view that the Appellants comprise a breakaway faction of the Interested Party. Mr. Enonda submitted even if they are such, they are not prevented from registering their Trade Union.

8. The Appellants submitted that the Registrar, as held in a catena of court decisions, must exercise his discretion judiciously and examine relevant matters within the law. Both sides must be heard. The Respondent must be impartial and reasonable. He did not exercise his role reasonably, even by the stringent registration of trade unions' regime of the old Constitution. Mr. Enonda proposed that the Court adopts the principles established in various decisions of the Industrial Court, the High Court and the Court of Appeal. He similarly referred to Legislation, the Constitution, ILO Conventions 87 and 98, as well as the Industrial Relations Charter. In the ***High Court of Kenya at Nairobi Miscellaneous Civil Application Number 298 of 1986 between the Republic v. the Registrar of Trade Unions and Banking Insurance Union***, the Court ruled that *"the body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case"* In ***Industrial Court Appeal Number 50 of 2012 between Seth Panyako and 5 others v. the Attorney General & 4 others***, the Court granted the Nurses Union registration stating that Section 14 [1] [d] [i] does not limit the Constitutional right of workers to form, join and participate in trade unions. This was similarly the position in ***Industrial Court Appeal Number 1 of 2010 between Patrick Olenda and 6 others v. the Registrar of Trade Unions*** where the Court stated that the intention of the Constitution is to advance the rights and fundamental freedoms of the employees, rather than highlight the limitations in exercise of those rights and freedoms. The Appellants buttressed their position that the Interested Party is in any case unrepresentative and ineffective, through the ***High Court at Nairobi Civil Appeal Number 176 of 1996 between George Momanyi and 2 others v. the Registrar of Trade Unions*** where the Court ruled *" in both cases, there is no registered trade union representing the interests of the workers affected because a trade union which has ceased to exist, though registered as the registered trade union in this case was, is dead and incapable of carrying out the functions which include real and practical representation of the interests of its members."*

9. The Interested Party according to the Appellants, merely rehashed the ground stated by the Respondent in declining registration, in its Statement of Response. There were no other legal or constitutional grounds raised by the Interested Party in amplification of its objection. Section 14 of the Labour Relations Act is not the only law that the Respondent should look at in considering an application for registration; he must seek guidance from the Constitution. The Registrar based his decision on Section 20 [2] of the Labour Relations Act which is non-existent. The Interested Party retains an omnibus Constitution, while that of the Appellants' Trade Union is specific in its area of coverage. The Appellants were able to recruit workers under the provisional certificate. The Labour Relations Act ought to be interpreted within the totality of the Constitution of Kenya. The decisions submitted by the Respondent to the Court in support of his position arose before the enactment of the Labour Relations Act and passage of the Constitution; they do not reflect the law on registration of trade unions, as it stands today.

10. Mr. Langat adopted his Statement of Response dated 9th July 2012, filed in Court on 10th July 2012. He invoked the cases of *Angaha and Others v. Registrar of Trade Unions [1973] E.A. and Kenya Tea Workers Union and 7 others v the Registrar of Trade Unions [2001] KLR*. In both decisions, the holding was that in order to be satisfied that the interests of a proposed trade union are sufficiently or substantially represented by another trade union already registered, the Registrar is not bound on a preponderance of probabilities, but only on a scintilla of evidence.

11. The Respondent clarified that his decision was made under Section 14[1] [d] [i] of the Labour Relations Act. There is a Trade Union, the Interested Party herein, which is sufficiently representative of the Appellants. This is the only law that gives grounds upon which registration can be refused. The Registrar considers the Appellants' Constitution, aims and objectives, and the areas of coverage. The Appellants seek to represent the Building Sector; the same area represented by the Interested Party. The Registrar is not supposed to look beyond Section 14 [1] [d] [i] in making his decision. This is the strand running through the judicial authorities submitted by the Respondent. The Registrar made the decision upon consultation with the National Labour Board, in accordance with Section 19 of the Labour Relations Act and Section 31 of the Labour Institutions Act. The ground for refusal of registration was stated clearly in Form 'D.' Article 25 of the Constitution defines rights that cannot be limited; they do not include rights under Article 41. Article 24 allows for limitation to the extent that is reasonable in a democratic society. Section 14 [1] of the Labour Relations Act is a law that allows for such limitation. Unless the Appellants demonstrated there was an area that remained unrepresented, they did not merit registration. The decisions cited by the Appellants were distinguishable. *In Appeal Number 1 of 2010*, the Court found the area of shipping, represented by the objector Trade Union, was clearly defined and separate from the area sought to be represented by the Applicants. In the *Nurses case*, the Court ruled that the Registrar should have restricted himself to sectoral interests. In *Civil Appeal Number 176 of 1996*, the Court was concerned about Trade Unions which though registered, were moribund. These cases were completely distinguishable from the case presented by the Appellants herein. The Registrar prays the Court to decline the Appeal and uphold his decision refusing registration of the Appellants' Trade Union.

12. Ms. Guserwa associated herself fully with the submissions made by the Respondent. It is uncontroverted that all persons have the right to form Trade Unions. The right is limited, not absolute. Article 24 [5] [d] allows for limitation by legislation. All Trade Unions seek registration based on what they can do. The Interested Party has a Constitution which covers precast, tiling, roofing etc. The issue is not whether there is another Trade Union representing the sector; it is whether, that Trade Union is effectively covering the sector. The Registrar determines that issue by reliance on Section 14 [1] [d] [i] of the Labour Relations Act. This consideration is imposed by legislation. The Appellants have no reason to say the workers in this sector are not sufficiently represented. There was no evidence offered by the Appellants to support their allegations. The Appellants wish to scuttle industrial stability in an area that is ably represented by the Interested Party. The Court in the *Nurses case* stated sectoral interests are the primary consideration. If the Appellants were pursuing representation in specific areas such as roads or airports, the Interested Party would consider the Appellants to have some arguable Appeal. They however seek to replicate what the Interested Party is doing. In the case of the *Kenya Tea Workers Union* cited by the Respondent, the Court ruled that the Registrar, in considering registration takes into consideration certain factors such as the history, membership base, organization and structure, employer provided facilities, finance, collective bargaining record, statutory provisions and any factors peculiar to the case.

“The Applicants must show for the good of the industry and trade unionism, the only open way is to break away to form the proposed trade union. If it is a matter of self –ego driving some persons to over-rate themselves into thinking that they can provide better leadership, that is not a consideration for the Registrar or the Court. That is a matter to be tested under the democratic electoral process.” The Registrar was not biased and exercised his discretion judiciously. The decisions cited by the Appellants were distinguishable as submitted by the Registrar. Registration of the Appellants’ Trade Union would not be warranted. The Interested Party and the Appellants submit the Appeal should fail.

The Court Finds and Orders:-

13. The issue as isolated by Ms. Guserwa may be narrowed down to this: whether the Interested Party is sufficiently representative of the whole or substantial proportion of the interests in respect of which the Appellants’ Trade Union has sought to represent.

14. This limitation as pointed out by Mr. Enonda originated in Section 80 of the retired Constitution of Kenya, and was replicated in Section 14 [1] [d] [i] of the Labour Relations Act 2007. The Court does not think that the omission under Article 41 of the Constitution to specify this limitation on freedom of association has the effect the Appellants submitted it to have. Article 24 of the current Constitution provides that , *“ a right or fundamental freedom in the Bill of Rights, shall not be limited except by law, and then only to the extent that limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors.”* Under sub-Article 5, a provision of legislation may limit the application of fundamental freedoms with respect to among other Articles, Articles 36 on freedom of association and 41 on Labour Relations. Limitation under Section 14 [1] [d] [i] is therefore still a relevant law, and permissible under the current Constitution, notwithstanding that the wording of Section 80 of the old Constitution and Section 14 [1] [d] [i] of the Labour Relations Act, are not explicit under Article 41 of the

15. The Registrar exercises his role on the advice of the National Labour Board. Section 19 of the Labour Relations Act states, *“ 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.”* Section 31 [3] of the Labour Institutions Act 2007 provides that the *“ Registrar shall in exercise of his powers relating to registration and regulation of trade unions, act on the advice of the Board.”* Section 31 [1] provides for appointment by the Minister for Labour a Registrar of trade unions *“who shall be responsible for the registration of trade unions.”* Although the law requires the Registrar to consult the National Labour Board, the ultimate responsibility in registration of trade unions vests in the Registrar.

16. The nature of the consultation and advice the Registrar must seek from the National Labour Board is not clarified by the statute. In this case, it is alleged very strongly by the Appellants that the Registrar only made a decision after the meeting of the National Labour Board. The inference would be that the National Labour Board, not the Registrar is the actual registration authority, the role of the Registrar being more or less to rubber stamp the decisions of the Board. This has been a common refrain made by Applicants who have sought and been denied registration by the Registrar; that he has not exercised his mind independently, but is in fact communicating decisions of the National Labour Board to the failed Applicants.

17. The National Labour Board is established under section 5 of the Labour Institutions Act. Its primary function is to advise the Minister on all matters relating to labour and employment. While the good intention of the social partners in crafting this mechanism of policy implementation cannot be doubted, the structure and functioning of this Board, appears inimical to an effective implementation or adjudication of labour rights enshrined in the current Constitution. The Board is composed of the General Secretary of the most representative federation of trade unions, in this case COTU, and the CEO of the most representative federation of employers’ organization which in our situation is F.K.E. Other than having their principals in the Board, the two social partners are represented by two other nominees apiece. Other members of the Board include departmental heads in the Ministry of Labour, who include the Registrar of trade unions. In this set up, it is highly unlikely that the Registrar exercises any independence

of mind in making his decision. The problem is much larger than just this lack of independence of mind.

18. The Labour Movement has traditionally been a very close knit family, where interests have become vested over many years, with the main players bent on closing out new entrants. There is a perception that the established players are wielding their power at the National Labour Board to frustrate registration of new trade unions, which explains the growing number of Applicants seeking the intervention of the Court. When groups of people have built a dominant position, they tend to use all means to suppress any move forward that threatens their hegemony. This in the view of this Court plays against the purpose of the Constitution. If the Registrar can be shown to have failed to exercise his duty independently, the resultant limitation on the freedom of association can hardly be said to be reasonable and justifiable in a democratic society. The Registrar would in such a situation be breaching the parameters within which the limitation under Article 24 ought to be exercised. The Constitution requires the Court to take into account all the relevant factors in determining whether limitation has been exercised reasonably and is justifiable in an open and democratic society.

19. There was no reason given by the Interested Party why it drew in COTU and FKE in its objection dated 16th March 2011. The perception would be that the Interested Party was in effect calling upon the National Labour Board big wigs to take pre-emptive action against the Appellants' application. The swift rejection of the application thereafter, upon the meeting of the National Labour Board, would give weight to this inference. Where does this leave the discretion of the Registrar? Most of the judicial authorities availed to the Court make it clear that the Registrar is to act judicially or quasi judicially in performance of his role. It does not seem likely that this is made possible under the current interaction with the National Labour Board.

20. The only ground given in rejection of the Appellants' application for registration was that there existed another trade union already registered, sufficiently representative of a substantial proportion of the interests in respect of which registration is sought. There is no hard and fast rule as to what is sufficiency of representation. In the view of this Court, sufficiency of representation is not merely to be read from the Constitution of the already registered trade union; sufficiency of representation must include what the **High Court in Civil Appeal 176 of 1996** characterized as real and practical representation of the interests of the members. This should include how well and visibly, such a trade union represents its members in Court, be it on disputes relating to rights or interests. Sufficiency of representation must be seen in the quality and number of Collective Bargaining Agreements concluded, and within the context of a devolved state, the geographical reach of the trade union. It is not an open and shut case for the Registrar to point at the constitutional reach of the particular trade union; most constitutions are phrased in a manner that gives the trade unions far and extremely wide reach. Sufficiency of representation must be seen as qualitative and quantitative.

21. This Court was not persuaded that the Interested Party is sufficiently representative of the huge and vibrant, building sector in Kenya. Every morning and evening in any corner of this country, one is encountered by young men and women going to or coming from 'mjengo' or construction sites. This is the area the two protagonists are battling over. It is a huge area, dynamic, and as suggested in an earlier decision of this Court, such dynamism brings with it new means of production and new forms of labourers. This is the reason the Court advised in the **Kenya Tea Workers Union** decision, that in making enquiries whether registration is merited, the Registrar should not be unreasonably narrowed and restricted. Sectoral hegemony by certain trade unions, which is normally couched in the cloth of industrial trade unionism, may have been acceptable in times gone by when the Kenyan economy was relatively compressed. The Judicial authorities cited by the Registrar largely fall in that era. We are however living in an age of rapidly expanding economy. In such expansion, it is not expected that the same old trade union remains sufficiently representative of the burgeoning forms of builders and constructors.

22. The Appellants have demonstrated to this Court that they were not treated fairly and reasonably by the Registrar of trade unions as instructed by the National Labour Board. While the Court agrees that Section 14 [1] [d] [i] is a valid legislation in regulation of the exercise of freedom of association, the Registrar of trade unions did not exercise his role independently, judiciously and fairly in denying the Appellants registration of their trade union. Taking into account all relevant factors including the deficiency in the

legislation and the potential for manipulation of that legislation by entrenched interests; the expanding building and construction sector; the principle that the Court must act in protection and promotion of fundamental rights rather than highlight the limitations to which such rights may be subject; and given the need for qualitative and quantitative representation of this sector, the Court is persuaded registration of the Appellants' Trade Union would serve the workers of this country well. This Court is not in any way suggesting that the Interested Party is registered but dead; far from it. Rather, the Court is suggesting that the volume of workers and potential workers in the sector is enormous, that it may not be feasible for a single trade union, with the organizational structure of the Interested Party, to offer effective representation. There is evidence the Appellants' Trade Union has members and potential for recruitment of members in areas not reached by the Interested Party. This economy is growing, with a vibrant building and construction sector. The Court feels that considering the organization and structure of the Interested Party, it may not have the capacity to sufficiently represent the rising number of workers in the sector. The Registrar was narrow and restricted in denying the Appellants' Trade Union registration. IT IS ORDERD-:

[a] The Appeal against the decision of the Registrar of Trade Unions is allowed;

[b] The objection by the Interested Party is rejected.

[c] The Kenya Concrete, Structural, Ceramic Tiles. Wood Plys and Interior Designs Workers Union is hereby granted registration from the date of this Judgment;

[d] The Registrar of Trade Unions shall enter the name and details of the Appellants' Trade Union in the appropriate register forthwith; and,

[e] No order on the costs

Dated and delivered at Nairobi this 9th day of December 2013

James Rika

Judge

