



Case Number:	Petition 50 of 2012
Date Delivered:	16 Apr 2013
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	-
Judge:	
Citation:	SETH PANYAKO & 5 others v ATTORNEY GENERAL & 2 others [2013] eKLR
Advocates:	-
Case Summary:	<p>Reported by Andrew Halonyere & Cynthia Liavule</p> <p>Issues</p> <ol style="list-style-type: none"> 1. Whether the petitioners had satisfied all the statutory requirements for the registration of the Kenya National Union of Nurses. 2. Whether the existence of other trade unions was a justifiable reason in terms of article 24(1) of the Constitution of Kenya, 2010 in the circumstances of the case to limit the petitioners right to form, join or participate in the activities and programs of a trade union 3. Whether it was unlawful for persons serving in an essential service sector to hold a strike action or lock-out. <p><i>Constitutional Law-fundamental rights and freedoms- limitations of fundamental rights and freedoms-right to form, join or participate in the activities and programmes of a trade union- whether the existence of other trade unions is justifiable reason in terms of article 24(1) of the Constitution of Kenya 2010 to limit the right to</i></p>

form, join or participate in the activities and programmes of a trade union-Constitution of Kenya,2010 articles 24(1),24(2)(b),41(2)

Labour Law- *registration of trade unions-statutory requirements for the registration of trade unions-whether the petitioners/appellants had satisfied all the statutory requirements for the registration of the Kenya National Union of Nurses-whether other registered trade unions were sufficiently representative of the whole or a substantial proportion of the interest of nurses in the public and private sectors hence not warranting a new union-Labour Relations Act No.4 of 2007,sections 14(1)(d)(i), 14(2)*

Constitution of Kenya, 2010

Article 24(1) - 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...

Article 24(2) (b) - Despite clause (1), a provision in legislation limiting a right or fundamental freedom

(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

Article 41(2)-Every worker has the right to form, join or participate in the activities and programmes of a trade union

Labour Relations Act No.4 of 2007

Section 14(1) (d)-A trade union may apply for registration if no other registered union is

(i)- in the case of a trade union of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicant seek registration.

Section 14(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 employees.

Held

1. The appellants lodged an application for registration of the trade union and the registrar being satisfied with the formal requirements of the application, caused a gazette notice under the Labour Relations Act to be issued notifying, pursuant to sections 14, 15 and 17 of the Act, to all Trade Unions, Federation of Trade Unions, Employers' Organizations or Federations of the receipt of application for registration of Kenya National Union of Nurses among other Applicants. The petitioners therefore satisfied the requirements for registration of the union.

2. Section 81(3) of the Labour Relations Act provided that there would be no strike or lock-out in an essential service, whereas section 81(4) provided that any trade dispute in a service that was listed as or was declared to have been an essential service might be adjudicated upon by the Industrial Court. The two provisions were meant to protect life of a person or health of the population or any part of the population.

3. The membership of the proposed union consisted of nurses drawn from the private sectors and public sectors including Local Government. Therefore in terms of section 14(2), the Registrar in exercise of his discretion to register or not to, had to consider the Constitution of the Union to determine if it contained suitable safeguards to protect and promote the respective sectorial interests of the employees.

4. The extent of limitation of the right to form, join or participate in the activities and programs of a trade union was not absolute for the reason that the registrar was granted a discretion to register a new union notwithstanding the existence of a rival trade union in a sector in terms of section 14(1) (d) (i) of the Labour Relations Act.

5. The Registrar failed to balance the enjoyment of

the right to form and join a union of choice by the petitioners with the prejudice if any, the enjoyment of the right would occasion others. He had not demonstrated how registration of the Nurses Union would be inimical to the interests of the larger public.

6. The provisions of section 14(1)(d)(i) as read with section 14(2) of the Labour Relations Act, No.14 of 2007 did not limit the Constitutional right of workers to form, join and participate in a union of their choice in that the provisions did not clearly and specifically limit the said right and did not clearly define the nature and extent of the limitation as required by Article 24(2)(b) of the Constitution.

7. It would not have been a unique situation to have one union represent the very large workforce of Nurses who shared common interests regardless of who their employer was. The fact was that the union once registered had to recruit a simple majority of the unionisable employees in each and every employer entity where it sought to operate and then apply for recognition to operate therein in terms of the provisions of the Labour Relations Act, 2007.

8. The action by the Registrar was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The refusal by the Registrar of Trade Unions to register the Kenya National Union of Nurses upon satisfying the requirements of sections 12 and 18 of the Labour Relations Act No.14 of 2007 was contrary to Article 41(2) (c) of the Bill of Rights as contained in the Constitution of Kenya 2010 and the same was *null and void ab initio*.

9. *Obiter* "It is up to the Republic of Kenya to update its Labour Policies in conformity with the Constitutional realities of the time."

10. *Obiter* "Another ambiguity in the provision of Section 14(2) is the use of words "*sectoral interests*". Indeed Section 14(1)(e) provides that subject to Subsection (2) only members in a Sector specified in the Constitution qualify for membership of the trade union. In the context of the Public Service would the health services be

	<p>described currently as a Sector?</p> <p>The definition of the term sector in the context of employment is not very clear. The Concise Oxford English Dictionary defines a Sector as; <i>“an area or portion that is distinct from others. A distinct part of an economy, society or sphere of activity”</i></p> <p>The word may clearly be used to designate an area or an activity. To this end the activities in the area of health may aptly be defined as sectorial activities as opposed to all other activities in public service. This adds to the non-precision of the language applied in Section 14 of the Labour Relations Act to place a restriction on a Constitutional right to form, join or participate in the activities and programs of a trade union.”</p> <p><i>Orders</i></p> <p><i>(a) Registrar of trade unions directed to register the Kenya National Union of Nurses and issue it with a certificate of registration within 14 days from date of judgment.</i></p> <p><i>(b) Declaration that it was unlawful to hold a strike action or lock-out in an essential service.</i></p>
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 50 of 2012

IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED VIOLATION AND THREAT TO VIOLATION OF THE
NURSES (WORKERS) FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3,
10,36 AND 41 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND SECTION
SEVEN OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF SECTION 14, 15, 17, 19 AND 20 OF THE LABOUR RELATIONS ACT 2007
LAWS OF KENYA**

AND

IN THE MATTER OF SECTION 5,6,7 AND 31 OF THE LABOUR INSTITUTIONS ACT 2007

**AND IN THE MATTER OF REGISTRATION OF THE KENYA NATIONAL UNION OF NURSES
(KNUN)**

UNDER THE LABOUR RELATIONS ACT 2007 LAWS OF KENYA

AND

**IN THE MATTER OF CONSTITUTIONALITY OF SECTION 14(d) OF THE LABOUR RELATIONS ACT
2007 LAWS OF KENYA**

BETWEEN

SETH PANYAKO

LILIAN OSUNGA

LYDIA NGARE

JOSEPH WANDEREVA

LAWRENCE KINYUA

WINNIE NAISIAMBE

SHENA.....PETITIONERS/APPELLANTS

VERSUS

THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT

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

KENYA PROGRESSIVE NURSES ASSOCIATION.....3RD
RESPONDENT

COMMISSIONER OF
LABOUR.....AMICUS CURIE

AND

UNION OF KENYA CIVIL SERVANTS.....1ST INTERESTED
PARTY

FEDERATION OF KENYA EMPLOYERS (FKE).....2ND INTERESTED
PARTY

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS

AND ALLIED WORKERS.....3RD
INTERESTED PARTY

AS CONSOLIDATED WITH

INDUSTRIAL CAUSE NO.1 OF 2013

JUDGMENT

The petitioners obtained a Certificate in accordance with Section 12 of the Labour Relations Act to undertake lawful activities in order to establish KENYA NATIONAL UNION OF NURSES on 8th November, 2011. The Application for the registration of the trade union was to be made within six months of the date of the Certificate.

The Application for registration of the Union was made under Section 18(1) of the Labour Relations act 2007, signed by 7 members who appended their names and signatures to the Application.

According to the Application Form 'A', the union was duly established on 15th November, 2011 and,

(a) a copy marked 'A', of the Constitution;

(b) a list marked 'B' of the title, names identity certificate number, address and occupation of the members of the Union; and

(c) a list marked 'C' of the title, names identity Certificate numbers, address and occupation of officials of the trade union were annexed to the Application.

All these documents are provided as annexures to the Petition and in the Supporting Affidavit of William Kibet Langat dated 22nd January, 2013 and filed on 23rd January, 2013.

By a letter dated 27th November, 2012 the Registrar of Trade Unions wrote to the Interim General Secretary of the proposed union as follows:-

"RE: APPLICATION FOR REGISTRATION OF UNION OF KENYA NATIONAL UNION OF NURSES

I refer to your application for registration of Kenya Union of Nurses dated 15th November, 2011 but submitted on 24th July, 2012. Your application was presented to the National Labour Board which met on 22nd November, 2012 for deliberations.

The board noted that your application was objected to by two Unions namely:-

(a) Union of Kenya Civil servants; and

(b) Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA).

Upon lengthy deliberations, the board resolved that your application be refused on the grounds stated herebelow;

(a) That the nurses in the Public Service are sufficiently represented by Union of Kenya Civil Servants;

(b) Those in the parastatal and private hospitals are represented by KUDHEIHA;

and

(c) Those in the Local Authorities' Hospitals are represented by Kenya Local Government Workers

Union.

I have enclosed the notice of refusal in form D as per the provisions of the Labour Relations Act.”

The Form ‘D’ is issued in terms of Section 20 of the Labour Relations Act and is annexed to the Supporting Affidavit of Mr. Langat and reads as follows;

“It is notified that the registration of KENYA NATIONAL UNION OF NURSES as a Trade Union under the Labour Relations Act is refused. The grounds of the refusal are as follows:-

There are already registered trade unions sufficiently representative of the whole or of a substantial proposition of the interests in respect of which the applicants sought registration namely:-

- 1. Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers.*
- 2. Union of Kenya Civil Servants.*
- 3. Kenya Local Government Workers Union”.*

The Notification is dated 27th November, 2012 and signed by Mr. Langat.

The requirements for registering a trade union are contained under Section 14(c) of the Labour Relations Act as follows;

“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”.*

Section 14(2) on the other hand provides that notwithstanding existence of another registered trade union in terms of Section 14(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”.

In their petition dated 24th December, 2012 the petitioners seek the following orders *inter alia*;

“2. Declaration that Kenya Nurses have a Constitutional right to form, join or participate in the activities and programs of a Trade Union;

4. Declaration that Kenya Nurses have a right to go on a strike;

6. That the letter of refusal and subsequent notification through form ‘D’ in accordance to the Labour Relations Act, 2007 are hereby nullified;

7. That the Registrar of Trade Unions issue the Certificate of Registration to the Kenya National Union of Nurses forthwith”.

The other orders sought have more or less been overtaken by events and the court will not engage them substantially in this judgment.

It is worthy noting that by the time, this petition was filed the nurses engaged in Public Service were engaged in a nationwide strike called by interim officials of the Union to pressurize the Registrar of Trade Unions to reverse his decision not to register the union.

Section 12(1)(4) provides that a Certificate issued under subsection (3) shall specify that “(a) the promoter may undertake lawful activities in order to establish a trade union

In this respect, Section 30 provides;

“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”.

This was the only lawful route available to the petitioners upon receipt of the decision by the registrar and not to embark on a strike action for the following reasons;

1. In terms of part X of the Labour Relations Act headed Strikes and Lock-outs and in particular Section 76;

A person may participate in a strike or lock-out if:-

“(a) The trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union.”

A dispute arising from a failure to register a trade union in terms of Section 18 of the Labour Relations Act, does not “concern terms and conditions of employment or the recognition of a trade union” within the meaning of this provision and therefore cannot be a basis for a strike action or a lock-out. That is why a quick dispute resolution mechanism by way of an Appeal to the Industrial Court is provided under Section 30 of the Act.

Secondly, in terms of Section 78(1) “no person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if:-

(e) the trade dispute was not referred for conciliation in terms of –

(i) *this Act; or*

(ii) *a collective agreement providing for conciliation.*

(f) *the employer and employees are engaged in an essential service”*

It is common cause that the petitioners did not take this dispute to conciliation in terms of this Act and that the employer and employees (nurses) are engaged in an essential service in terms of the Fourth Schedule to the Labour Relations Act termed “*Hospital Services*”.

It is noteworthy that Article 41(2) of the Kenya Constitution 2010 provides;

“Every worker has the right to;

(d) *go on strike.”*

This right is however subject to the provisions of part X of the Labour Relations Act, 2007. This is the delicate balance that Industrial Relations practice endeavours to maintain and is well captured in the preamble to the Labour Relations Act as follows:-

“An Act of Parliament to consolidate the law relating to trade unions and trade disputes to provide for the registration, regulation, management and democratization of trade unions and employers’ organizations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes”.

It should be remembered that procedural requirements regulating the right of workers to go on strike action and Employer to declare a lock-out abound in most jurisdictions world over and for good reason. Strikes are a legitimate bargain weapon at the disposal of workers, and should be used sparingly as a last resort measure. For this reason, Section 79(1) of the Labour Relations Act provides for protected strike and protected lock-out which means a strike or lock-out that complies with the provisions of part X of the Act.

Protected strike actions do not therefore amount to breach of employment contracts unlike the illegal ones that attract consequences such as disciplinary action and non payment of remuneration for the period not worked. Section 81(1) defines; “*essential services*” as “*a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population*”.

The Ministry of Labour in consultation with the National Labour Board has listed the Health Services that include Nursing Services as essential services and Section 81(3) provides;

“There shall be no strike or lock-out in an essential service”. Whereas Section 81(4) provides;

“Any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated upon by the Industrial Court.”

These two provisions are as clear as daylight and are meant to protect “*life of a person or health of the population or any part of the population*”.

These provisions meet the criteria provided under Article 24(1) of the Constitution in ensuring that the enjoyment of rights and fundamental freedoms by any individuals does not prejudice the rights and fundamental freedoms of others.

The law has gone further to ameliorate the effects of the restriction by providing for a direct adjudication of disputes involving essential services by the court and in any event by way of Certificate of Urgency where necessary.

The legislation is specific and clear about the right to be limited, that is, the right to go on strike by the essential service and the limitation is restricted to defined category of workers. The said limitation does not derogate from the core or essential content which is to provide an effective means to guarantee fair and just terms of employment to majority of workers with certain exceptions in the category of essential service, a limited group whose terms are secured through collective bargaining, dispute resolution mechanism provided in the Act, and especially adjudication by the Industrial Court on a priority basis.

Having said that, it is incumbent on the Minister to ensure that there is proper and thorough consultation with the Sector affected by a decision to declare a service essential because such declaration imposes a limitation of a Constitutional right. That process should therefore be open and transparent and should involve the sector appropriately so as to provide built-in mechanisms for quick dispute resolution especially on terms and conditions of service.

Getting to the Merits of the Application for Registration of the Kenya National Union of Nurses, it is essential to recap the history of this Petition, as I captured it in my ruling on an interlocutory matter as follows;

On 8th January 2012, the Petitioners brought an Urgent Application seeking to have the orders of Justice Maureen Onyango set aside.

The Court noting that the Nurses had failed to honour the orders of the Court declined to entertain the petition unless and until they obeyed the order of the court observing that if the court entertained them whilst they continued to defy an order of the court, it would be conniving with parties who had chosen not to observe the rule of law and that if parties before court were to be allowed to choose and pick which orders to obey and which not to observe, this would set the administration of justice in disarray with consequences too ghastly to contemplate.

The Nurses through their duly appointed representatives made a commitment to return to work immediately observing that it was in the interest of justice that the Petition seeking registration of Kenya Union of Nurses be disposed off expeditiously to allow calm to return to the workplace.

The Court noted that the nurses ought to have come to the court in terms of Section 30 of the Labour Relations Act which reads:-

“30 – 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”.

The parties present agreed that the Petition No.50 of 2012 as consolidated with Cause No.1 of 2013 be deemed to be an Appeal.

The Court being aware of the need to resolve the matter urgently and taking into Account the provisions of Article 159(2) of the Constitution that provides; -----

(c) *alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted; and*

(d) *Justice shall be administered without undue regard to procedural technicalities* "as read with Section 15(1) of the Industrial Court Act, 2011; which reads:-

"Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution",

made an order in the following terms:-

1. **THAT** Petition No.50 of 2012 as consolidated with Cause No.1 of 2013 be and is hereby deemed to be an Appeal against the decision of the Registrar of Trade Unions on 27th November, 2012 refusing the registration of Kenya National Union of Nurses in terms of Section 30 of the Labour Relations Act No.4 of 2007

2. **THAT** the matter will proceed as such on 14th January, 2013.

3. **THAT** the nurses have undertaken to return to work immediately and it is so ordered.

4. **THAT** the matter be mentioned on 11th January, 2013 to review the situation at the workplace and give further directions as may be deemed necessary by the parties and the court.

5. **THAT** the Order be served on all the parties in Petition No.50 of 2012 as consolidated with Cause No.1 of 2013 forthwith.

Of note therein was order Numbers 3 and 4 wherein the nurses undertook to return to work immediately and the matter was set down for mention on 11th January, 2012 to review the situation at the workplace and that the court will give further directions as maybe deemed necessary.

Having said that the issues for determination are as follows;

1. Did the Petitioners/Appellants satisfy all the statutory requirements for the Registration of the Union"

2. Was the registrar of trade unions justified to find that there were other registered trade unions that were sufficiently representative of the whole or a substantial proportion of the Interest of Nurses in the Public and Private Sectors and therefore a new Union was not warranted"

3. Was this justifiable reason in terms of Article 24(1) of the Constitution of Kenya 2010 in the circumstances of the case so as to limit the Petitioners/Appellants' right to form, join or participate in the activities and programmes of a trade union "

1. Did the Petitioners/Appellants satisfy all the statutory requirements for the Registration of the Union"

It is common cause that the Petitioner/Appellant received a certificate in accordance with Section 12

of the Labour Relations Act certifying that Kenya National Union of Nurses had been authorized;

“(a) To undertake lawful activities in order to establish a trade union; and

(b) That an application for the Registration of the trade union shall be made to the Registrar within six months of the date hereof”.

The certificate was dated 8th November, 2011.

It is also not in dispute that the Appellants lodged an Application for registration in terms of Section 18 and had satisfied all requirements of Section 18(1) a, b, & c and 18(2) in that the prescribed fee was paid, certified copy of the Constitution of the Trade Union was attached and a certified copy of the attendance register and minutes of the meeting at which the trade union was established were attached to the Application. It is also without a doubt that the provisions of Section 18(2) were satisfied in that seven members of the trade union had signed the Application.

The Registrar of the Trade Union upon receipt of the Application did not in terms of Section 18(3)(a) & (b) call for further information with the purpose of evaluating the application nor did he request the proposed name of the Union to be altered in terms of Section 18(4)(a).

Being satisfied with the formal requirements of the Application, he caused Gazette Notice No.1566 – under the Labour Relations Act No.14 of 2007 to be issued notifying pursuant to Sections 14, 15 and 17 of the Act, to all Trade Unions, Federation of Trade Unions, Employers’ Organizations or Federations of the receipt of application for registration of Kenya National Union of Nurses among other Applicants. This question is therefore answered in the Affirmative.

2. Was the registrar of trade unions justified to find that there were other registered trade unions that were sufficiently representative of the whole or a substantial proportion of the Interest of Nurses in the Public and Private Sectors and therefore a new Union was not warranted"

In his Supporting Affidavit dated 22nd January, 2013 the Registrar of Trade Unions states that, upon receipt of the application for registration, he forwarded the same to the National Labour Board for consultation as required under Section 19(1) of the Labour Relations Act No.14 of 2007.

He goes on to state that during the meeting of the Board held on 22nd November, 2012, the Board after deliberations resolved that the application for registration of The Kenya National Union of Nurses (KNUN) be refused on grounds that there are other trade unions already registered which are sufficiently representative of the whole or substantial proportion of the interest in respect of which the applicants sought registration.

That as per the advice of the board;

A. The Nurses in the Public Service are sufficiently represented by the Union of Kenya Civil Servants.

B. That those in the parastatal and private hospitals are represented by KUDHEIHA.

C. Those in the Local Authorities’ Hospitals are represented by Kenya Local Government Workers’

Union.

He does not indicate whatsoever if he had received any objection from any other registered Trade Union, Federation of Trade Unions' or any Employer Organization or Federation to the registration of the union within 14 days specified in the notice he had issued.

Section 14(1)(d) reads;

"14 A trade union may apply for registration if –

(d) no other trade union already registered is –

(i) in the case of a trade union of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicant seek registration".

This is the claim relied upon by the National Labour Board in its advice to the Registrar to refuse registration.

However Section 14(2) reads;

"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 employees."

The membership of the proposed union consists of nurses drawn from the Private Sectors and Public Sectors including Local Government. Therefore in terms of Section 14(2), the Registrar in exercise of his discretion to register or not to had to consider the Constitution of the Union to determine if it contained suitable safeguards to protect and promote the *"respective sectoral interests of the employees"*.

In the letter of refusal dated 27th November, 2012, the Registrar duly refers to the consideration by the Board that two Registered Unions namely; Union of Kenya Civil Servants and Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) had objected to the registration of the Union. The Board had noted that the two sufficiently represented the nurses in the Public Service, in parastatals and private hospitals and that those in Local Authorities' Hospitals are represented by Kenya Local Government Workers Union. The latter did not object to the registration of the new union.

It appears, the Registrar did not exercise his mind on the requirements of Section 14(2) aforesaid. The other auxillary matter that comes to the fore is the procedure to be followed upon receipt of an objection to a union registration. Is the Registrar required to give an opportunity to the Applicants to respond to those objections" The Registrar did not in this matter give an opportunity to the Applicant Union to respond to the objections by the two Unions and the Labour Relations Act is silent on this matter.

It should not be lost on the minds that upon receipt of the Certificate in terms of Section 12, the Kenya National Union of Nurses had embarked on a recruitment drive and attached to its Appeal are lists of members totaling about 1000 from various health Institutions in the private and public sector.

Indeed, when the unregistered union embarked on what was clearly unlawful strike, the action paralysed the entire of Nursing Services in the Public Sector throughout the Country. Though this was a

very low point by the unregistered union which should not at all count in its favour, it is indicative of its large following especially in the Public Sector.

This brings into play the provisions of the Section 4 of the Labour Relations Act which provides;

“4(c) – Every employee has the right to –

(a) participate in forming a trade union;

(b) join a trade union; or

(c) leave a trade union”

This provision which came to life in 2007, is well buttressed by Article

41(2) of the Constitution, 2010 which reads;

“Every worker has the right:-

(c) to form, join or participate in the activities and programmes of trade union;”

These are weighty provisions that the Registrar of Trade Unions must put into consideration in exercise of his statutory duty to register or not register a trade union.

In particular the interpretation of Section 14(1)(d)(i) and 14(2) must be read in context of Section 4(1)(a)(b) and (c) of the Labour Relations Act and more so in the context of Article 41(2)(c) of the Constitution of Kenya 2010.

It was further submitted by the Registrar of Trade Unions, the Federation of Kenya Employers and the Commissioner of Labour who the court invited as *‘amicus curie’* that since 1965, the Kenya Government adopted the policy of Sectoral Trade Unions as opposed to craft or professional unions. In this regard, “the policy on Trade Union Organization in Kenya” was produced in support of this submission. The document is dated 1st September, 1965.

The Court was referred to recommendation 8 titled **‘AMALGAMATION’**.

“That the Central Organization of Trade Unions (Kenya) shall maintain as one of its urgent and primary objectives the amalgamation of trade unions in order to have fewer but stronger and viable trade unions”.

This followed recommendation that the Kenya Federation of Labour and the Kenya African Workers Congress be deregistered with immediate effect and the formation of COTU.

Another curious recommendation titled;

“EXTERNAL AFFILIATIONS; provided

(i) That all trade unions cancel their existing affiliations with external bodies forthwith and that external affiliations applies to all bodies not only outside Africa but outside Kenya.

(ii) *No further external affiliation shall be made by trade unions without Governments' prior approval*".

Clearly this policy document is born of the Political, Social and Economic dynamics of the time. It is not reflective of the Kenya Policy today and as a matter of fact was abandoned shortly thereafter with COTU and many other Unions expanding their wings and forging relations with International Organizations in and out of Africa and especially the International Labour Organisation which in many respects is responsible for the progressive legislation and major milestones in Industrial and Labour Relations in Kenya to such an extent that many African countries owe their growth in these areas to the stewardship of the union leaders in Kenya.

We cannot therefore be heard to pick and choose from a document that has clearly been overtaken by events. We were also referred to the Industrial Relations Charter revised on 30th April, 1984 which under Clause 4 obliges the Registrar of Trade Unions in registering new unions to ensure the union's Constitution clearly define its sphere of operation to avoid overlap of activities. He is also to consult the Minister of Labour, COTU and FKE. This document does not clearly state policy considerations to be applied prior to the registration and does not take us any further in resolving this matter to the extent that the Registrar made no comments at all regarding the content and suitability of the Constitution of the proposed Union.

The court observes that the practice in South African jurisdiction to register craft or occupation unions has not negated broad based collective bargaining based on bargaining councils. It is up to the Republic of Kenya to update its Labour Policies in conformity with the Constitutional realities of the time. 'See Essential Labour law, Volume 2: Collective Labour Law – Third Edition'. This gives a summary of the South African Statutory Bargaining Forums. The inquiry to determine if the objectors to an application are;

"sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration", cannot be reasonably and fairly determined without giving opportunity to the applicants to make an input on the matter.

After all, Section 14(2) provides an exception to that requirement upon an examination of the Constitution of the Applicants for *"suitable provisions to protect and promote the respective sectoral interests of the employees"*.

The Registrar clearly failed in these two respects to the detriment of the Applicants. This leads us to the 3rd issue;

3. Was the decision of the Registrar justifiable in the circumstances of the case in terms of Article 24(1) of the Constitution 2010 so as to limit the Petitioners/Appellants' right to form, join or participate in the activities and programmes of a trade union"

The Registrar deponed in his Supporting Affidavit that it is within his knowledge that there are other applications for registration of trade unions within the health sector that are pending before or have been refused registration by him and the decision of the court in this matter will affect the working within the health sector. He has annexed an application for registration by Kenya Health Professionals Union submitted on 20th March 2012. Also annexed is an application by Union of Kenya Clinical Officers dated 22nd September, 2012. This Application was refused on 27th November 2012 for the same reasons as

the Nurses Union, whereas the latter application is still pending before the Registrar.

The Registrar states that it is in the interest of the larger public and the preservation of harmony within the health sector that the instant petition is dismissed and orders sought are denied.

In short, these and other reasons outlined in this judgment earlier informed the decision of the Registrar to deny the Petitioners/Appellants Union Registration.

As earlier cited, Article 41(2)(c) of the Constitution of Kenya 2010 gives every worker a right to form, join or participate in the activities and programmes of a trade union. This right is restated under Section 4(a)(b) and (c) of the Labour Relations Act, 2007

The core content of this right is as follows;

Every worker has a right;

- (i) to form a union of his choice;
- (ii) to join a trade union of his choice;
- (iii) to leave a trade union freely.

These rights are clearly stated in the Bill of Rights which in terms of Article 20(1);

“applies to all law and binds all state organs and all persons”.

The office of the Registrar of Trade Unions is therefore bound by the provisions of the Bill of Rights.

Article 20(2) provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights *“to the greatest extent consistent with the nature of this right or fundamental freedom”*, and in applying the Bill of Rights.

“a court shall –

- (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and*
- (b) adopt the interpretation that most favours the enjoyment of a right or fundamental freedom.”*

With respect to the matter before the court, the right of every worker to form, join, participate in the activities of a trade union is subjected to the aforesaid legal provisions that the registrar relied on to refuse the workers the right to form and therefore by inference the right to join and participate in the proposed union's activities, by fact of non-registration. Indeed, Section 23(1) of the Labour Relations Act, 2007 provides the consequence of failure to register a Union as follows;

“No person shall perform any act in furtherance of a trade union unless that trade union.....

- (a) is registered under this Act; or*

(b) an application for its registration is being considered.”

Therefore from the 27th November 2013 when registration of the union was refused, the Law dealt it a death blow and denied any person to join or participate in its activities or programmes only subject to an Appeal against the decision of the Registrar to refuse registration in terms of Section 30 of the Act.

To this extent, the Action of the Registrar totally and also literally negated the rights of all the workers who had formed this union and joined it as members forthwith. This in itself is an absolute measure that must be subjected to the provisions of Article 24 of the Constitution to see the light of day.

In this regard, Article 24(1) provides;

“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.”

In evaluating the reasonableness and justifiability, the court takes into consideration;

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure the enjoyment of rights by any individuals does not prejudice the rights of others and;

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Furthermore, as in the present case the rights of the Petitioners/Appellant are limited by a provision of the law enacted before the effective date. Therefore in terms of Article 24(2)(b) the said provisions;

“shall not be construed as limiting the right unless the provision is clear and specific about the right to be limited and the nature and extent of the limitation; and

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

Finally the state or person seeking to justify the Limitation of a right has the burden to show that the requirements of Article 24 have been satisfied.

The offending provision as earlier stated is Section 14(1)(d)(i) of the Labour Relations Act, which restricts registration of a Union if there is in existence a registered union of employees

“sufficiently representative of the whole or of a substantial proportion of the interest in respect of which the applicants seek registration.”

This provision states clearly that workers will not be allowed to register a new union if there is in existence another registered union serving the purpose it seeks to serve.

What is not clear is how the sufficiency of representation of the whole or substantial of the interest referred to in the provision is to be established so as to justify the limitation of a Constitutional right.

The nature of the right is one to provide the workers with a clear choice as to who is responsible for negotiating their terms and conditions of service. The terms and conditions of service include their earning a living wage in addition to getting decent conditions at work such as provision for housing; medical services; sanitation; rest and leave days; salary increments; favourable terminal benefits; favourable grievance and disciplinary procedures and codes among others. In short the competence, dedication and efficiency of the union in ventilating the terms and conditions of the members determines their welfare and dignity at the work place. The right to choose who represents them in respect of all these matters is clearly fundamental hence its protection in the Bills of Rights and in the Labour Legislation.

The nature and importance of the Limitation referred to according to the Respondents, Interested Parties and *amicus curie* in this case and in particular the Registrar, Commissioner of Labour, the Federation of Trade Unions; KUDHEIHA, and Union of Kenya Civil Servants is to;

- (i) avoid proliferation of Trade Unions in a single sector to enable unitary collective bargaining;
- (ii) avoid negative competition and wrangling amongst competing unions in a single sector;
- (iii) implement the Kenya Government Policy of Sectoral Unionism as contained in the "The Policy on Trade Union Organization..... in Kenya" dated 1st September 1965 and the Trade Union's Charter.

Having said that, the extent of limitation is not absolute for the reason that the registrar is granted a discretion to register a new union notwithstanding the existence of a rival trade union in a sector in terms of Section 14(1)(d)(i) aforesaid. This exception is couched as follows;

"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 interest of the employees."

From the papers filed in this matter and in particular the Supporting Affidavit by the Registrar dated 27th January 2013, and filed on the same day in which he gives a detailed account about how the Application of this Union was dealt with by his office and the National Labour Board, it is clear that an inquiry in terms of this provision was not entered into by himself before denying the union registration.

There is absolutely no reference by him or the National Labour Board of the suitability of the Union's Constitution and provisions to protect and promote the *"respective sectoral interests of the employees"* in the health sector.

To this end, the Registrar failed to balance the enjoyment of the right to form and join a union of choice by the Petitioner/Appellants with the prejudice if any, the enjoyment of the right would occasion others. He merely states that the refusal was in the interest of the larger public and the preservation of harmony in the health sector. He has not demonstrated how registration of the Nurses Union would be inimical to the interests of the larger public. He should with respect have restricted himself to the respective sectoral interests, such as the ability of the proposed union to ventilate pertinent issues

affecting the health sector as compared to the 'catch all' unions that objected to the registration of the new union.

Following the foregoing analysis, it is the court's considered opinion that the provisions of Section 14(1)(d)(i) as read with Section 14(2) of the Labour Relations Act, No.14 of 2007 do not limit the Constitutional right of workers to form, join and participate in a union of their choice in that the provisions do not clearly and specifically limit the said right and do not clearly define the nature and extent of the limitation as required by Article 24(2)(b) of the Constitution.

Furthermore, the argument by the Registrar, Federation of Kenya Employers, and the Commissioner of Labour that the Kenyan Policy, is to register sectoral based unions as opposed to professional or craft unions is not borne out by the facts of this case in that the objecting Union, KUDHEIHA, represents non professional staff in the Public Universities in Kenya whereas the professional staff in the said universities are represented by a different union.

It will therefore, not be a unique situation to have one union represent the very large workforce of Nurses who share common interests regardless of who their employer is. The fact is that the Union, once registered has to recruit a simple majority of the unionisable employees in each and every employer entity where it seeks to operate and then apply for recognition to operate therein in terms of the provisions of the Labour Relations Act, 2007. The submission that, registration of a new union would lead to anarchy in Labour relations as posited by the Registrar of trade unions is unlikely in this highly regularized relationships.

Another ambiguity in the provision of Section 14(2) is the use of words "*sectoral interests*". Indeed Section 14(1)(e) provides that subject to Subsection (2) only members in a Sector specified in the Constitution qualify for membership of the trade union. In the context of the Public Service would the health services be described currently as a Sector"

The definition of the term sector in the context of employment is not very clear. The Concise Oxford English Dictionary defines a Sector as;

"an area or portion that is distinct from others. A distinct part of an economy, society or sphere of activity".

The word may clearly be used to designate an area or an activity. To this end the activities in the area of health may aptly be defined as sectoral activities as opposed to all other activities in public service. This adds to the non-precision of the language applied in Section 14 of the Labour Relations Act to place a restriction on a Constitutional right to form, join or participate in the activities and programmes of a trade union.

This lacuna is magnified by the lack of opportunity to the Petitioners/Appellants to respond to the objections made by the registered unions opposed to the registration as happened in this case. The provisions of Section 14(d)(1) and 14(2) should be read to include the right of an applicant to respond to any objections to the Application by third parties before a determination of the matter is made by the Registrar of Trade Unions.

To the extent this did not happen, the action by the Registrar is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The court therefore, finds that the refusal by the Registrar of Trade Unions to register the Kenya National Union of Nurses upon satisfying the requirements of Sections 12 and 18 of the Labour Relations Act No.14 of 2007 is contrary

to Article 41(2)(c) of the Bill of Rights as contained in the Constitution of Kenya 2010 and the same is *null and void ab initio*.

Accordingly, the court;

(a) directs the Registrar of Trade Unions to register the KENYA NATIONAL UNION OF NURSES and issue it with a Certificate of Registration in Form B set out in Second Schedule to the Labour Relations Act No.14 of 2007 within 14 days from to date.

(b) declares that it is unlawful to hold a strike Action or Lock-out in an essential service.

(c) that each party bears its own cost of this suit

The court appreciates greatly the conduct and industry of all the counsel and other representatives in this matter.

It is so ordered.

DATED and **DELIVERED** in Nairobi this 16th day of April, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE

Appearances:-

Mr. Maranga Maosa for the Petitioner/Appellant

Mr. Kiage for 1st & 2nd Respondent

Mr. Ogeto for 3rd Respondent

Mr. P.N. Macharia for Amicus Curie

Mr. Nyandiega for 1st Interested Party

Mr. Okeche for 2nd Interested Party

Mr. Nyabena for 3rd Interested Party



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