REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO 248 OF 1998

KENYA TEA WORKERS UNION & 7 OTHERS……. APPELLANTS

VERSUS

REGISTRAROF TRADE UNIONS……..……RESPONDENT

JUDGMENT

In this appeal the appellants were dissatisfied with a ruling of the Registrar of Trade Unions on their application for registration as a trade union under the Trade Unions Act (cap 233), and they have appealed to the High Court against that ruling, on the grounds that the ruling of the Registrar was against the weight of evidence and the law, and that he erred in:

a) refusing to register the appellants and disregarding all the grounds advanced by them in favour of registration;

b) ignoring their evidence that the Kenya Plantation and Agricultural Workers Union was not a sufficient representative of the interests of a substantial proportion of the members of the appellants; and

c) upholding unreasonable objections raised by the Kenya Plantation and Agricultural Workers Union, the Federation of Kenya Employers, and the Central Organisation of Trade Unions.

For these reasons they ask this Court to allow their appeal with costs, and to reverse the ruling of the Registrar.

When the appellants applied for the registration of their proposed body, interested organizations, including the Kenya Plantation and Agricultural Workers' Union, opposed the proposed registration, basically on the ground that the proposed union composed of persons, particularly unionisable workers in the tea industry, whose interests were adequately and competently represented by the Kenya Plantation and Agricultural Workers Union, which is already registered and is in place.

The Registrar was advised that the Kenya Plantation and Agricultural Workers Union represents all the employees sought to be represented by the proposed union. He was advised that there is in place a valid recognition agreement and collective bargaining agreement between the Kenya Plantation and Agricultural Workers Union on the one hand, and the employer in the tea industry on the other, covering all the employees whom the proposed union wants to represent. Rule 3 of the constitution of the Kenya

Plantation and Agricultural Workers Union was cited to the Registrar to show that the employees in the tea industry are so represented fully and adequately that it was not in the interest of workers, labour relations and the industry, that another union should be registered.

The Registrar invited comments on these objections. The proposed Kenya Tea Workers Union proposed officials responded to those objections. It was said that the Kenya Tea Workers Union intended to specialize in tea workers and give specialized service to all workers in the tea industry only; the tea industry has a workforce of about 80,000 most of whom are not union members “because of the inefficient manner that the Kenya Plantation and Agricultural Workers Union handles their matters”; collective bargaining agreements are never revised for even as long as three years after their expiry, thus having negative effects on tea workers whose terms and conditions of service “are probably the worst in the country”; tens of thousands of tea workers have voluntarily withdrawn their membership with the umbrella union, which has even lost in workers trade disputes which it should have won; the Kenya Plantation and Agricultural Workers Union head office has chosen a combative approach when handling tea workers matters with employers thereby straining the relationship between the union and employers, to the disadvantage of tea workers. In conclusion, it was stated that the formation of the Kenya Tea Workers Union is a natural product of the wishes of the workers in the tea industry, and if registered, the Union will adequately and competently represent the interests of the entire unionisable workforce in the tea industry only, “leaving KPAW union to go on representing the workers in the many other industries”. All these things are set out and expounded in, among others, the letter of Thomas Anyonje (for general secretary) addressed to the Registrar of Trade Unions, on May 25, 1998, and in the letter of the same date to the Registrar, written by P A Okore, interim General Secretary of the intended union, to the same effect.

On a copy of the original file of the Registrar of Trade Unions, which is on this Court file, are documents relating to the application of the appellants for registration of the proposed trade union. The file of the Registrar shows that upon receipt of the application and the objections in opposition, the office of the Registrar considered thematter, and based on the findings, particularly with regard to the membership of the proposed Trade Union as stated in the proposed constitution of the proposed Trade Union, and having paid attention to the constitution, representations by the applicants and the objections and grounds of objection, it was concluded that the Kenya Plantation and Agricultural Workers Union is sufficiently representative of the whole or a substantial proportion of the interests in respect of which the Kenya Tea Workers Union seeks registration. Based on these findings, considerations and conclusion, the Registrar rejected the application, and he notified the applicants accordingly under section 16 of the Trade Unions Act (Cap 233), giving as his reasons for refusal of registration, his find that:

“There is a trade union already registered namely the Kenya Plantation and Agricultural Workers Union which is sufficiently representative of a substantial proportion of the interests of which the Kenya Tea Workers Union seeks registration”. Hence this appeal.

Of course, under section 16(1) (d) (i), refusal of registration of a trade union may be based on the ground that any other trade union already registered is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration.

The Court holds the position that when the Registrar is considering an application for the registration of a trade union, some of the factors he takes into account when deciding upon the issue include the history, membership base, organization and structure, employer-provided facilities, finance, collective bargaining record, statutory provisions, and any factors peculiar to the case. To arrive at a decision, he must make such inquiries as he thinks fit, and take into account any relevant information submitted to him. Any person with a sufficient interest may object to unreasonable conduct. It is one of the functions of the

Registrar to prevent “poaching” of members, and unhealthy splinters; and no activities should be organized by a group with respect to a particular class of workers if another union is in place for those activities and its members or a substantial majority of them are not suffering any substantial deficiency. Self-government of trade unions should generally be encouraged. In the performance of his duties and in carrying out his functions with regard to the registration of trade unions the Registrar is expected to act judicially or quasi-judicially; and being in a judicial position, the Registrar cannot, on appeal, be called as a witness and cross-examined on the reasons for his decision as if he were a party to the proceedings. The appeal court considers what he did and his reasons for doing what he did by the record as presented to the Court. The Court holds these propositions to represent the correct principles which guide it in deciding an appeal such as the instant one. It is now appropriate to consider this appeal in the light of these principles.

The Registrar was entitled to make the inquiries he carried out. He considered the grounds advanced by the appellants in the light of the views given him by other stakeholders, namely the Kenya Plantation and Agricultural Workers Union, the Federation of Kenya Employers and the Central Organisation of Trade Unions. The objections raised by these bodies to the registration of the Kenya Tea Workers Union as a trade union, cannot legitimately be referred to as unreasonable. Each of these three objectors had a direct interest in the matter: The Kenya Plantation and Agricultural Workers Union was being threatened with some of its members being poached by the proposed union; the Federation of Kenya Employers was being threatened with having to deal with a new creature with which to negotiate apart from the one to which it was accustomed; the Central Organisation of Trade Unions was being threatened with having to expend its resources organizing a splinter union; and all saw no new added or more effective advantage in having a new animal around.

In the absence of frivolity, vexation or abuse of the legal process, or culpable conduct, the Registrar is entitled to seek for relevant information from any person who may have it, to assist in making a decision to either register or refuse to register a trade union which seeks registration. The scope of his inquiry should not be unreasonably narrowed and restricted. He has to make a very important decision – to register or not to register a proposed trade union. He is required to avoid registering a body if another one which is already registered is sufficiently representative of a substantial proportion of the interests in respect of which the applying body seeks registration. To arrive at a proper decision, he has to consider the aims and objects of the proposed trade union, along with any relevant objections from any source, provided that the Registrar does not, in seeking information, open the door to abuse, frivolity and vexation or anything done in bad faith. Evidence tending to show that the interests, or a substantial portion of the interests, of a proposed trade union are sufficiently represented by a registered trade union, should not be shut out by any strict unbending rule.

The Registrar would be failing to discharge his statutory duty to satisfy himself that the policy of the statute is not infringed, if he did not seek evidence on whether the interests of the proposed trade union were sufficiently or substantially represented by another body already registered; and he would have acted contrary to his statutory duty if he allowed registration of the proposed trade union whilst seized of relevant evidence, irrespective of its source, that the proposed trade union was not qualified for registration as a trade union.

It is not the policy of the legislation, and it is not a part of the duty of the Registrar, to encourage members of an existing trade union to quit a registered trade union to form another trade union with almost identical objectives to those of an existing trade union. It has been held that the Registrar is not bound to be satisfied on a preponderence of evidence or a balance of probabilities, but only on any scintilla of evidence, that the interests of the proposed trade union are sufficiently or substantially represented by another trade union already registered: see *Angaha v Registrar of Trade Unions* [1973] E

A 297 (K). It is sufficient for the Registrar to consider the objections received and the constitution of the proposed trade union, and to compare such constitution with the constitution of the registered trade union, and anything else that is relevant. On the basis of such material, he may make a decision to register or to refuse to register a proposed trade union, if in those circumstances it is reasonable to reach the decision he takes. The Registrar may make inquiries and obtain information from “any group of persons before making his decision”, and no attempt should be made to narrow the field of the Registrar’s inquiries: *Mwendo v Registrar of Trade Unions*, HCCA 215 of 1997.

In the instant case, the Registrar sought relevant information and obtained it in good faith from persons who were not acting in *mala fides* or fraudulently or in abuse of the legal process, and whose points of objections were neither frivolous nor vexatious, but were useful in helping the Registrar reach his decision in a proper exercise of his powers and in the performance of his statutory duties to uphold the policy and objects of the law.

The Registrar looked at a number of fundamental points. He had regard for the objects of the proposed union as expressed in its constitution and compared them with those expressed in the constitution of the registered union from which the proposed body sought to break away. He paid due regard to the membership base, organization and structure, and collective bargaining record, of these bodies. For instance, it was discovered from the proposed union constitution, that the proposed union sought to draw its members from workers in tea farms, factories, nurseries, projects, brokers, selling and buying firms, warehousing, packaging and auction firms – all of which were sufficiently represented by the Kenya Plantation and Agricultural Workers Union. In these circumstances it is not right to say that the Registrar disregarded the grounds advanced for registration, or that the objections were unreasonably upheld by the Registrar.

The appellants unfairly and without any legitimacy, accuse the Registrar of refusing to register the proposed trade union, and disregarding all the grounds advanced in favour of registration. But the record before the Court shows clearly the process by which the Registrar reached his decision. It was a fair one, and the grounds advanced by the appellants were not ignored or disregarded. Indeed, the Court, looking at each of those grounds independently, finds that the Registrar came to the right decision after having regard for them. For instance, much was made of the alleged special nature and problems in the tea industry. In the first place, nothing specifically peculiar was cited. But secondly, and more importantly, any specialization required in handling special problems peculiar to the tea industry could be afforded and achieved through the formation of sub**704** committees within the existing union framework, consisting of specialized members. This would be a *modus operandi* of the registered trade union in solving special problem cases. It is not necessary that whenever a special problem of a peculiar nature relating to a portion of members, members of the registered trade union especially affected must splinter into a splinter party to be registered as a trade union. There is nothing proved to show that specialization cannot be practised within a trade union covering a number of specialized industries substantially of common features.

The question of some alleged inefficient manner of handling undisclosed matters of the unionisable workforce in the tea industry was a matter of fact requiring factual particulars and instances pointing to alleged inefficiency. It is not enough for a person or group of persons to call another person or group of persons as inefficient. Such a tag to describe a person or persons, must result from specific factual occurrences or omissions on the part of the person so labelled. The factual matter must be ascribed to that person or substantially so. Otherwise anyone would get away with it by calling others by any label he pleases. The Registrar did not have facts before him pointing to inefficiency on the part of the existing registered trade union. On the other hand, he had before him, information that one of the key figures in the splinter group was a senior negotiating party in the registered union, and if he has acted in a manner

to fail that union so as to assist another group to form another trade union, that would be an unconscionable conduct which would disentitle him and his group to seek judicial intervention to assist him and those of the group hoodwinked by him and others.

There was alleged delayed revision of collective bargaining agreements. Again this was a matter of fact, and it required factual evidence on the allegation and on apportioning guilt (if any); and one would expect a showing that tea workers were thereby especially prejudiced over and above anyone else. The conclusion that the terms and conditions of service in the tea industry “are probably the worst in the country”, finds no support in any statistical factual data, for no such data was furnished. Likewise, there was no factual information on alleged lost trade disputes alleged to have been due to incompetence on the part of the Kenya Plantation and Agricultural Workers Union, nor was there a demonstration of any instance of the latter’s alleged “chosen combative approach in handling tea workers matters with employers”. There are allegations, without proof, of alleged visible strain in relationship or disadvantage suffered by tea workers.

But even if any of these alleged factual matters were demonstrated to the Registrar or to this Court (and they were not), the applicants would still have to go another crucial step further: They would have to prove that these are matters which cannot domestically resolved by resorting to available internal constitutional machinery. They would have to show that their in-put cannot be considered owing to some wrongful action or conduct of the registered union of which they are members. They would have to show that by some wrongful means on the part of that union they cannot make things change for the good of its members, and that they cannot change the leadership under the domestic constitutional framework under which the registered Trade Union of which they are members is set up and operated. They must show that for the good of the industry and trade unionism, the only way open is to break away and to form the proposed trade union. None of these or other relevant factors has been disclosed. 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 process – the electoral process.

Having regard for these things, this Court finds that none of the grounds on which the appellants have come here is a valid one, and none has been established. The appeal fails, and it is dismissed with costs. It is so decreed.

Dated and Delivered at Nairobi 2001

S.M. AMIN

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JUDGE

R.C.N. KULOBA

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JUDGE