

DEMEANING FACE OF POLITICS AND BUREAUCRACY IN LABOUR MOVEMENT IN KENYA: A QUEST FOR AN EFFECTIVE LABOUR LAW

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DEMEANING FACE OF POLITICS AND BUREAUCRACY IN LABOUR MOVEMENT IN KENYA: A QUEST FOR AN EFFECTIVE LABOUR LAW

DR. RATEMO TOM JUNIOR

Abstract

The Constitution of Kenya, 2010, the Labour Relations Act, 2007, and the Employment Act, 2007, along with several other labour statutes, are designed to facilitate the establishment of employer-employee unions that play a significant role in safeguarding the social, political, and economic rights/interests of their registered members. Employers and employees generally need a conducive environment to perform their daily duties. Of late, however, continuous interference from political and state machineries in the running of union activities has proved to be a bedrock for regular internal disputes between the management and employees of various institutions in the country. For instance, the Kenya National Union of Teachers has accused, on several occasions, the Teachers Service Commission and politicians of sabotaging the affairs of the union. This paper, therefore, aims to evaluate the constitutional and legal framework regulating the establishment and registration of trade unions in Kenya. Besides, with the aid of judicial pronouncements, it analyses the impact of politics and bureaucracy in exercising the right to freedom of association, an essential element in the survival of trade unions in Kenya. Finally, the paper proposes measures to counter the threat posed by external parties in running trade union activities.

Keywords: Kenya, Africa, politics, bureaucracy, trade union, establishment, registration.

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EL ROSTRO DEGRADANTE DE LA POLÍTICA Y LA BUROCRACIA EN EL MOVIMIENTO LABORAL EN KENIA: EN BUSCA DE UNA LEGISLACIÓN LABORAL EFICAZ

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Resumen

La Constitución de Kenia de 2010, su Ley de relaciones laborales de 2007, su Ley de empleo de 2007, junto con varios otros estatutos laborales, están diseñados para facilitar el establecimiento de sindicatos de empleadores/empleados que desempeñan un papel importante en la salvaguardia de los derechos/intereses sociales, políticos y económicos de sus miembros. Los empleadores y los empleados generalmente necesitan un entorno propicio para realizar sus tareas diarias. Últimamente, sin embargo, la continua interferencia de las maquinarias políticas y estatales en el desarrollo de las actividades sindicales ha resultado ser la base de disputas internas regulares entre la dirección y los empleados de varias instituciones en Kenia. Por ejemplo, el Sindicato Nacional de Docentes de Kenia ha acusado en varias ocasiones a la Comisión del Servicio de Docentes ya los políticos de sabotear los asuntos del sindicato. Por lo tanto, este documento evalúa el marco constitucional y legal que regula el establecimiento y registro de sindicatos en Kenia. Además, con la ayuda de pronunciamientos judiciales, analiza el impacto de la política y la burocracia en el ejercicio del derecho a la libertad de asociación, elemento esencial para la supervivencia de los sindicatos en Kenia. Por último, el documento propone medidas que deben tomarse para contrarrestar la amenaza que representan las partes externas en el desarrollo de las actividades sindicales.

Palabras clave: Kenia, África, política, burocracia, sindicato, establecimiento, registro

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A CARA HUMILHANTE DA POLÍTICA E DA BUROCRACIA NO MOVIMENTO TRABALHISTA QUENIANO: EM BUSCA DE UMA LEI TRABALHISTA EFETIVA

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Resumo

A Constituição do Quênia de 2010, sua Lei de Relações Industriais de 2007, sua Lei de Emprego de 2007, juntamente com vários outros estatutos trabalhistas, são projetados para facilitar o estabelecimento de sindicatos de empregadores/empregados que desempenham um papel importante na salvaguarda dos direitos sociais, políticos e econômicos além dos interesses de seus membros. Empregadores e funcionários pelo geral precisam de um ambiente propício para realizar suas tarefas diárias. Ultimamente, no entanto, a contínua interferência das máquinas políticas e estatais no desenvolvimento das atividades sindicais acabou por ser a base de disputas internas regulares entre a direção e os funcionários de várias instituições no Quênia. Por exemplo, o Sindicato Nacional de Professores do Quênia acusou repetidamente a Comissão de Serviço de Professores e os políticos de sabotar os processos do sindicato. Portanto, este livro avalia a estrutura constitucional e legal que regula o estabelecimento e registro de sindicatos no Quênia. Além disso, com a ajuda de pronunciamentos judiciais, analisa o impacto da política e da burocracia no exercício do direito à liberdade de associação, elemento essencial para a sobrevivência dos sindicatos no Quênia. Finalmente, o documento propõe medidas a serem tomadas para contrariar a ameaça representada por partes externas no desenvolvimento das atividades sindicais.

Palavras-chave: Quênia, África, política, burocracia, união, estabelecimento, registro.

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Introduction

The Constitution of Kenya, 2010 (COK), the Labour Relations Act, 2007 (LRA), and the Employment Act, 2007, along with a number of other labour statutes, are designed to facilitate the establishment of employer-employee unions that play a significant role in safeguarding the social, political, and economic rights/interests of their registered members.¹

Employers and employees generally need a conducive environment to perform their daily duties. Of late, however, continuous interference from political and state machineries in the running of union activities has proven to be a bedrock for regular internal disputes between the management and employees of various institutions in Kenya. For instance, the Kenya National Union of Teachers (KNUT) has, on several occasions, accused the Teachers Service Commission and politicians of sabotaging the affairs of the union.² Besides, the multiplicity of unions caused by ideological rifts fuelled by politicians and state machineries, a craft division among employees, and the employers' own myopia have also weakened the bargaining power of employees.³

This paper, therefore, evaluates the constitutional and legal framework regulating the establishment and registration of trade unions in Kenya. In addition, with the aid of judicial pronouncements, it analyses the impact of politics and bureaucracy in the exercise of the right to freedom of association, an essential element in the

¹ "The Constitution of Kenya, 2010," *Kenya Law*, accessed February 21, 2021, <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>; "The Employment Act, 2007," *Kenya Gazette Supplement* 117, Nairobi, October 26, 2007, <https://www.ilo.org/dyn/travail/docs/506/Employment%20Act%202007.pdf>; "The Labour Institutions Act, 2007," *Kenya Gazette Supplement* 108, Nairobi, October 26, 2007, <https://www.ilo.org/dyn/travail/docs/508/labour>, pts. II, III, and IV.

² Christine Muchira, "Sossion Accuses TSC of Sabotaging Affairs at KNUT," *KBC News*, January 24, 2021, <https://www.kbc.co.ke/sossion-accuses-tsc-of-sabotaging-knut-affairs>. It can also be noted that there is a gradual silent growth of trade union affiliations with political parties. Several union leaders have, for instance, been nominated or elected or appointed to hold influential state offices by major political parties in Kenya. For example, the Kenya National Union of Teachers' Secretary General, Hon. Wilson Sossion, and the Kenya Union of Post Primary Education Teachers' National Chairman, Hon. Milemba Jeremiah Omboko, are also Members of Parliament sponsored by the Orange Democratic Party and the Amani National Congress Party, respectively. See The National Assembly of the Republic of Kenya, "Hon. Wilson Sossion," accessed February 18, 2021, <http://www.parliament.go.ke/the-national-assembly/hon-sossion-wilson>; The National Assembly of the Republic of Kenya, "Hon. Milemba Jeremiah Omboko," accessed February 18, 2021, <http://www.parliament.go.ke/node/3344>.

³ For example, the fragmentation of the teachers' union into several unions, i.e., Kenya National Union of Teachers, Private Schools Teachers Association, and the Kenya Union of Post Primary Education Teachers, has weakened the bargaining power of teachers in Kenya.

survival of trade unions in the country. Finally, the paper proposes measures to counter the threat posed by external parties in running trade union activities.

CONCEPT AND MEANING OF THE TERM *TRADE UNION*

Labour unions are key players in the promotion of harmonious industrial relations. The primary objective of such voluntary associations is to promote and protect the social, political, and economic interests of their members, but subject to paying due regard to the general national interest.

Labour unions are of two kinds, i.e., employer unions and trade unions.⁴ An *employer union* refers to a group of employers united with the aim of regulating employer-employee (trade union) relations.⁵ A *trade union*, on the other hand, is generally a voluntary association of employees,⁶ which is concerned with rulemaking, welfare, and recreational activities of workers, collective bargaining, employee compensation and working conditions, and preservation and improvement of professional standards within an organisation.⁷ Sydney Webb (1859-1947) and Beatrice Webb (1858-1943) define the term *trade union* as “a continuous association of wage earners for the purpose of maintaining or improving the conditions of their working lives.”⁸ According to the LRA, a *trade union* is an association of workers aimed at regulating employee-employer relations, including any employer association.⁹ This definition incorporates three key elements: first, there must be an “association,” whether permanent or temporary, which demonstrates some degree of formal structure as opposed to a casual grouping of employees, and which provides a primary link between the management and employees.¹⁰ Such a link can only be

⁴ The origin of trade unions can be traced back to the eighteenth century in Great Britain.

⁵ “Labour Relations Act,” Section 2.

⁶ Equally, a trade union has a choice to affiliate itself with a federation of unions.

⁷ There are several reasons why employees resort to joining a trade union. Most of them join to: i) have a sense of job security, ii) have a platform for self-expression that includes aspects related to sharing of ideas, feelings, and opinions, iii) minimise instances of exploitation/discrimination, particularly under the capitalist system, iv) have a sense of participation and/or belonging, v) negotiate better terms and conditions of employment, vi) have a healthier work relationship, and vii) have greater bargaining power—this is particularly important because a worker who acts individually has less bargaining power with the management.

⁸ Singh Subhash, “Trade Union: Meaning, Objective and Benefits,” *Abhipedia*, accessed February 22, 2021, <https://abhipedia.abhimanu.com/Article/EPFO/MTUxMzY5/Trade-Union--Meaning--Objectives-and-Benefits-Industrial-Relation-and-labour-law-EPFO>. Dale Yoder also defines a *trade union* “as a continued long-term association of employees formed and maintained for specific purpose of protecting the interests of members in their working relationship”; see Jayna B., “Trade Union,” *Accounting Notes*, accessed February 22, 2021, <https://www.accountingnotes.net/human-resource-management/trade-union/trade-union/17572>.

⁹ “Labour Relations Act,” Section 2.

¹⁰ Subhash, “Trade Union.”

achieved if union members, as held in the *British Actors' Equity Association* case,¹¹ act collectively to achieve the objectives of the majority. Second, the association must be composed of mainly employees or their trade unions or federations. Third, the primary purpose of the association is to regulate employee-employer relations.¹² In *Midland Cold Storage v. Turner*,¹³ the Court held that the formation of a joint shop steward committee that does not engage an employer in negotiations but merely acts as a pressure group that seeks to persuade the dock workers' union to proceed on strike cannot be considered as a workers' union as it does not satisfy the requirements in the definition of the term *trade union*.

Legal Framework Regulating the Establishment and Registration of Trade Unions in Kenya

Workers all over the world generally advocate for unreserved exercise of freedom of association. However, it is equally significant for states to supervise the activities of trade unions through enacting laws that govern the proper functioning of such organisations to advance the rule of law. Thus, even though the international law stakes a claim for freedom of association, the International Labour Organisation supervisory authorities concur that there is a need for limitations to regulate the labour sector.¹⁴ Such limitations should, nonetheless, be reasonable to avoid preventing trade unions from effectively promoting the interests of their constituents.¹⁵

The establishment and registration of trade unions are governed by several instruments at the international and domestic levels. For instance, at the international level, the Freedom of Association and Protection of the Right to Organise Convention of 1948 (Convention No. 87) not only extends to parties with an employment contract the right to establish and register trade unions but also mandates states to refrain from interfering with union activities.¹⁶

¹¹ *Goring v. British Actors' Equity Association*, IRLR 122 (Ch D) 125 [1987].

¹² *Kenya Chemicals and Allied Workers Union v. Bamburi Cement Limited*, 2017.

¹³ *Midland Cold Storage v. Turner*, ICR 230 (1972). Contra: *British Association of Advisers and Lecturers in Physical Education v. National Union of Teachers*, IRLR 497, CA (1986).

¹⁴ Freedom of Association and Protection of the Right to Organise Convention, 1948, Art. 3.

¹⁵ Hugh Collins, K. D. Ewing, and Aileen McColgan, *Labour Law: Text and Materials*, 2nd ed. (Oxford: Hart Publishing, 2005), 648.

¹⁶ *Midland Cold Storage*, ICR 230 (1972).

The Right to Organise and Collective Bargaining Convention of 1949 (Convention No. 98) is another shot to exercising the freedom of association in Kenya.¹⁷ The Convention mandates state parties to protect employees against certain acts of anti-union discrimination at workplaces, i.e., acts intended to deny or threaten an employee from establishing, joining, registering, or participating in activities of a trade union.¹⁸

At the domestic level, the COK and the LRA are the major instruments that underpin the provisions to establish and register trade unions in Kenya. Therefore, this implies that trade unions, as held by Judge Onyango in the *Kenya Union of Sugar Plantation and Allied Workers* case,¹⁹ are bound by the provisions of both documents.

Below is a detailed examination of these provisions for the establishment and registration of trade unions in Kenya.

Process of Establishing a Trade Union in Kenya

Various constitutional provisions support the establishment of trade unions in Kenya.²⁰ Buttressed by these provisions, Part III of the LRA mandates any Kenyan with an intention to recruit members for the purpose of establishing a trade union to ensure, first, that they have applied for and been granted a Certificate of Establishment of a Trade Union by the Registrar of Trade Unions (RTU).²¹ An application to that effect must be carried out by two persons promoting the establishment and must clearly specify the proposed name for the union, along with other necessary information.²²

The question is whether promoters of a proposed trade union should be adequately facilitated by an employer and/or given unlimited access to an employer's premises to recruit members for a trade union. In the *Mt. Kenya University* case,²³ the Kenya Private Universities Workers' Union had filed a suit at the Employment and Labour Relations Court (ELRC) at Nairobi against Mt. Kenya University, seeking orders,

¹⁷ The Convention was ratified by Kenya and came into force on January 13, 1964; International Labour Organisation, "Ratification of CO98 - Right to Organise and Collective Bargaining Convention 1949 (No. 98)," accessed August 10, 2021, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::no:11300:p11300_instrument_id:312243.

¹⁸ International Labour Organisation, "Ratification of CO98," Art. 1.

¹⁹ *Kenya Union of Sugar Plantation and Allied Workers v. Mumias Sugar Company Limited* (2016).

²⁰ For example, Constitution of Kenya, 2010, Art. 41(2)(c).

²¹ "Labour Relations Act," Section 12(1).

²² "Labour Relations Act," Section 12(2).

²³ *Kenya Private Universities Workers' Union v. Mt. Kenya University*, Cause No. 117 of 2020 (2021).

inter alia, to compel the university to allow recruiting its employees to become members of the union. The university, however, objected to the demands by claiming that it had no recognition agreement with the union. Judge James Rika ruled that the union did not have to be formally recognised by the university to recruit its employees since the recognition of a union can only be achieved if there is a recruitment of members.

The Judge nonetheless faulted the union for insisting in being facilitated by the employer by granting them a hall, requiring the university to invite all its employees to the union meeting, providing a tent for member registration, etc. According to the Judge, the employer only has an obligation to open its gates for the officials to gain access. Once the gates are open, it is not the employer's business to know how the union undertakes the recruitment of its members. Alternatively, Judge James Rika observed that it is not mandatory that the recruitment be carried out on the premises of an employer. It can happen elsewhere, i.e., in public town halls or open spaces surrounding the employer's premises. In view of the decision in the *Mt. Kenya University* case, it is evident that promoters of a proposed trade union have a right to access an employer's premises to recruit members to establish a trade union. However, this right does not extend to demanding from the employer assistance in the recruitment process. Similarly, the promoters cannot engage politicians or state machineries to pressure employers to facilitate them in recruiting members.

The RTU is required to issue a certificate within 30 days upon receiving an application, unless the promoters submit a defective application or the proposed name of the union is considered to be the same as one of an already existing union or sufficiently similar so as to mislead or cause confusion to the public.²⁴ In the *Charles Salano & 9 Others* case,²⁵ the Court of Appeal at Nairobi was subjected to determine a trade dispute as to whether it is automatic and/or mandatory for the RTU to issue a Certificate of Establishment within a period of 30 days. Appellant Charles Salano and nine others were promoters who sought to register a new trade union christened Kenya Supermarkets Workers Union (KESMWU). They submitted a duly executed application for registration to the RTU. The RTU, however, invoked Sections 12 and 14(1)(d) of the LRA and declined to issue the certificate to KESMWU due to the existence of another union, the Kenya Union of Commercial Food and Allied Workers (KYCFAW), whose constitution extended coverage to employees working in supermarkets, retail and wholesale outlets, and distribution and supply

²⁴ "Labour Relations Act," Section 12(3).

²⁵ *Charles Salano and 9 Others v. Registrar of Trade Unions and Another*, Civil Appeal No. 19 of 2016 (2017).

companies. The decision prompted KESMWU promoters to file a suit at the ELRC and later at the Court of Appeal. This Court observed that it is a fallacy to claim that the RTU is mandated to issue a certificate of establishment to the promoters of a union within 30 days of receiving an application without any defect or in absence of existence of another union that sufficiently represents the interests of a certain group of employees. Moreover, the claim that the RTU was obligated to automatically register a union once promoters submitted an application to the effect could not suffice, as such automatic registration would open flood gates for a multiplicity of unions covering groups of employees with similar interests, leading to confusion and mismanagement of trade unions in Kenya. Accordingly, since the appellants' interests were sufficiently represented by KYCFAW, the Court dismissed the claim.

The certificate issued by the RTU is to specify that promoters are only permitted to undertake lawful activities to establish a trade union and that a formal application for the registration of a union is made to the Registrar within six months from the date of issue.²⁶

The RTU is empowered to withdraw a Certificate of Establishment, particularly if they discover that it was obtained through misrepresentation or fraud sponsored by politicians or state machineries, or as a result of a mistake, or the promoters of the union are involved in acts contrary to the provisions of the LRA or any other law.²⁷

Registration Process of a Trade Union in Kenya

No person in Kenya can perform any trade union activity unless they are operating under a registered union/branch of a union or an application to register the union/branch of a union has been submitted to the RTU and is under consideration.²⁸ As such, it is the sole statutory duty of the RTU (as held by the Supreme Court of Kenya in the *Kenya Plantation and Agricultural Workers' Union* case²⁹) to order the registration of a proposed trade union. It is in this context that the LRA provides that once the promoters of a trade union have been given a Certificate of Establishment, it is their duty, upon being granted the requisite authority,³⁰ to apply to the RTU

²⁶ *Kenya Private Universities Workers' Union*, Section 12(4).

²⁷ *Kenya Private Universities Workers' Union*, Section 12(5).

²⁸ *Kenya Private Universities Workers' Union*, Sections 23(4) and 25(5).

²⁹ *Kenya Plantation and Agricultural Workers' Union v. Kenya Export Floriculture, Horticulture and Allied Workers' Union*, Petition No. 4 of 2018, Art. 38 (2020).

³⁰ It must be stated whether the authority to make the application was given by a resolution of a general meeting of the Trade Union or, if not, in what other way it was given.

within six months after receiving the certificate to have their new union officially registered.³¹ Such an application must be addressed to the RTU on Form A set out in the Second Schedule of the Act.³²

Other equally significant requirements at the time of application include:

- a. The application must be accompanied by a prescribed processing fee.
- b. Promoters must affix revenue stamps in the value of Ksh 20 to the application.
- c. At least seven members of the trade union must sign the application before submission to the RTU.
- d. The application ought to be accompanied by an attendance register and minutes, details of promoters, a distinct name for the proposed trade union, proposed physical office and postal address, and the union's constitution that should meet all prerequisites outlined in the LRA and those indicated in the First Schedule of the LRA.³³ In the *Mombasa Maize Millers Limited* case,³⁴ the Court of Appeal held that a trade union has the right to come up with its constitution, which, however, must be in line with existing labour laws.
- e. The RTU is empowered to ask for further information to evaluate the submitted application or, when a mistake is found in an application, it may request the persons submitting the application to rectify it before submission within a specified period.
- f. Once the RTU, after consulting the National Labour Board, is satisfied that the application has met all the requirements, the union is officially registered using Form B set out in the Second Schedule of the LRA and is issued with a Certificate of Registration that acts as conclusive evidence of registration.³⁵ Thus, it becomes a body corporate with perpetual succession and a common seal,

³¹ *Kenya Private Universities Workers' Union*, Section 13.

³² *Kenya Private Universities Workers' Union*, Section 18(1).

³³ For instance, the name of the trade union, the manner of amending and rescinding union constitution, subscription, and fees payable by members, appointment/election/removal of union officials, inspection and auditing of union books, and dissolution of a trade union.

³⁴ *Mombasa Maize Millers Limited v. Bakery, Confectionary, Food Manufacturing and Allied Workers Union and Another*, Civil Appeal No. 79 of 2016 (2018).

³⁵ *Kenya Private Universities Workers' Union*, Section 19.

with the capacity to sue and be sued³⁶ in its own name. Similarly, it can enter into contracts and hold, purchase, and dispose of its movable and immovable property.³⁷ Besides, the newly registered trade union becomes independent from being directed or controlled by any employer.³⁸ Subsequently, the RTU is required to enter the name and all other relevant details of the union in the register using Form C set out in the Second Schedule of the LRA.³⁹

In the *Kenya Plantation and Agricultural Workers' Union* case,⁴⁰ the Supreme Court of Kenya has held that once the promoters of a proposed trade union have made an application to register it, complying with the provisions of Sections 12, 13, and 14 of the LRA and other statutory and constitutional provisions, the RTU has no choice but to subsequently register the proposed union. Once registered, as pointed out above, the trade union can sue and be sued. The question, however, is whether a branch/chapter of a union has the capacity to sue an employer. To discuss this, reference can be made to the *Universities Academic Staff Union, Kenyatta University Chapter* case⁴¹ and the *Egerton University Chapter* case.⁴² In the latter, the university held its Chapter elections on March 24, 2021. The elected officials, in a meeting on March 26, 2021, decided to co-opt three other members to represent special interests in the Chapter. The names of the co-opted officials were forwarded to the RTU for registration. The RTU, however, registered the names of three other persons who were considered strangers to Chapter membership, resulting in the filing of an instant suit by the Chapter. The UASU Secretary-General, Constantine Wasonga, claimed in an affidavit that a Chapter had no *locus standi* to sue as it was not a legal entity and that the prerogative to sue was a sole preserve of the National Union. Considering the evidence submitted and the

³⁶ Under *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* [1901] AC 426, it was held that trade unions are subject to be sued for torts committed by their officials.

³⁷ *Kenya Private Universities Workers' Union*, Sections 18 and 21. See Ian Smith and Aaron Baker, *Smith & Baker's Employment Law*, 10th ed. (Oxford: Oxford University Press, 2010), 567.

³⁸ *Kenya Private Universities Workers' Union*, Section 14(1)(h).

³⁹ *Kenya Private Universities Workers' Union*, Section 19(1)(b).

⁴⁰ *Kenya Private Universities Workers' Union*, Section 34.

⁴¹ *Universities Academic Staff Union, Kenyatta University Chapter v. Kenyatta University*, Cause No. E073 of 2021 (2021).

⁴² *Republic v. Registrar of Trade Unions ex-parte Universities' Academic Staff Union, Egerton University Chapter, Joseph Juma Mafura and 6 Others (Interested Parties)*, eKLR: Judicial Review No. E004 of 2021 [2021]. See *Perpetua Mponjiwa and 4 Others (On behalf of members of Aviation and Airports Workers Service Union and 2 Others v. Aviation & Airports Workers Service Union & 2 Others* [2016] eKLR. Contra: *Universities' Academic Staff Union v. Jomo Kenyatta University of Agriculture and Technology* [2006] eKLR, where the Court held that a branch cannot institute Court proceedings.

facts of the case, Judge Hellen Wasilwa of the ELRC at Nakuru observed that Section 21(b)(i) of the LRA lays bare that a registered trade union is a body corporate with capacity to sue and be sued. Nevertheless, the Act is silent on the capacity of a branch to initiate proceedings. Despite that, Section 25(5) of the Act proceeds to provide that a branch cannot operate without proof of registration, an essential element that extends the capacity/locus of a branch to sue and be sued. While referring to the Supreme Court's decision in the *Mumo Matemu* case⁴³ and the Court of Appeal's decision in the *Law Society of Kenya, Nairobi Branch* case,⁴⁴ Judge Wasilwa observed that Articles 22, 50(1), and 258 of the COK extended the scope of *locus standi* in Kenya by empowering any person, whether corporate or non-corporate, to access justice by instituting Court proceedings where fundamental rights have been threatened, denied, or infringed. Accordingly, a branch cannot be at the mercy of the National Union in filing Court proceedings. It can institute proceedings at any time.

In the *Kenya National Chamber of Commerce and Industry, Muranga Chapter, and 2 Others* case,⁴⁵ however, the Court held that a branch/chapter of a trade union must be ready to demonstrate before the court of law that it has the capacity and mandate to file a suit against an employer on behalf of the National Union.⁴⁶

To discuss whether inordinate and unreasonable delay in the issuance of a Certificate of Registration of a trade union amounts to violation of Articles 36, 41, and 47 of the COK as read with Sections 12, 13, and 18 of the LRA, reference can be made to the *Francs W. Ngariuki* case.⁴⁷ In the matter, the promoters of the Public Servants Union applied for a Certificate of Establishment of a trade union by dint of Section 12 of the LRA, which was duly granted by the RTU. The promoters proceeded to apply for full registration of the union as required by Section 18 of the Act. Upon receiving the application, the RTU published

⁴³ *Mumo Matemu v. Trusted Society of Human Rights Alliance and 5 Others* [2014] eKLR.

⁴⁴ *Law Society of Kenya, Nairobi Branch v. Malindi Law Society of Kenya and Others* [2017] eKLR. See John Wekesa Khaoya v. Attorney General [2013] eKLR: Petition No.60 of 2012.

⁴⁵ *Kenya National Chamber of Commerce and Industry, Muranga Chapter and 2 Others v. Delmonte Kenya Limited and 3 Others* [2020] eKLR.

⁴⁶ In *Dock Workers Union v. Kenya Ports Authority* [2015] eKLR, the Court held that a branch/chapter of a trade union must attach in its suit papers a list of the claimants' names, while in *Mrao Limited v. First American Bank of Kenya Limited and 2 Others* [2003] eKLR and *Giella v. Cassman Brown and Company Limited* [1973] EA, it was held that a branch/chapter of a trade union must demonstrate a *prima facie* case with the possibility of success and that its members will suffer an irreparable injury for it to be entitled for granting the orders sought.

⁴⁷ *Francs W. Ngariuki and 16 Others v. Registrar of Trade Unions and Another; Union of Kenya Civil Servants (Interested Party)* [2015] eKLR: Petition No. 10 of 2014.

it in the Kenya Gazette inviting objections against registering the union. The promoters claimed that:

1. They duly complied with the law regarding the registration of a trade union.
2. Two years after submitting the requisite documents, they had not received any response about the application from the RTU.
3. The conduct of the RTU was contrary to Article 36(1) and (3),⁴⁸ 41(2) (c),⁴⁹ and 47(1) and (2).⁵⁰

Responding to the allegations, the RTU confirmed receiving the application but contended that Sections 7(1) and 31(3) of the Labour Institutions Act 2007 mandates the RTU to consult the National Labour Board when exercising powers related to the registration and regulation of trade unions in Kenya. According to the RTU, the Board had not convened to discuss pending applications for union registration that included the promoters' application. As such, the RTU was unable to communicate the decision of the Board to the promoters. Besides, the RTU contended that the petition was filed prematurely before the registration process was concluded. The Union of Kenya Civil Servants (UKCS), which was the interested party in the matter, argued on its part that it was the rightful, recognised union authorized to represent all workers in the civil service, except for those working in the National Youth Service, Kenya Defence Force, National Police Service, Teachers Service Commission (teachers), Prisons Department, National Security Intelligence Service, and Administrative Police Department. As such, the interested party objected to the registration of the Public Servants Union on the basis that since it was likely to recruit members from the same constituency, it could be in direct competition with the UKCS, which was contrary to the provisions of the LRA. Besides, the UKCS argued that the proposed union's name was substantially similar to its name and permitting its registration was to cause anxiety, confusion, and general misunderstanding among Kenyan civil servants. Agreeing with the RTU's submissions, Judge Mathews N. Nduma of the ELRC at Nairobi observed that the Court was convinced that there was a delay in the registration; however,

⁴⁸ The Article incorporates provisions on the freedom of association.

⁴⁹ Under the provision, every worker is entitled to form, join, or participate in activities of a trade union.

⁵⁰ The Article incorporates provisions on fair administrative action that must be expeditious, reasonable, lawful, and procedurally fair.

the promoters of the Public Servants Union had failed to demonstrate that they had taken reasonable steps not only to determine the reasons for the registration delay but also to get their union registered. They could have lobbied in the Board to help sort out their problem. The Court concluded that the matter was prematurely filed against the RTU and others since the issue regarding the registration of the union was in the hands of the National Labour Board, which incidentally was not a party to the petition. The Court, however, directed all parties concerned to take a decision on the matter and facilitate the processing of the union's registration within 30 days. From the foregoing, it is evident that inordinate and unreasonable delay in the issuance of a Certificate of Registration of a trade union may not amount to violation of Articles 36, 41, and 47 of the COK as read with Sections 12, 13, and 18 of the LRA.

- g. The RTU has a right to reject the registration of a union particularly if the application submitted does not meet the requirements laid down in the LRA.⁵¹ However, the RTU must first make an inquiry on any objection raised before proceeding to decide on whether to reject or allow an application; in the case of a rejection, it must be accompanied by the reasons outlined on Form D set out in the Second Schedule of the Act.⁵²

In case there is a dispute as to when a suit is/was to be properly filed and/or applicable law, the Supreme Court of Kenya has held in the *Kenya Plantation and Agricultural Workers' Union* case⁵³ that the date upon which a notification is made about the refusal to register a trade union by the RTU is the date to be taken as to when a cause of action arose and not the date when the application for the registration of the union was submitted. The decision was in relation to an application for a trade union registration made on February 16, 2010, before the promulgation of the COK, and the subsequent notification by the RTU to the concerned party of its rejection on August 30, 2011, a year after

⁵¹ *Kenya Private Universities Workers' Union*, section 19(1)(b). In *Joel Mbuthia and 2 Others v. Registrar of Trade Unions and Another* [2018] eKLR: Appeal No. 3 of 2017, section 49, Judge Wasilwa held that where there are other trade unions capable of catering for members in a specific sector, the Registrar of Trade Unions has "a right to reject registration of another union to avoid proliferation and weakening of trade unions."

⁵² "Labour Relations Act," Section 20; *David Benedict Omulama and 8 Others v. Registrar of Trade Unions and Another* [2014] eKLR: Appeal No.7. See also *National Union of Domestic Workers v. Registrar of Trade Unions; Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers' (Interested Party)* [2019] eKLR: Appeal No. 1 of 2018; *Kenya Plantation and Agricultural Workers' Union v. Kenya Export Floriculture, Horticulture and Allied Workers' Union* [2020] eKLR: Petition No. 4 of 2018, Section 35.

⁵³ *Kenya Private Universities Workers' Union*, Section 26.

the promulgation of the COK. The Court eventually observed that the COK was the applicable law and not the repealed one.

- h. When promoters apply to register a branch of a trade union, an application is prepared and addressed to the RTU using Form F set out in the Second Schedule to the LRA.⁵⁴ In the *Raphael Otieno Odumo* case,⁵⁵ the decision to establish three branches by the National Executive Committee of the Kenya Engineering Workers Union was challenged at the ELRC at Mombasa. After considering the evidence submitted, Judge Makau observed that there must be clear provisions in the union constitution empowering the National Executive Committee to create new union branches.

An application to the effect should:

1. Be prepared within 30 days of formation of a branch by an authorized representative.
2. Denote the name, and physical and postal address of the branch.
3. Specify the names, occupations, titles, ages, and workplaces of all branch officials.⁵⁶

The RTU is obligated to maintain a register of all Trade Union Branches in Kenya.⁵⁷ Before registration or cancellation of registration of a branch, the RTU is empowered to request applicants to furnish further information to facilitate the registration/cancellation process.⁵⁸

- i. After registration, if a trade union desires to change or replace its name or constitution, it has to apply to the RTU for approval within 14 days after its members pass the resolution.⁵⁹ The application has to be accompanied by the requisite documents outlined in the LRA.⁶⁰

⁵⁴ "Labour Relations Act," Section 25(1).

⁵⁵ *Raphael Otieno Odumo and 2 Others v. Charles Natili and 5 Others* [2015] eKLR: Cause No. 48 of 2014.

⁵⁶ *Kenya Private Universities Workers' Union*, Section 25(2).

⁵⁷ *Kenya Private Universities Workers' Union*, Section 25(4)(a).

⁵⁸ *Kenya Private Universities Workers' Union*, Section 25(4)(b).

⁵⁹ *Kenya Private Universities Workers' Union*, Sections 27(1) and (3).

⁶⁰ *Kenya Private Universities Workers' Union*, Section 27(2).

Upon receipt of such notice, the RTU is obligated to give a 21 days' notice in the official Gazette and in three daily newspapers of national circulation, inviting any objections from any party to the proposed changes.⁶¹ When no objection is raised and all requirements are met, the RTU is to issue a Certificate of Change of Name/Constitution on Form K or Form L set out in the Second Schedule of the LRA, as the case may be.⁶² Such changes take effect on the date of approval.⁶³ When, however, objections are raised, the RTU is mandated to conduct investigation to that effect and do one of the following:

1. Refer the matter to the ELRC.
2. Decline the proposed changes and tender reasons for such refusal.
3. Make any appropriate orders.⁶⁴

A change in the name of a trade union does not affect the rights and obligations of a union nor does it render any legal proceeding instituted by or against it in former or new name defective.⁶⁵

Impact of Politics and Bureaucracy on the Exercise of the Right to Freedom of Association

Freedom of association is a fundamental right that the COK and the LRA extend to all employers and Kenyan workers both in the public and private sectors.⁶⁶ The right is primarily twofold, i.e., right to form, join, and participate⁶⁷ in any lawful activity organised by a registered union or federation of unions; and right to leave such union.⁶⁸ Equally, both the COK and the LRA prohibit any person from promising/

⁶¹ *Kenya Private Universities Workers' Union*, Section 27(4).

⁶² *Kenya Private Universities Workers' Union*, Sections 27(5) and (6).

⁶³ *Kenya Private Universities Workers' Union*, Section 27(7).

⁶⁴ *Kenya Private Universities Workers' Union*, Section 27(4).

⁶⁵ *Kenya Private Universities Workers' Union*, Section 27(8).

⁶⁶ See "Constitution of Kenya," Art. 36; "Labour Relations Act," Section 4. See also *Kenya Union of Commercial, Food and Allied Workers' Union v. London Distillers (K) Limited* [2021] eKLR: Cause No. 102 of 2020.

⁶⁷ See *Scientific Research International Technical and Allied Workers Union v. Kenya Agricultural Research Institute and Another* [2013] eKLR: Cause No. 639 of 2012, Section 10.

⁶⁸ "Constitution of Kenya," Art. 41(2)(c). In *Kenya Game Hunting and Safari Workers' Union v. Micatio Safaris* [2013] eKLR: Cause No. 2437 of 2012, the ELRC at Nairobi held that the right to fair labour practises as enshrined under Article 41 of the COK cannot be taken lightly by an employer. The Court may be compelled to impose serious sanctions in case of its violation.

taking/giving advantage to or compelling an employee in exchange for the employee to refrain from exercising their right to form, join, or participate in union activities.⁶⁹ In addition, the Kenyan parliamentarians are barred from enacting any legislation that authorises unreasonable revocation or withholding of registration of a trade union without employees being given a fair hearing.⁷⁰

Even though the freedom of association is extended to all employees and employers in Kenya, the COK makes certain provisions for its limitations.⁷¹ This can be particularly the case where the limitation is reasonable and justifiable based on the principles and values of human dignity, freedom, and equality, and in circumstances where its exercise may prejudice the enjoyment of the rights and fundamental freedoms of other citizenries.⁷²

Moreover, the Parliament is empowered to enact a law limiting the enjoyment of the fundamental freedom of association to specific employees serving in the National Police Service and the Kenya Defence Forces.⁷³ Section 3 of the LRA goes further to limit the rights of not only the two mentioned institutions but also the Administrative Police Force, National Youth Service, and Kenya Prisons Service from forming or joining a trade union. The provisions are also underpinned by Article 5 of the Right to Organize and Collective Bargaining Convention of 1949 (of which Kenya is a signatory) that empowers member states to enact legislations limiting certain rights enjoyed by the armed forces and the police. This position was, however, challenged in the Court of Appeal at Nairobi in the *Nicky Njuguna* case.⁷⁴ Here, an application was submitted to the RTU by Nicky Njuguna, interim Secretary-General for the registration of the Kenya Police Union on December 5, 2002. The RTU, however, rejected the application arguing that police officers were prohibited from forming or joining a trade union under the then Trade Disputes Act Cap. 234, as they were considered an essential service. With the full support of COTU, Nicky and three others filed an appeal against the RTU's decision before the ELRC.

⁶⁹ "Constitution of Kenya," Art. 36(2); "Labour Relations Act," Section 5(3).

⁷⁰ "Constitution of Kenya," Art. 36(3).

⁷¹ "Constitution of Kenya," Art. 24.

⁷² "Constitution of Kenya," Art. 24(1). See *Joel Mbuthia and 2 Others v. Registrar of Trade Unions and Another* [2018] eKLR: Appeal No. 3 of 2017.

⁷³ "Constitution of Kenya," Art. 24(5).

⁷⁴ *Registrar of Trade Unions v Nicky Njuguna and 4 Others* [2017] eKLR: Civil Appeal No. 251 of 2014.

During the pendency of the appeal, the current COK was promulgated that led to filing a Notice of Motion by Nicky and others seeking a declaration that Section 47(3)(e) to (g) of the National Police Service Act of 2011 and Section 3(b) of the LRA were inconsistent with Articles 24 and 41 of the COK. The ELRC agreed with Nicky and proceeded to hold that the Sections took away police officers' fundamental right to form, join, and participate in activities of a trade union. An appeal to the Court of Appeal was preferred by the RTU where, *inter alia*, the jurisdiction of the ELRC to interpret the Constitution and police officers' right to form, join, and participate in activities of a trade union were questioned. Regarding jurisdiction and in reference to the cases of *Prof. Daniel N. Mugendi*,⁷⁵ *Gladys Boss Shollei*,⁷⁶ *United States International University*,⁷⁷ and *Seven Seas Technologies*,⁷⁸ where the same issue was raised, the Court of Appeal observed that Article 165(3)(b) of the COK extends jurisdiction to the High Court to adjudicate matters involving denial, infringement, or violation of the Bill of Rights; it equally does not oust the ELRC's jurisdiction to determine constitutional interpretation matters, particularly where such matters are interwoven, germane, central, and intricately connected with a labour issue. Regarding the police officers' right to form trade unions, the three Judge Benches consisting of Justices Visram, Koome, and Karanja observed that the ELRC had made an error in its decision and proceeded to hold that police officers were prohibited from forming or joining a trade union under the COK for being essential service providers.

Despite the above comprehensive provisions, the existence of a complex bureaucratic system and politicians have contributed to an uneven growth of trade unions in Kenya. Declining membership in trade unions due to multiplicity of unions is another concern when dealing with matters related to trade unionism. This is because there have been several instances where politicians and the bureaucratic system have been involved in the exercise of trade union activities just to advance their ill motivated personal interests. For instance, the KNUT has in a number of occasions accused the Teachers Service Commission and politicians of sabotaging the affairs of the union.⁷⁹ Besides, the multiplicity of unions in specific professions caused by ideological rifts among union officials, fuelled by politicians and state machineries, craft division among employees, and the employers' own myopia have

⁷⁵ Prof. Daniel N. Mugendi v. Kenyatta University and Others, Nairobi Civil Appeal No. 6 of 2012.

⁷⁶ Judicial Service Commission v. Gladys Boss Shollei and Another, Civil Appeal No. 50 of 2014.

⁷⁷ United States International University v. Attorney General and 2 Others [2012] eKLR.

⁷⁸ Seven Seas Technologies v. Eric Chege, Nairobi HC Misc. Appl. No. 29 of 2013.

⁷⁹ Muchira, "Sossion Accuses TSC."

also weakened the bargaining power of employees.⁸⁰ It is for these reasons that union officials have sacrificed the interests of trade union members for political gains, hampering thus the growth of a healthy employee-employer relationship.

The hand of politics and interference by state machineries in trade union activities leading to rivalry among trade union officials can also be noted these days in Kenya.⁸¹ Such interference generally leads to loss of interest in unionism among employees, besides providing an employer with the opportunity to take advantage of infighting among union leaders to decline to engage in collective bargaining as there cannot be a proper representation during the negotiation process.⁸² An employer can thus argue that they do not know whom to engage in negotiations.

Considering the set qualifications for one to be eligible as an official of a trade union and provisions for the conduct of union elections, the question that crops up is whether the RTU acting as a state machinery is entitled to micro-manage the election of union officials. To discuss the issue, reference can be made to the *Kenya National Union of Nurses* case.⁸³ In this case, the appellant (Nurses Union) had filed a Memorandum of Appeal at the ELRC at Nairobi, seeking an order to compel the RTU to register duly elected union officials and to strike out a circular issued by the Registrar requiring trade unions to hold branch and national elections by June 30, 2016. Upon considerations of the facts, the Court held that the RTU has no powers to supervise (or oversee through a proxy) union elections and to declare when and how such elections can be conducted since Section 34 of the LRA is clear on the conduct of the election of union officials, which must be held in accordance with the union's constitution. As such, the circular issued by the RTU to this effect was found to be improper to the extent of trying to micro-manage union affairs. The Court proceeded to observe that the interference of the Registrar in running the affairs of a union is not only a total contravention of the International Labour

⁸⁰ A good example in this regard is the establishment of several trade unions designed to promote and protect the teachers' interests. As explained above in Note 4, there is now the Kenya National Union of Teachers, the Kenya Union of Post Primary Education Teachers, the Kenya Women Teachers Association, Kenya Secondary School Heads Association, Private Schools Teachers Association, etc. Thus, the fragmentation of the teachers' union has weakened the bargaining power of teachers in Kenya.

⁸¹ For instance, the Kenya Plantation and Agricultural Workers' Union has experienced challenges in uniting cut flower farm workers in Kenya due to constant political interference; see Joseph G. Kabiru, "Trade Unionism in the Cut Flower Industry in Kenya: A Case of Kenya Plantation and Agricultural Workers' Union," *European Scientific Journal* 14, no. 13 (2018): 224, <http://dx.doi.org/10.19044/esj.2018.v14n13p215>.

⁸² *Scientific Research International Technical and Allied Workers Union v. Kenya Agricultural Research Institute and Another*.

⁸³ *Kenya National Union of Nurses v. Registrar of Trade Unions & 8 Others* [2016] eKLR.

Organisation's Convention No. 98 on *Freedom of Association and the Right to Organise*, but also of Articles 2 and 41 and Chapter Six of the COK, along with Section 34 of the LRA. This therefore implies that every trade union in Kenya has a right to determine its own administrative activities, programmes, and the procedure for the conduct of elections.⁸⁴ There may, however, arise a problem, particularly when most members of a trade union are uneducated, which prevents them from taking appropriate long-term decisions to steer union activities while engaging them in unprotected strikes fuelled by politicians and state bureaucrats.

Conclusions and Suggestions

In the light of the above discussion, it is evident that the existing legal framework governing various aspects of labour relations has fairly streamlined the way trade unions are registered and/or operate in Kenya. However, the same requires effective implementation, which can only be achieved through the commitment of all parties concerned. As such, it is important to have in place policies that will deter external interference by politicians and state officials, who for selfish personal and political gains are involved in the day-to-day running of trade unions in Kenya. To shield trade unions from bureaucracy and political interference, the Judiciary needs to come up with measures to fast-track the dispensation of all pending matters related to the establishment and registration of trade unions. Similarly, trade unions ought to devise strategies that will curtail inter-union rivalries, encourage the appointment of experts for advisory purposes, and support employees to see trade union membership and participation in union activities as essential requirements for protecting their rights and interests. For employers, it is high time that they adopt measures geared to promote good industrial relations. As such, encouraging the split of unions and political interference, reduction of employee wages/salaries due to Covid-19, unfair retention of union dues, and retrenchment of employees with an intention to frustrate trade union membership should be shunned. The Salaries and Remuneration Commission also need to avoid unnecessary interference in the negotiation processes.

⁸⁴ See Aloise A. Otiende v. Boniface M. Munyao, Cause No. 1650 of 2011.

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