REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Ojwang', Wanjala, Njoki & Lenaola, SCJJ)

AT NAIROBI

PETITION NO. 4 OF 2018

BETWEEN

KENYA PLANTATION & AGRICULTURAL

WORKERS' UNION.....APPELLANT

AND

THE KENYA EXPORT FLORICULTURE,

HORTICULTURE AND ALLIED WORKERS'

UNION (KEFHAU) REPRESENTED BY ITS PROMOTERS:

DAVID BENEDICT OMULAMA.....1ST RESPONDENT

ANDREW MAKWAGA.....2ND RESPONDENT

BENARD AMUCHIZI MUKAISI.....3RD RESPONDENT

ADRIANO MUKALO.....4TH RESPONDENT

WYCLIFF SORE.....5TH RESPONDENT

SEVERIO MASIKA.....6TH RESPONDENT

LILIAN INGUTIA.....7TH RESPONDENT

EFELIA A. NANDI.....8TH RESPONDENT

JAMES AMATONYE.....9TH RESPONDENT

AND

THE REGISTRAR OF TRADE UNIONS.....10TH RESPONDENT

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Appellant moved this Court via a Petition dated 6th March 2018, being an appeal against the Judgment of the Court of Appeal (*Githinji, Waki & Kiage JJA)* in ***Kenya Plantation & Agricultural Workers Union v David Benedict Omulama & 9 others,*** Nairobi Civil Appeal No. 141 of 2014 which upheld the Judgment of the Industrial Court (now Employment and Labour Relations Court) at Nairobi (*Monicah Mbaru J*) in Cause No. 7 of 2011. The Court of Appeal dismissed the Appellant's appeal on 12th May, 2017.

[2] While certifying this appeal as one involving a matter of general public importance, in Civil Application No. Sup.5 of 2017, the learned Judges of Appeal (*Warsame, Ouko & Murgor JJA*) on 23rd February, 2018 held themselves thus:

"We have analyzed the Notice of Motion and the affidavit in support of the application and hold that the intending appellant has met his obligation to identify and concisely set out the specific elements of "general public importance" which he attributes to the matter for which certification is sought. Counsel for the applicant outlined clearly that the decision shall affect the labour movement, the work force and the economy if the parameters of registration of trade unions are not set right. In Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013 [2014] eKLR at para 52, it is stated that an appeal to the Supreme Court within the terms of Article 163 (4) should be founded on cogent issues of constitutional controversy. The applicant has demonstrated to our satisfaction that he intends to challenge the interpretation or application of any specific provision in the Constitution and has demonstrated how the issues that were before the High Court and the Court of Appeal became matters within the ambit of Article 163 (4) of the Constitution. The Supreme Court in Peter Oduor Ngoge v Francis Ole Kaparo & 5 others (supra) stated that a petitioner must rationalize the transmutation of the issue in contention from an ordinary subject of leave to appeal, to a meritorious theme involving the interpretation or application of the Constitution, such that it becomes a matter as of right falling within the appellate jurisdiction of the Supreme Court. In the instant case, the applicant has established that this Court's reasoning and conclusions in Nairobi Civil Appeal No.141 of 2014 delivered by Hon. Justice Philip Waki, Onesmus Githinji and Patrick Kiage dated 12th May2017 can properly be issues of constitutional interpretation or application, for which under Article 143(4) (a) of the Constitution no leave would be required. In totality, however, we are satisfied that the threshold in Article 143(4) (b) has been met." [emphasis added]

[3] The Appellant has thus sought orders namely, that the Petition is allowed; the Judgment/Order of the Court of Appeal be set aside, and an order be made allowing the appeal with costs including costs of the courts below.

B. BACKGROUND

[4] On 17th July, 2009, the 1st to 9th Respondents made an application to the Registrar of Trade Unions for the establishment of a trade union namely, the Kenya Export, Floriculture, Horticulture and Allied Workers' Union (KEFHAU). The Registrar acknowledged receipt of the application by a letter dated 25thMarch 2010 and notified the 1st to 9th Respondents that the application would be placed before the National Labour Board for consideration. Later, the Registrar notified the General Secretary of the Kenya Plantation & Agricultural Workers Union (*the Appellant*) of the pendency of the application aforesaid and inviting objections if any. Thereafter, the said Registrar sent a letter dated 30th August 2011 to the interim secretary of KEFHAU enclosing a notification of refusal of registration in the following terms:

"*The ground of refusal is as follows: -*

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 sought registration namely:

Kenya Plantation and Agricultural Workers Union"

(i) Proceedings at the Employment and Labour Relations Court

[5] Aggrieved by the Registrar's decision, the 1st to 9th Respondents appealed to the Employment and Labour Relations Court in ***David Benedict Omulama & 8 Others v Registrar of Trade Union & Another, Appeal No. 7 of 2011 [2014] eKLR.*** The orders sought in the appeal were against the Registrar of Trade Unions and included an order to quash the Registrar of Trade Unions' decision dated 30th August 2011; a mandatory order compelling the Registrar to unconditionally register the 1st to 9th Respondents' Union, the Kenya Export Floriculture and Allied Workers Union; an order to issue a certificate and enter the same in the register of registered trade unions; the costs of the appeal; and any other relief that the Court deemed fit to grant. The issue in dispute was "*refusal of registration of the appellants by the registrar of trade unions*."

[6] The 10th Respondent filed their response on 4th May 2012 submitting that the registration of the Respondents was heard and determined by the National Labour Board which rejected it and thus the appeal lacked merit. The Appellant, upon application to the Court, was enjoined as an Interested Party. The Appellant is an amalgamation of 4 different unions which represent interests of workers in the coffee, tea, sisal and general agriculture industries. They supported the 10th Respondent's decision to decline registration of KEFHAU on the ground that such registration would override their rights as a registered union.

[7] On 11th February, 2014, the learned judge (*Monicah Mbaru, J*) considered the provisions of the Constitution of the Appellant organization in terms of assessing the issue of representation and sectoral interest *vis-a-vis* the rights of all parties and found that the Registrar's decision was largely based on the provisions of *the repealed Constitution and the limitation under Article 24 of the Constitution did not apply to the 1st – 9th Respondents*. The Court also found that *there was a fundamental difference between that which comprised the plantations and agricultural industry and the floriculture and horticulture*. Consequently, the learned Judge reversed the decision of the Registrar, declared KEFHAU to be registered **as a trade union**, and ordered the Registrar to immediately issue a registration certificate.

(ii) Proceedings at the Court of Appeal

[8] Aggrieved by the decision of the Industrial and Labour Relations Court, the Appellant preferred an appeal to the Court of Appeal, in *Kenya Plantation & Agricultural Workers Union v David Benedict Omulama & 9 others*, Nairobi Civil Appeal No. 141 of 2014. The Court of Appeal (*Githinji, Waki & Kiage JJA*) dismissed the appeal on 12th May, 2017. That Court held that the application for registration was made before the promulgation of the current Constitution and also found that *the decision of the Registrar refusing registration was made on 30th August 2011, slightly over one year after the current Constitution commenced*. Hence, the applicable law at the time the decision was made was the Labour Relations Act and the current Constitution. On the issue as to whether *the learned judge failed to recognize the fact that the rights to form and join trade unions and associations are not absolute and are limited by Article 24 of 2010 Constitution*, the Court of Appeal found that the condition imposed by Section 14(1)(d)(i) of the Labour Relations Act was not an unconstitutional limitation of the right to form and join a trade union. The Court of Appeal also found that whereas a court should not assume any role in the registration of a trade union, it found that the trial Court had jurisdiction to order registration and that the subsequent registration of KEFHAU by the Registrar cured any defect in the order. The dismissal of the appeal triggered the filing of the Petition herein.

(iii) Proceedings before the Supreme Court

(a) The Appellant's Submissions

[9] The Appellant filed the instant Petition of Appeal based on five grounds as follows:

1. That the learned Appeal Judges erred in law in finding and holding that the Industrial Court was right in applying the provisions of the Constitution to a case that came into being before its promulgation;

2.That the learned Appeal Judges erred in law and in fact in infringing on the Appellant's right of existence as a general and giant union without considering its rights under Article 41 of the Constitution in the same manner as those of the Respondent;

3. That the learned Appeal Judges erred by misapprehending the order of registration by the Court for registration of the Respondent by the Judges as set out in Article 41 of the Constitution and Section 14(d) of the Labour Relations Act without power or mandate to do so;

4.That the learned Appeal Judges erred in fact and in law in taking into account an irrelevant factor to the effect that the

registration of the Union by the Registrar of Trade Unions cured the defect in the Superior Court's (Justice Mbaru) orders of 11th February 2014 when the order related to a specific cause of action that arose before the promulgation of the Constitution of Kenya in August, 2010; and

5. That the learned Appeal Judges erred in law and in fact by making the decision that is plainly wrong as they failed;

(a) to appreciate that floriculture and horticulture are indeed part of the agriculture sector activities which areas attract great public interest as well as economic attention;

(b) to overrule the trial Judge's lack of mandate to register the new union which is the preserve of the Registrar of Trade Unions; and

(c) to observe the administrative role of the Registrar of Trade Unions in issuing certificates to unions that have been duly registered by virtue of the statutory mandate of the said office and not otherwise.

[10] In the above context, Counsel for the Appellant in his submissions urged that the Court of Appeal itself in holding that the Petitioner's right of existence as a general and giant union was a violation of Article 41 of the Constitution in the same manner as the 1st to 9th Respondent Union whose application was made on 16th February 2010 before the promulgation of the Constitution.

[11] Further, Counsel submitted that the learned Judges of Appeal contravened the provisions of Section 14(d) of the Labour Relations Act by ignoring the fact that the law has vested the powers of Registration of Trade Unions squarely on the 10th Respondent and that any attempt by the Court to usurp the powers was null and void. Consequently, he challenged the decision of the trial Court to have the 1st to 9th Respondent's union registered. Counsel cited the case of ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others,*** S.C Appl. 2 of 2011; [2012] Eklr in support of his submissions on this point.

[12] While further citing the Court of Appeal decisions in ***Charles Salano & 9others v The Registrar of Trade Union & another*** C.A No. 19 of 2016 and ***Benson Ngurua Mtengu & 6 others v the Registrar of Trade Unions & another*** C.A No. 16 of 2017, Counsel for the Appellant urged that the Learned Judges of Appeal failed to appreciate the requirements of Sections 12, 13 and 14 of the Labour Relations Act by the condition that there should not be another union in existence that is sufficiently representative of employees interest in the named sector.

[13] Furthermore, Counsel for the Appellant urged that the Court of Appeal failed to appreciate that the trial Court's orders were premised on the 2010 Constitution despite the cause of action arising prior to the promulgation of the Constitution. It was the Appellant's other case that the Constitution did not apply retrospectively and maintained that the only applicable law at the material time was the Labour Relations Act. In that regard, the Appellant blamed the Court of Appeal for dismissing its appeal on a wrong interpretation and application of Articles 36 and 41 of the Constitution. They thus urged us to allow the Petition as prayed.

(b) 1st to 9th Respondent's Submissions

[14] In response to the Petition, the 1st to 9th Respondents filed their replying affidavit and a further affidavit sworn on 28th March 2018 and 8th July, 2018 respectively. They also filed their submissions dated 18th September, 2018. No pleadings were filed by the 10th Respondent. Further, when the suit came up for hearing on 15th October, 2019, there was no appearance on the part of the 10th Respondent despite being duly served with the hearing date.

[15] In opposing the appeal, the 1st – 9th Respondents submit that their Union was established to represent its members drawn from Export Floriculture and Allied Sectors covering specific areas as set out in the union's Constitution.

[16] In their view, for a trade union to qualify for registration, emphasis is placed on the provisions of its Constitution regarding the specific sector or sectors from which it seeks to draw membership and the Constitution of any objecting union. They cite Section 14 of the Labour Relations Act to support the argument that facts in the Constitutions of intended and/or existing unions must support the applicable laws.

[17] Further, the 1st to 9th Respondents submit that their main areas of interest are export, floriculture industry and horticulture industry and all types of fruits cultivation mainly for the export market, which specific sectors are not included clearly defined in the

Appellant's Constitution. They therefore support the finding of the Employment and Labour Relations Court and that of the Court of appeal.

[18] In countering the Appellant's submissions that the Court of Appeal erred in upholding the trial Court's decision to apply the Constitution 2010 retrospectively, the 1st – 9th Respondents submitted that the cause of action arose on 30th August, 2011 when the 10th Respondent notified them of the refusal to register their Union and not the date the application was made. Ultimately, they submitted that the Constitution 2010 was therefore in force as at the time the cause of action arose. They also urged us to find that the Court of Appeal was right to find that the cause of action occurred more than a year after the promulgation of the Constitution.

[19] The Respondents further submitted that the learned Judge of the Employment and Labour Relations Court and the Registrar of Trade Unions were bound to apply their minds to the provisions of Article s 20 and 41(2) (c) of the Constitution. And as to whether the Court of Appeal infringed the Appellant's right to exist as a general and giant trade union pursuant to Article 14(1) (e) of the Constitution, the Respondents submitted that the ground of appeal is misplaced as the learned Judges of Appeal did not in any way infringe on the rights of the Appellant as alleged. Instead, they urge that trade unions are registered in specific sectors and not general areas of coverage.

[20] Additionally, it is the 1st to 9th Respondent's submissions that the Employment and Labour Relations Court did not register their trade union but directed the Registrar to issue a registration certificate, an order the registrar understood and complied with. They therefore support the Court of Appeal's interpretation of that Court's orders. Furthermore, they cite Section 12(3) of the Industrial Court Act which empowers the Court to issue orders of specific performance and any other appropriate relief in line with the orders that court had issued.

[21] On the fourth ground of appeal, that the Court of Appeal erred in considering an irrelevant factor to the effect that the registration of the union by the Registrar of Trade Unions cured the defect in the trial Court's judgement, they supported the Court of Appeal's finding on the question; that the Court did not register their trade union but directed the registration of the same.

[22] In disagreeing with the Appellant that the Court of Appeal was entirely wrong in its decision, the 1st – 9th Respondents urge that the learned judges appreciated the requirements imposed by Sections 12, 13 & 14 of the Labour Relations Act and insist that having complied with all the steps set out to register a trade union, the the trial Court and the Court of Appeal did not have any reason to hold that they had not complied with the laid down procedure. They also challenge the relevance of the authorities cited by the Appellant namely, ***Charles Salano & 9others v The Registrar of Trade Union & another*** C.A No. 19 of 2016 and ***Benson Ngurua Mtengu & 6 others v the Registrar of Trade Unions & another*** C.A No. 16 of 2017. In their view, the facts in those cases were completely different from the instant case, in that in C.A No 19 of 2016, the Appellants therein had not complied with the relevant legal provisions and in C.A 16 of 2017, the Appellant had clearly and specifically provided for the supermarket sector in its Constitution and even signed collective bargaining agreements with major supermarkets. They furthermore submit that the Court of Appeal did not have the benefit of seeing the said authorities as they were delivered after the decision in the instant appeal.

[23] In addition, the 1st – 9th Respondents urged the Court to read Section 14 of the Labour Relations Act in context of Article 24(2) (b) (c) of the Constitution find that Section 14(2) of the Labour Relations Act does not intend to limit the fundamental right of workers in the Floriculture and Horticulture sectors to form, join and participate in activities of a trade union of their choice.

[24] Finally, the 1st – 9th Respondents submit that if the Appeal is allowed and the orders sought granted, they will suffer irreparable prejudice as their rights under Article 41(5) will be infringed. They thus submit they were issued with a certificate of registration by the 10th Respondent, they have been operating as a trade union, recruited members and entered recognition agreements with employers of the areas covered. They also urge that negotiation for Collective Bargaining Agreements are ongoing and so the Appeal has been overtaken by events.

C. ISSUES FOR DETERMINATION

[25] Having considered the Court of Appeal's order certifying this appeal as one involving a matter of general public importance, the grounds of appeal, the submissions of the parties, the authorities in support thereof and having further noted that the Appellant has raised several other issues for determination, it is evident to us that there is only *one* issue for determination by this Court, namely:

What are the parameters of registration of a trade union"

D. ANALYSIS

[26] The Appellant submits that the Court of Appeal erred in holding that their right of existence as a general and giant union was a violation of Article 41 of the Constitution in the same manner as the 1st to 9th Respondent's Union whose application was made on 16th February, 2010 *before the promulgation of the Constitution*. The 1st to 9th Respondents on their part urge that their cause of action arose on 30th August, 2011 when the 10th Respondent notified them of the refusal to register their union. We must thus answer the question in line *as to whether the trial Court applied Article 24 of the Constitution retrospectively.* In that regard, we note from the record at page 88 that the 1st to 9th Respondent's application for registration for their trade union was received by the 10th Respondent on 16th February, 2010. We have also taken note of the record at page 66 and 114 that the notification of refusal to register the 1st to 9th Respondents' union was made on 30th August, 2011. So then, when did the 1st to 9th Respondents' cause of action against the 10th Respondent arise" It is noted from the record (Vol one pages 29, 32 and 46) that the issue in dispute before the then Industrial Court was "*refusal of registration of the appellants by the Registrar of trade unions*". In light of the observations made from the record, we are inclined to agree with both the trial Court and the learned Judges of Appeal that the cause of action was " *refusal of registration of the appellants by the Registrar of trade unions"* and that the same arose on 30th August 2011, a year later after the promulgation of the Constitution 2010. The applicable Constitution was therefore the one of 2010 and not the former and now repealed one. We therefore find no reason to fault the finding of the courts below on this issue.

[27] This finding notwithstanding, this Court has previously held that a court of law can in appropriate circumstances apply fall back to the provisions of the Constitution 2010 in determining a dispute that may have crystalized before the promulgation of the Constitution. In ***Samuel Kamau Macharia & 2 Others v. Kenya Commercial Bank & 2 Others*** [2012] eKLR, at paragraph 62, this Court specifically stated as follows:

"At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of the Constitution."

[28] More recently, in ***Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties),*** SC. Pet. No 37 of 2014; [2019] eKLR, this Court found at paragraph 54, that a Court of law can draw insights from the Constitution 2010, for just and fair resolution of a dispute that may have arisen prior to the promulgation of the Constitution 2010. We therefore, find that even if the cause of action would have arisen prior to the 2010 Constitution, the Court would have been right to draw insights from the same for the fair determination of the issue before it that is, *refusal of registration of the appellants by the Registrar of trade unions.*

What are the parameters for registration of a trade union"

[29] We now turn to the main issue for determination, *what are the parameters for registration of a trade union*" *Were they complied with*" *Were the Appellant's rights infringed in the registration of the 1st to 9th Respondents' union"* Counsel for the Appellant urged that the Learned Judges of Appeal failed to appreciate requirements in Sections 12, 13 and 14 of the Labour Relations Act of the condition that there should not be another union in existence that is sufficiently representative of the employees' interest in the sector. Conversely, it's the 1st to 9th Respondents' case that their Union was established to represent its members drawn from Export, Floriculture and Allied Sectors covering *specific* areas *set out* in their Constitution, areas that are not included in the Appellant's Constitution. They also submit that they complied with the provisions of the Labour Relations Act before their union could be registered.

[30] In that context Article 41(2) (c) of the Constitution makes provision for the rights of workers as follows:

"Every person has the right to form, join or participate in the activities and programmes of a trade union."

[31] Article 36 of the Constitution on the freedom of association provides as follows:

"(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that--

(a) registration may not be withheld or withdrawn unreasonably; and

***(b)* there shall be a right to have a fair hearing before a registration is cancelled."**

[32] Article 24 of the Constitution makes provision for limitation of rights and fundamental 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--

(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.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom --

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service--

(a) Article 31 – Privacy;

(b) Article 36 – Freedom of association;

(c) Article 37 – Assembly, demonstration, picketing and petition;

(d) Article 41 – Labour relations;

(e) Article 43 – Economic and social rights; and

(f) Article 49 – Rights of arrested persons."

[33] On the requirements for the registration of Trade Unions, the Labour Relations Act, 2007 provides as follows:

"12. (1) No person shall recruit members for the purpose of establishing a trade union or employers' organization unless that person has obtained a certificate from the Registrar issued under this section.

…"

"13. A trade union or employers' organization shall apply to the Registrar for registration within six months of receiving a certificate issued under section 12."

"14. (1) A trade union may apply for registration if—

(a) the trade union has applied for registration in accordance with this Act;

(b) the trade union has adopted a constitution that complies with the requirements of this Act, including the requirements set out in the First Schedule;

(c) the trade union has an office and postal address within Kenya;

(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) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:

Provided that the Registrar shall, by notice in the Gazette and in one national daily newspaper with wide circulation, notify any registered trade union, federation of trade unions or employers' organizations which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organization concerned to submit in writing, within a period to be specified in the notice, any objections to the registration;

(e) subject to subsection (2), only members in a sector specified in the constitution qualify for membership of the trade union;

(f) the name of the trade union is not the same as that of an existing trade union, or sufficiently similar so as to mislead or cause confusion;

(g) the decision to register the trade union was made at a meeting attended by at least fifty members of the trade union;

(h) the trade union is independent from the control, either direct or indirect, of any employer or employers' organizations; and

(i) the trade union's sole purpose is to pursue the activities of a trade union.

(2) Notwithstanding the provisions of subsection (1)(d), the Registrar may register a trade union consisting of persons working in more than one sector, if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote the respective sectoral interests of the employees."

[34] We have carefully perused the provisions of Sections 12, 13 and 14 of the Employment and Labour Relations Act and other relevant statutory and Constitutional provisions in respect to the issue in question. It is clear in our mind that once an application for registration of a trade union has been made and the same is compliant with the aforesaid Sections and the Constitution, the Registrar of Trade Unions has no choice but to register the same. The only reason for refusal of registration is where there is another trade union sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration as provided under Section 14 (1) (d)of the same Act. It is not disputed that the 1st to 9th Respondents' trade union met the criteria for registration as set out in Sections 12, 13 and 14. The only reason the Appellant challenged the registration of the Respondents' union was that it contravened Section 14 (1) (d) of the Labour Relations Act. We will therefore limit ourselves to the said Section.

[35] We have to make it clear from the onset that Section 14(1)(d) of the Labour Relations Act does not operate in a vacuum. The Registrar has to make an inquiry on any objection before arriving at a decision to reject or allow an application. In the instant case, we are convinced that the inquiry made by the trial Judge based on the evidence presented before her, to the effect that the decision of the 10th Respondent in rejecting the application for registration of the 1st to 9th Respondent's Union, was largely based on the provisions in the repealed Constitution; that the limitations under Article 24 of the Constitution did not apply with regard to the 1st to 9th Respondents' union; and that there was a fundamental difference between what comprises plantations and agriculture industries, as against the floriculture and horticulture industries was proper. This position was also upheld by the learned Judges of Appeal.

[36] We opine that even though the Appellant submitted that the Court of Appeal infringed on their right of existence as a general and giant union without considering the provisions of Article 41 of the Constitution, we do not see how any infringement of right could have occurred. This is because the Appellant is already registered and is enjoying its rights of existence as a trade union under Article 41 of the Constitution. In our opinion, it is the 1st to 9th Respondents' rights that will be infringed, if the orders sought were to be granted more so, considering the fact that the Appellant was never a primary party to the original suit. This Court has previously emphasized that the most crucial interest or stake in any case is that of the primary parties before the Court. In ***Francis Karioki Muruatetu & Another v. Republic & 5 others,*** Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court" [emphasis supplied].

[37] Similarly, we thus observed in ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others***, Civil Appeal No. 290 of 2012 (paragraph 24):

"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

The foregoing authorities are still applicable and we see no need to depart from them in the context of the issue at hand.

[38] The Appellant has also urged the point that the Court of Appeal contravened the *Provisions of Section 14(d) of the Labour Relations Act by ignoring that the law has vested the powers of Registration of the Trade Union squarely on the 10th Respondent.* The 1st – 9th Respondents submit on the other hand and urge that it is the 10th Respondent who registered their Union and not the Court, hence curing the defect in the trial Court's judgment. Having gone through the record (Volume one page 48) we note that the registration certificate was issued by the Senior Assistant Registrar of Trade Unions. We thus agree with the Court of Appeal's finding that the role of registration of a trade union is a statutory duty of the Registrar of Trade Unions and that a relevant court only has jurisdiction to order registration of the proposed union and further, that the Registrar cured any defect that may have occurred in the order of the trial judge. We find therefore the Appellant's submission on this issue baseless.

[39] On costs, this Court has previously settled the law on this issue, stating that costs follow the event in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** **Petition No. 4 of 2012;** *[2014]* and that a court has the discretion in awarding costs in its decision. This remains the law. In the instant case, we see no reason to deny the 1st – 9th Respondents the costs of the Appeal herein.

[40] For the foregoing reasons, we do not find any reason to disturb the decision of the Court of Appeal.

ORDERS

[41] Consequently, upon our findings above, the final orders are that:

1. The Petition of Appeal dated 6th March, 2018 **be and is hereby dismissed.**

2. The Appellant shall bear the costs of the 1st to 9th Respondents.

[42] Orders accordingly.

DATED and DELIVERED at NAIROBI this 23rd Day of January 2020.

..... **.....**

M.K IBRAHIM **J.B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

..... **.....**

S. C. WANJALA **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

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SUPREME COURT OF KENYA