



Onyancha & another (Suing on behalf of the proposed Kenya Medical Doctors' Union) v Registrar of Trade Union (ROTU) & 2 others (Petition E017 of 2023) [2024] KEELRC 1734 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1734 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E017 OF 2023**

**HS WASILWA, J
JULY 4, 2024**

BETWEEN

**DR APIMA ABEL ONYANCHA 1ST PETITIONER
DR YVONE KWAMBOKA OSORO 2ND PETITIONER
SUING ON BEHALF OF THE PROPOSED KENYA MEDICAL DOCTORS'
UNION**

AND

**REGISTRAR OF TRADE UNION (ROTU) 1ST RESPONDENT
HON ATTORNEY GENERAL 2ND RESPONDENT
KENYA MEDICAL PRACTITIONERS PHARMACISTS & DENTIST
BOARD 3RD RESPONDENT**

JUDGMENT

1. This suit is instituted by the petition dated 14th August, 2023, seeking for the following reliefs; -
 - a. A declaration that the 1st Respondent is at all times required in mandatory terms to act on an application(s) for registration of a trade union and issue a promotion certificate or any other document contemplated in section 12 within 30 days once the applicants have met stipulated conditions for registration of a trade union as per Labour Relations Act No. 14 of 2007, the constitution and any other statutory requirements.
 - b. A declaration that the 1st Respondent is at all times required in mandatory and within reasonable time terms to issue certificate of Registration once all requirements for registration of a union has been met by the applicants as per Labour Relations Act, the Constitution and any other statutory requirements.



- c. A declaration that the failure by the 1st Respondent to act on petitioners' application for the formation/ establishment/ registration of a Union(Kenya Medical Doctors Union) for more than one year is discriminatory, doesn't bring honour to the nation and dignity to the office, doesn't promote public confidence and integrity of the office, constitute a significant undue/ unreasonable delay and is a statutory failure and abdication of responsibilities on her/his part(1st Respondent) and indignity to the applicants contrary to Articles 3,10,27,28,30,36,41,73 and 75 of [the Constitution](#).
 - d. A declaration that failure to act/reply on the application within 30 days as provided by the law(LRA) is deemed to have issued a promotion certificate contemplated in section 12 of the [Labour Relations Act,2007](#).
 - e. In the alternative to (d), the Honourable Court be pleased to issue an order of judicial review by way of an Order of Mandamus compelling the 1st Respondent to issue a promotion certificate or any document envisaged at section 12 of the [Labour Relations Act](#) 2007.
 - f. The Honourable Court be pleased to issue an order of Judicial Review by way of an order of Mandamus compelling the 1st Respondent to issue statutory gazette notices for purposes of registering the Union (Kenya Medical Doctors Union).
 - g. The Honourable court be pleased to issue an Order of Judicial Review by way of an order of Mandamus compelling the 1st Respondent to issue the Kenya Medical Doctors Union, a registration certificate after the letter has provided all the requirements as envisaged in section 18(1) &(2) of the [Labour Relations Act](#).
 - h. The Honourable Court be pleased to issue an order of judicial review by way of Prohibition, prohibiting the Respondents and any other party jointly and severally, from impeding the registration of Kenya Medical Doctors Union as a labour/ trade Union.
 - i. That any other Order or/and modification of petitioner's prayers which this Honourable Court may deem fit so as to achieve objects of justice for the petitioners as a whole.
 - j. Costs of this petition be borne by the Respondents.
2. The 1st Petitioner is described as a medical officer and the registrar in the College of Surgeons of East, Central and Southern Africa(COSECSA) surgery programme and not a member of any Trade Union in Kenya or elsewhere in the World. The 2nd Petitioner on the other hand is a Kenyan medical officer(MO) working within Nakuru County and is also not a member of any Trade Union within Kenya and the world.
 3. It is stated that they are both promoters of Kenya Medical Doctors Union, a proposed trade Union exclusively meant to agitate for rights of medical doctors whose 1st degree is MBChB/MD (Medical officers) and its master equivalents (e.g Mmed,MPH) provided the 1st degree is bachelors of medicine and Bachelors of Surgery and not any other healthcare professionals like Nurses, Physiotherapist, Pharmacists, Dentists, Occupational therapist among others.
 4. The Petitioners state that they are instituting this petition on the strength of Article 3(1) of [the Constitution](#) which provides that everyone has an obligation to respect, uphold and defend [the Constitution](#) and that the petitioners are persons envisioned under Article 22(1) of [the Constitution](#) which provides that everyone has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.



5. On jurisdiction of this Court to determine this suit, the petitioner stated that Article 23(1) as read with Articles 258 and 259 of *the Constitution*, provides that the High Court or Special Courts has jurisdiction, in accordance with Article 162(2) and or 165 to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.
6. Having set out the legal foundation of the petition, the petitioners gave the factual background of the petition and stated that they wrote to the Registrar of Trade Union, 1st Respondent herein, on 7th July, 2022, requesting for a promotion certificate pursuant to section 12(2) of the *Labour Relations Act*, but the letter did not elicit any response.
7. A reminder letter was sent to the Registrar of trade Union on the 7th October, 2022, 1st March, 2023 and another letter by its advocates, Kamau Lagat Advocates on 24th April, 2023 but that all these letters did not received any response.
8. The Petitioners aver that the 1st Respondent has refused and or neglected to perform its statutory duty of processing the registration of the Kenya Medical Doctors Union, herein for more than a year now, despite several reminders from the Petitioner and other members of the Kenya Medical Doctors Union.
9. It is averred that there are no justifiable reasons given in terms of Article 24(1) of *the Constitution*, so as to limit the petitioner right to form, join or participate in the activities under programs of the proposed unions by the 1st Respondents simply keeping quiet.
10. Further that the failure by the 1st Respondent to communicate its decision, whether positive or negative, is in violation of section 12(3) of the *Labour Relations Act*, which mandates the registrar to communicate its decision to accept or reject registration application within 30 days.
11. It is contended that the failure to issue certificate of promotion envisaged under section 12(2) of the *Labour Relations Act*, has made it impossible for the petitioner and their fellow colleagues, to file the requisite documents such as *the Constitution*, fees, signatures and all requirements as expected under Sections 13,14,18 and 19 of the *Labour Relations Act*.
12. The petitioners state that the 1st Respondent keeping quite for more than one year is in violations of their rights under Articles 36 and 41 of *the Constitution* and breach of Sections 4, 12, 14,17 18 and 19 of *Labour Relations Act* as well as its statutory mandate conferred upon its office to discharge its duties fairly and reasonably.
13. That unless this Court intervenes and issues the reliefs sought in the petition, the petitioners' right to associate and form a trade Union as provided for under Article 42(2)(c) of *the Constitution* and section 12 of the *Labour Relations Act*, will continue to be infringed to their detriment.
14. The Application is opposed by the Respondents, where the 1st and 2nd Respondent filed a replying affidavit sworn on 19th March, 2024 by Beatrice Mathenge, the Acting registrar of Trade Union.
15. In her affidavit, the affiant stated that by a letter dated 7/7/2022, the 1st Petitioner and Dr. Lucky Kiguongo applied for a certificate to promote the establishment of Kenya Medical Doctors Union, therefore that the 2nd Petitioner was not one of the Applicant and should thus be struck out from the petition with costs to the Respondents.
16. That a reminder was received from the said 1st Petitioner and Dr. Lucky by the letter dated 7/10/2022 following up on the said certificate and another reminder by the letter dated 1/3/2023 and on 26/4/2023, the 1st Respondent received a letter dated 24/4/2023 from Kamau & Lagat company Advocates still following up of the issue.



17. She stated that since Dr. Lucky Kiguongo is not party to this petition and Dr. Yvone Kwamboka Osoro was not one of the parties that applied for the certificate, the petition is incompetent, fatally defective, bad in law, frivolous, vexatious and scandalous, and the same should be dismissed with costs as it violated section 12 of the [Labour Relations Act](#), since one of the parties that had applied for the certificate is no longer interested in promoting the establishment of the proposed Union.
18. It is stated that although section 12(3) of the [Labour Relations Act](#) provides that the 1st Respondent is required to issue certificate to promote establishment of a trade Union, the same is not automatic but subject to condition listed under section 12(3) of the Act inter alia that the application is not defective and the proposed name is not the same as that of an existing trade Union or sufficiently similar to an existing one so as to misled or cause confusion.
19. She stated that the reasons the certificate was not issue and or denial communicated at the material time, is because the Hon. Attorney General had deployed her to the Ministry of Labour and Social Protection, to act as the Registrar trade Union, until a substantive Holder could be sourced, being that the former registrar, Ms. Elizabeth Gicheha's term had expired and she left. Further that, at the time the said Ms. Gicheha left, there was an approved establishment of 9 Registrars but none had been recruited by the Public Service Commission, hence there was no registrar in the office to act on the Application within the requisite 30 days provided for under section 12(3) of the [Labour Relations Act](#).
20. It is averred further that the Public Service Commission had currently approved recruitment of 13 Registrar, however recruitment is underway and yet to be concluded. Nevertheless, that the Application of 7/7/2022 is defective as the applicants wrote the letter on a letter head of the proposed name of the Union being Kenya Medical Doctors Union instead of using their names. Also that they used remain address; KMDUdoctors@ gmail.com with the slogan "In Kenya medical Doctors Union Doctors' rights, accountability, professionalism and honesty is our priority". Further that the Union name Kenya Medical Doctor Union(KMDU) is sufficiently similar with Kenya Medical Practitioners, Pharmacists and Dentist Union(KMPDU), hence if the promotion certificate is issued to the Petitioners, the Union is likely to cause confusion within the medical sector.
21. The affiant stated that while checking the requirement for registration of a new Union, they are requirement to confirm the scope to be covered by the Union as provide for under section 14 of the [Labour Relations Act](#), to ensure they do not cover the same areas covered by other Union to avoid proliferation of trade unions in the same sector and enhance harmony in the industrial relations.
22. On that basis, the affiant stated that the scope of the proposed petitioner Union was to cover medical doctors who are already members of KMPDU as such the 1st respondent should be allowed to securitize the petitioner Application and make an informed decision.
23. The affiant also stated that the right to form and join a trade Union under Articles 36 and 41 of [the Constitution](#) is not an absolute right, therefore that the petition herein is not merited and should be dismissed with costs to the Respondents.
24. The 3rd Respondent also opposed the petition and filed grounds of opposition dated 15th May, 2024, based on the following grounds; -
 1. That the discretion to issue/deny a Promotion Certificate prior to registration of a Trade Union is domiciled in the Office of the Registrar of Trade Unions under section 12 of the [Labour Relations Act](#) and therefore this Honourable Court cannot compel the Registrar to issue a Promotion Certificate to the petitioners as prayed.



2. That the discretion to register/decline to register a Trade Union is domiciled in the Office of the Registrar of Trade Unions under section 19 of the [Labour Relations Act](#) and therefore this Honourable Court cannot compel the Registrar to register the proposed Trade Union as prayed.
 3. That while issuing a promotion Certificate under section 12 or registering a Trade Union under section 19, the Registrar is mandated to exercise discretionary powers conferred by the [Labour Relations Act](#) without direction from any other person or authority.
 4. That it would amount to usurpation of the powers and authority of the Registrar of Trade Unions if the Court were to direct her to issue a Promotion Certificate or Register the proposed Trade Union without exercising her statutory discretion as provided under the law.
 5. That whereas this Honourable court has powers to compel the Registrar of Trade Unions to process the petitioners' application for registration of a Trade Union, such powers of the court cannot go into the merit of the said application as in so doing, the court will not only be acting ultra vires its judicial powers but will also amount to usurpation of the administrative powers of the Registrar of Trade Union.
 6. That whereas the Registrar is expected to issue a Promotion Certificate within thirty days of receiving an application or communicate her decision one way or the other to the promoters; no evidence has been adduced in this petition to show that the petitioners' letters to Registrar were actually delivered.
 7. That none of the four letters addressed to the Registrar, which have been exhibited in this petition shows on their faces that they were delivered as there is no acknowledgment stamp on them and furthermore, no explanation has been offered by the petitioners as to how and when the said letters were actually, delivered.
 8. That this court can therefore not issue orders of mandamus compelling the Registrar to process the petitioners' application for a promotion certificate under section 12 of the [Labour Relations Act](#) without proof that the Registrar indeed received the petitioners' application but chose to not act on it.
25. In a rejoinder brought through the affidavits of 20th February, 2024 and 5th June, 2024, sworn by the 2nd Petitioner. The Petitioner stated that he is a Kenyan citizen and a resident & Medical officer in training (Registrar) under College Of Surgeons of East, Central and Southern Africa (COSECSA) Surgery programme. He confirmed that he not a member of any labour union in Kenya or anywhere in the world and thus the promoters of this new union- Kenya Medical Doctors Union being sui juris and compos mentis.
 26. In response to the 3rd Respondent's Grounds of Opposition that this honourable court cannot compel the registrar to issue promotion certificate, he stated this court has powers pursuant to Article 1(3)(c) to compel the registrar to issue promotion certificate in situations where the registrar of trade unions fails/neglected/is unwilling/derelects to discharge her constitutional and/or statutory obligations as it is the case in this matter where the registrar constitutional has failed to give a reply to the petitioners' application for registration of a new union for the last 2 years(since 7th July 2022) despite clear statutory requirements of section 12(3) of [Labour Relations Act](#).
 27. On the allegations that in compelling Registrar of Trade Unions to issue promotion certificate is usurpation of her powers and authority, he stated that the same has no legal nor constitutional foundation since the court has been invited to issue judicial review orders of mandamus pursuant to



- Article 23(1) & (3)(f) due to the failure of the by the 1st Respondent (Registrar of Trade Unions) to perform her function.
28. On the 5th Ground, it was stated that the 3rd Respondent has failed to appreciate that despite 4 consecutive letters sent to the 1st Respondent, the registrar has neglected/derelicted/failed to process the same since the year 2022(2 years ago). The registrar having failed to process the application by either approving it or rejecting it and only keeping quiet, she has consequently invited the court to her desk by her actions and/or omissions.
 29. In response to ground 6 to 8 , it was stated; Firstly, that It's only the registrar who can accept or deny that she did or she didn't receive the applications/letters and reminders for the last 2 years and not the 3rd respondent. Therefore, the 3rd Respondent has no loci standi to depose on behalf of the registrar(ROTU). Secondly, by her own admission on paragraph 6,7,8,9, &10 and attachment of the same as annexure marked BM(Beatrice Mathenge) BM1,BM2,BM3 &BM4 on her replying affidavit dated 19th March 2024 the registrar herself confirmed receipt of the Application and the reminder letter. Hence, the argument by the 3rd Respondent does not hold water and is otiose, is a hearsay and has no probative value in this petition.
 30. In response to the Replying affidavit by the 1st Respondent, the affiant stated that the allegations that the 1st Petitioner Yvonne Kwamboka did not apply for registration of union, is false since she is among pioneers of the proposed union and her name has been shown in her own annexure "BM3. In any event, the Registrar (1st respondent) has accepted Dr. Apima Abel Onyancha(1st petitioner) did apply for registration of new union and is a proper petitioner in this case. Thus, there is no rationale of classifying this petition as defective since there is no requirement in law or otherwise that a petition should have more than one petitioner.
 31. On the allegations that Dr.Lucky Kaguongo has "likely" lost interest in matters union. He stated that the same is without basis as no evidence was tender in support of these allegations. Additionally, that the Registrar has avoided the substratum of the petition and majorly dwelt on sideshows.
 32. The affiant stated that the allegations that the excess workload, cause the delay in considering the Application should not be used as an excuse for failure by the registrar to perform her constitutional functions.
 33. On allegations that the Application was not merited having be made in a letter head of the proposed Union, the petitioner stated that the same is fallacious on the basis that its clearly written "proposed" and even if this was the reason for rejection, the same was never been communicated to the petitioners. Further that for any other reason that the registrar deems fit to reject the Application, the same ought to have been communicated to the petitioner including on the alleged similarity of name with KMPDU.
 34. The affiant maintained that the Respondent violated on his rights in failing to communicate whether the Application was merited or otherwise.
 35. Directions were taken for the Petition to be canvassed by written submissions. However only the Petitioners and the 3rd Respondent filed Submissions. The 1st and 2nd Respondent opted to rely on its Replying affidavit.

Petitioners' Submissions.

36. The petitioner submitted from the onset that while interpreting *the constitution*, the same should be in a manner that promotes its purpose, values and principles, advances the rule of law, human Rights and fundamental freedoms in the Bill of rights and that contributes to good governance. In this they relied



on the case of Institute of Social Accountability and Another Vs National Assembly & 4 Others[2015] eKLR.

37. The Petitioners submitted that it is important for actions of the Respondent to be controlled by the Rule of law as emphasized by a three Judge bench in the case of Salaries and Remuneration Commission & Another Vs Parliamentary Service Commissions & 15 Others; Parliament & 4 Others (Interested parties)[2020] eKLR where the Court held that;-

“Similarly, the principle of the rule of law, which is a foundational principle of *the Constitution*, requires the exercise of public power to conform to *the Constitution* and the enabling statutes. The rule of law requires that a decision, viewed objectively, must be rationally related to the purpose for which the power was given. The rule of law, is one of the constitutional controls through which the exercise of public power is regulated by *the Constitution*. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be *the Constitution* or statute. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the four corners of their powers or duties. They are also acting as guardians of sovereignty of the people by ensuring that the exercise of power is in accordance with the scope and purpose of the instruments conferring the power. As Currie points out “*the Constitution*, premised as it is on the doctrine of constitutional supremacy, attempts to reconcile two conflicting goals: to establish a state system with enough power to govern, and to find ways of constraining and regulating that power so that it is not abused. The rule of law, and the related principles of legality and accountability are the central constitutional doctrines governing the exercise of public power.”

38. Based on the foregoing, the petitioner submitted that it is important to award them appropriate reliefs as prayed to rectify the injury/violation and damage caused to them by the Respondent’s failure to process the registration of the proposed trade Union.
39. The petitioners submitted that they have followed the law in seeking for the promotion certificate and registration of the trade Union, however that the 1st Respondent has failed without any reason to register the trade Union in total violation of *the Constitution* under Articles 36 and 41 and Sections 4,12,14,17,18 and 19 of the *Labour Relations Act*. Further that the 1st Respondent has breached its statutory mandate conferred to its office to discharge its duties fairly and reasonably.
40. The petitioners submitted also that the inaction by the 1st Respondent and the lack of communication for more than one year was grossly unreasonable as was held in the case of Republic Vs Vice chancellor Moi University & 2 Others Ex parte Benjamin J Gikenyi Magare[2019] eKLR where the court quoted the case of Pastoli V Kabale [2008] 2 EA 300 , where the Court of Appeal held that;-

“...irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....Procedural impropriety is when there is a failure to act fairly on the part of the decision – making authority in the process of taking a decision. The unfairness may be its non-observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”



41. Justice G.V Odunga was of the similar view as held in the case of Republic Vs Chief Licensing Officer & Another Ex parte Tom Mboya Onyango [2017] eKLR where the judge held that:-

“The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, the executive should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the executive is not one of the reasons upon which it is legally entitled to act, the Court is entitled to intervene since the action by the executive would then be based an irrelevant matter.”

42. The petitioners submitted also that they had legitimate expectations that all persons including public institutions would follow the law and that once they made application for the registration of the trade Union, they would get the same registered and at the very least feedback from the Registrar of the 1st Respondent. Failure to give any feedback would amount to abuse of office. To support this argument, they relied on the case of Oindi Zaippeline & 39 Others V Karatina University & Another [2015] eKLR where the Court held that:-

“Legitimate expectation” is a doctrine well recognized within the realm of administrative law. In re Westminster City Council, [1986] A.C. 668 at 692 (Lord Bridge):“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation. Legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill a promise.”

A party that seeks to rely on the doctrine of legitimate expectation has to show that it has locus standi to make a claim on the basis of legitimate expectation. Wade and Forsyth in their work, Administrative Law, 10th edition (pages 446-448), discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation. Citing the House of Lords decision in R. v. DPP ex p. Kebilene [1999] 3 WLR 972 (HL), the learned authors observe that a statement made by a Minister cannot found an expectation that an independent officer will act in a particular way. In R. v. DPP ex p. Kebilene, (supra) it was stated that clear statutory words override any expectation howsoever founded. The principle of legitimate expectation is well reflected in judicial practice in Kenya. In Republic v. Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR it is stated that legitimate expectation cannot override the law. In Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited [2004] 2 eKLR 530 it was held a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Legitimate expectation is founded upon a basic principle of fairness - that legitimate expectation ought not to be thwarted – that in judging a case a Judge should achieve justice and weigh the relative strength of expectation. In South African Veterinary Council v. Szymanski 2003 (4) S.A. 42 (SCA) at [paragraph 28]: the Court held that “the law does not protect every expectation but only those which are ‘legitimate’”. The requirements for legitimate expectation include the following:



- i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit -98- Petition No. 14 of 2014 [Judicial Review of Administrative Action 5th ed] at 425 para 8-055).
- ii. The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
- iii. The expectation must be reasonable: Administrator, Transvaal v. Traub (1989 (4) SA 731 (A)) at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8- 037).
- iv. The representation must have been induced by the decision- maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney- General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.
- v. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v. Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G. This was also referred to with approval in Walele v. City of Cape Town and Others; 2008 (6) S.A 129 (C.C.) paragraph 41. -99- Petition No. 14 of 2014.”

43. On the reliefs sought, the Petitioner urged this Court to grant the reliefs sought of mandamus and compel the 1st Respondent to issued the Promotion Certificate to enable the registration of the proposed trade Union.
44. On costs, the petitioner submitted that costs follow event as was reiterated by the Court in the case of Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 Others [2014] eklr and prayed for costs of this Petition to be awarded to them.

3rd Respondent's Submissions.

45. The Respondent herein submitted on three issues; whether prayer for mandamus is competent, whether this court can issue the orders of mandamus in the manner prayed for and who bears the costs.
46. On the first issue, it was submitted that the petitioners have not demonstrated that they served the request for issuance of a promotion certificate under section 12 upon the Registrar of Trade Union(ROTU). Further, despite exhibiting correspondence allegedly addressed to the ROTU, there is no proof that the same were served as there is no acknowledgment stamp from the office of the ROTU on the said exhibited documents. Additionally, that the petitioners have not demonstrated the manner in which their request was served. Hence the statutory duty of the ROTU under section 12 of the *Labour Relations Act* did not crystallize and the Orders of mandamus cannot issue to compel the ROTU to do that which she has not been made aware of. In support of this, he relied on the case of



Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] eKLR, where Justice P, Nyamweya (as she then was) stated thus:-

“Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out.”

47. Similarly that in the case of Republic v Baringo County Public Service Board Ex parte Zipporah Mwangi & 18 others [2017] eKLR, Radido J, while declining an application for mandamus, stated thus:-

“The ex parte applicants have not demonstrated that they had made any attempts to have the Respondent to pay the costs as taxed. There is also no evidence that the certificates of costs were served upon the Respondent. In the view of the Court, an order compelling the respondent to pay the taxed costs should only issue after a demonstration that the Respondent has refused, failed or neglected to pay the costs. It would not be prudent to issue an order compelling the performance of a duty or obligation without evidence that the party under the duty or obligation has failed to act.”

48. On the second issue, whether this court can issue the orders of mandamus in the manner prayed for, it was submitted that the petitioners have urged this Court to compel the ROTU to issue them with a promotion certificate to enable them promote a new trade union to be known as Kenya Medical Doctors Union, when they have not complied with the requirement under section 12 of the *Labour Relations Act*. Further, that to ask for an order to compel the ROTU to issue the said certificate and to also register the trade union is tantamount to taking away the discretionary powers exercisable by the ROTU under the Act. In this, they relied on the Court of Appeal case of the *Kenya National Examination Council V Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 Of 1996* where the Court described the purpose of an order of mandamus as follows:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

49. It was argued further that in ordering for ROTU to issue the impugned certificate and to register the proposed trade union, this Court will be guilty of usurping the powers and discretion of the ROTU under sections 12 and 19 of the Act. In this, they relied on the case of Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] eKLR, as follows:

“It was noted by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that even though Article 47 of *the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act*, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator. Therefore, in granting an order of mandamus in the manner



sought, this Court will also be usurping the roles of other public bodies that regulate academic programmes, which is a forbidden in judicial review.”

50. In light of the foregoing, the Respondent submitted that the only order that can be made by this Court is to direct the ROTU to consider the petitioners’ request and determine it, one way or the other, according to the relevant law and only after the Court is satisfied that the Application was served on the 1st Respondent.
51. In conclusion, it was submitted that in light of the fact that no evidence has been adduced to demonstrate that the ROTU actually received the petitioners’ request and chose not to process it, the petition is premature as the petitioners’ rights have not crystallized. He thus urged this Court to find that the petition is unmerited and dismiss it in limine.
52. I have examined all the averments and submissions of the parties herein. The issues for this court’s determination are as follows:-
 1. Whether the Petitioners are the right parties to file this petition.
 2. Whether this court can compel the Registrar of Trade Union to issue promotional certificate for establishment of the proposed trade unions.
 3. What remedies the court can grant in the circumstances.

1. Locus

53. The Respondents have submitted that the 2nd Petitioner was not one of the Applicants who applied for a certificate to promote the establishment of the proposed Union and hence cannot file this Petition.
54. A look at the documents herein show that vide a letter of 7th July, 2022 Dr. Apima Onyancha Abel and Dr. Lucky Kiguongo wrote to the Registrar of Trade Unions an application letter as follows:-

“RE: APPLICATION REQUEST FOR CERTIFICATE OF ESTABLISHMENT OF A TRADE UNION-KENYA MEDICAL DOCTORS UNION (SEC 12(2) of the LRA)

The above refers.

Pursuant to section 12 (2) of the *Labour Relations Act* 2007, we the undersigned promoters of the formation of the new union today on 7th day of July 2022 (saba saba day) do hereby kindly request your esteemed office for a certificate of establishment, our new union – Kenya Medical Doctor’s Union.

Further Pursuant to section 12 (2)(b) of the *Labour Relations Act* 2007, the proposed name for our union is KENYA MEDICAL DOCTORS UNION

We intent to use the union for purposes of agitating for rights of our members pursuant to article 41 (2) of *the Constitution* 2010 which states “Every worker has the right to form join or participate in the activities and programmes of a trade union”. We the promoters undertake to do only lawful activities in the labour movement. Hoping to hear from you within the next 30 days pursuant to section 12 (3) of the *Labour Relations Act*, 2007.”

55. As per this letter, the application was brought under section 12 (2) of the *Labour Relations Act* 2007 which states as follows:-

“ 12.



- (2) An application for the certificate referred to in subsection (1) shall—
 - (a) be signed by two persons who are promoting the establishment of the trade union or employers' organisation;
 - (b) specify the name of the proposed trade union or employers' organisation; and
 - (c) contain any other prescribed information.”

56. Under section 12 (2) above the application for promotion must be signed by two persons who are promoting the establishment of the trade unions etc and the Registrar is compelled under section 12 (3) to issue the certificate within 30 days of receiving the application unless:

- “(a) the application is defective; or
- (b) the name of the proposed trade union or employers' organisation is the same as that of an existing trade union or employers' organisation or is sufficiently similar so as to mislead or cause confusion.”

57. The 1st Respondent, the Registrar of Trade Unions (RTU) has indicated that the Certificate of Promotion was never issued as anticipated as there was no substantive RTU in the office after the former Registrar retired. She averred that the omission to respond was not deliberate.

58. That notwithstanding the current matter before me is a petition seeking certain equitable remedies under *the Constitution* of Kenya at Article 41.

59. As provided under Article 22 (1) *the Constitution* “Every person has the right to institute court proceedings claiming that a right on fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.a

60. The fact that the 2nd Petitioner was not one of the two who applied as promoters of the proposed union is not a bar in the circumstances for her to apply to seek to enforce a constitutional right.

61. The preposition that the Petitioner lacks locus to file this petition is therefore without any merit and is disregarded.

Issue No. 2

62. Can the court compel the Registrar of Trade Unions (RTU) to issue a Promotional Certificate? Section 12 of the *Labour Relations Act* has been cited above and under sub section (3), the Registrar of Trade Unions (RTU) may issue the Certificate unless the application is defective or as (b) above, the proposed trade union is the same or similar to an existing one or for some sufficient reasons.

63. My understanding of this provision is that the Registrar of Trade Unions (RTU) is not to issue the promotional certificate blindly but must consider its viability before giving directions. The Registrar of Trade Unions (RTU) has indicated that she had no opportunity to consider the application as she was not in office and the previous occupier had retired.

64. Given this position, it is obvious that the Registrar of Trade Unions (RTU) has not had time to consider the viability or otherwise of the proposed union.



65. It is therefore this court's position that the remedy available to the Petitioners at this point is to compel the Registrar of Trade Unions (RTU) to consider their application and respond to their request within 14 days. There will be no order of costs.

JUDGMENT DELIVERED VIRTUALLY THIS 4TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Julius Juma for 3rd Respondent – Present

Bitek for Petitioner – Present

Court Assistant - Fred

