

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC PETITION NO. E140 OF 2024 CONSOLIDATED WITH E160 OF
2024

**KENYA NATIONAL PRIVATE SECURITY
WORKERS UNION.....PETITIONER**

VERSUS

THE PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

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

ANNE KAGWIRIA KANAKE.....3RD RESPONDENT

**FORUM FOR GOOD GOVERNANCE
AND HUMAN RIGHTS.....4TH RESPONDENT**

**THE CABINET SECRETARY, MINISTRY
OF LABOUR AND SOCIAL PROTECTION.....5TH RESPONDENT**

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT
FOR LABOUR AND SKILLS DEVELOPMENT.....6TH RESPONDENT**

**KENYA UNION OF SPECIAL AND
PROFESSIONAL GUARDS.....7TH RESPONDENT**

JUDGMENT

In the Nairobi Petition No. E140 of 2024, the Petitioner Kenya National Private Security Workers Union has sued seven (7) Respondents including, The Public Service Commission (PSC) 1st Respondent; The Registrar of Trade Unions 2nd Respondent, Anne Kagwiria Kanake, 3rd Respondent, Forum for Good Governance and Human Rights, 4th Respondent, The Hon. Cabinet Secretary Ministry of Labour and Social Protection, 5th Respondent, The Principal Secretary, State Department for Labour and

Skills Development, 6th Respondent and Kenya Union of Special and Professional Guards (KUSP RoG) 7th Respondent.

The petition is dated 11th September 2024 and seeks the following reliefs:

- (a) A declaration that the issuance of certificate of registration No. TU 258, No. TU 193 or any other by the 3rd Respondent was illegal, fraudulent and in contravention of directions of the court given on 5th June 2024 in Kisumu ELRCA 5 of 2020 and sections 14, 18 and 31 of Labour Relations Act.
- (b) A declaration that the appointment of the 3rd Respondent as the Acting Registrar of Trade Unions by the 1st Respondent contravened Articles 231-234 of the Constitution and section 32 and the PSC manual and section 31(1) of Labour Institutions Act.
- (c) A declaration that registration of the 7th Respondent as a trade union by the 3rd Respondent is null and void.
- (d) A declaration that the purported appointment of Anne Kagwiria Kanake as the Deputy Registrar Trade Unions and Acting Registrar of Trade Unions contravenes Articles 233(1) (g), 20(1)(2), 21, 22, 24,27,43,46(1)(c),47(1), 48,73(1),75,129, 154(4)(a), 159(1), 232, 259(1) of the Constitution.
- (e) A declaration that the appointment of the 3rd Respondent as the Acting Registrar of Trade Unions by the 1st Respondent contravened Articles 231 – 832 and the section of 32 and the PSC manual and section 31(i) of the Labour Institutions Act, Public Service Act and Human Resource Act.

AN ORDER

- (f) Compelling the 1st Respondent to establish the position of the Registrar of Trade Unions under the Staff Establishment of the office of the Registrar of Trade Unions Article 232 of the Constitution.
- (g) A permanent injunction restraining the 3rd Respondent from holding the position of Deputy Registrar and on discharging any duties and responsibilities as such.
- (h) A permanent injunction be issued restraining the 3rd Respondent from;
 - (i) Holding the position of Acting Registrar of Trade Unions.
 - (j) Compelling the Public Service Commission to establish the office of the Registrar of Trade Unions.
- (k) The registration of the 7th Respondent as a trade union by the 3rd Respondent be cancelled or nullified.
- (l) Nullifying the appointment by the Public Service Commission of Anne Kagwiria Kanake to the office of Deputy Registrar of trade unions.
- (m) Nullifying the appointment by the Public Service Commission of Anne Kagwiria Kanake to the office of Acting Registrar of trade unions.
- (n) Nullifying certificates of registration of Kenya Union of Special and Professional Guards and any entry thereof in the register of trade unions.
- (o) An order compelling the 1st Respondent to establish the position of the Registrar of Trade Unions under the staff establishment of office of the Registrar of Trade Unions and as provided for in Article 232 of the Constitution.
- (p) Compelling the Respondents to pay the costs of this suit.
- (q) Damages

(r) Any other relief the court may deem just to grant

Meanwhile, William Lengoyiap filed a public interest Nairobi Petition no. E160 of 2024 dated 1st October 2024 suing PSC, 1st Respondent Anne Kagwiria Kanake, 2nd Respondent, The Cabinet Secretary Labour, 3rd Respondent, PS Labour 4th Respondent and Forum for Good Governance and Human Rights, 5th Respondent seeking the following reliefs:

- i. A declaration that the procedure of appointment of the 2nd Respondent to the position of Deputy Registrar of Trade Unions by the 1st Respondent was fatally flawed, irregular, illegal, unprocedural and in contravention of the Constitution 2010, the Labour Institutions Act, Public Service Commission Act, Public Service Commission Regulations 2020 and the manual and the same is null and void.
- ii. A declaration that the procedure of and the appointment of the 2nd Respondent to the position of Ag. Registrar of Trade Unions by the 1st Respondent was fatally flawed, irregular, illegal, unprocedural and in contravention of the Constitution 2010, the Labour Institutions Act, Public Service Commission Act, Public Service Commission Regulations 2020 and the manual and the same is null and void.
- iii. A declaration that the failure by the 1st Respondent to establish the post of Registrar of Trade Unions in the approved staff establishment of the office of Registrar of Trade Unions is in contravention of the mandate of the 1st Respondent donated to it under Article 234 of the Constitution.
- iv. A declaration that the decision by the 1st Respondent contained in its letter dated 2nd August 2024 removing Ms. Mathenge from office as the Acting Registrar of Trade Unions and appointing the 2nd

Respondent in her place was ultra vires, illegal, irregular, unprocedural, unfair and against Article 47 of the Constitution and section 4 of the Fair Administrative Active Act.

- v. An order of certiorari be and is hereby issued quashing the letter dated 2nd August 2024 by Public Service Commission purporting to terminate the mandate of Ms. Beatrice Mathenge as Ag. Registrar of Trade Unions and appointing the 2nd Respondent in her place.
- vi. An order directing the 1st Respondent to immediately establish the post of Registrar of Trade Unions under the staff establishment of office of the Registrar of Trade Unions and subsequently advertise for the filing of the same within such timelines as the court may determine.
- vii. Costs of the petition be provided for.

The common denominator in the two petitions is nullification of appointment of Anne Kagwiria by the Respondents as the Deputy Registrar of Trade Unions and the Acting Registrar of Trade Unions; Reinstatement of former Acting Registrar of Trade Unions, Ms. Beatrice Mathenge and the establishment of substantive post of the Registrar of Trade Unions.

The Petitioner in Petition E140, is also aggrieved by the registration of the Kenya Union of Special and Professional Guards (KUSP RUA) by Ms. Anne Kagwiria Kanake and seeks nullification of the said registration of the 7th Respondent in Petition E140 OF 2024.

The two matters though not consolidated were placed together by consent of the parties for the court to consider and determine the two petitions together.

The issues for determination broadly in the two petitions therefore are:-

- i. Whether the appointment of Ms. Anne Kagwiria Kanake to the substantive position of Deputy Registrar of Trade Unions and Acting Registrar of Trade Unions is lawful.
- ii. Whether the registration of Kenya Union of Special and Professional Guards (KUSP RUG) was unlawful.
- iii. What reliefs if any should the Petitioners be granted.

Issue I

The Commission established the position of Registrar of Trade Unions with an authorized establishment of one (1) post pursuant to Article 232(2) of the Constitution as read with PSC Act and PSC Regulations 2020.

That the Commission advertised for the position of Deputy Registrar of Trade Unions in 2023. That following the advertisement, the 3rd Respondent Ms. Kanake applied for the said position of Deputy Registrar Trade Unions and copies of the advertisement and list of Applicants was placed before court marked PF '4' and '2' respectively.

The Commission shortlisted two candidates for the position of Deputy Registrar of Trade Unions and Ms. Kanake was one of the two. The shortlist is marked PF '4' and she emerged successful and was appointed

by the Commission to the position of Deputy Registrar of Trade Unions. The decision letter is marked PF '5' dated 29/5/2024.

Meanwhile the Commission received complaints against Ms. Beatrice Mathenge regarding her conduct as the Acting Registrar of Trade Unions which complaint included disobedience of court orders among other issues. At the time Ms. Mathenge had substantive post of a state counsel at the office of the Attorney General and Department of Justice.

The Commission considered the complaint and decided to release Ms. Mathenge back to the office of the Attorney General and Department of justice for appropriate deployment. The Commission further appointed Ms. Kanake as the Acting Registrar of Trade Unions pending recruitment of the substantive office holder. The letter communicating the decision was placed before court dated 2/8/2024 and marked PF. '6'. This decision was made in terms of section 34 of the Public Service Commission Act, the PSC Regulations 2020 and the applicable Human Resource Policies and Procedure Manual for the Public Service 2010.

The court has considered the objections to the appointment made by the Petitioner including that the said appointment as Acting Registrar of Trade Unions was illegal, irregular, unprocedural and unconstitutional.

The allegations that Ms. Kanake was not qualified to be appointed as Acting Registrar of Trade Union is unsubstantiated and without basis. The fact that Ms. Kanake was still serving probation as Deputy Registrar in terms of Clause 13.16(1) of the Human Resource Manual was not a bar for the Commission to appoint her in the Acting capacity as the Registrar while

still undergoing assessment as the Deputy Registrar. The Petitioners did not disclose any express provision of law that prohibited such appointment.

It is not demonstrated vide evidence that the commission did not follow section 31(1) of the Labour Institution Act, in the appointment of Ms. Kanake in the Acting capacity.

It is not also demonstrated that the 5th Respondent did any wrong in pointing out the ills that led to the ouster of Ms. Mathenge. The Commission is an independent body and there is no evidence it acted under undue influence from the 5th Respondent as alleged by the Petitioners or at all.

Clauses B3 (4) and 14 of the Human Resource Manual provides:-

B.3

(4) Recommendations for filling vacancies in Job Group 'M' and above in an acting capacity shall be submitted to the Public Service Commission. Such recommendations should be accompanied by a draft indent and a seniority list of officers including an account of their performance'.

B.14

1) It is the duty of the Authorized Officers, when making appointments under delegated authority, or in making recommendations for new appointments, to ensure that a candidate's record of previous employment is satisfactory in all respects.

(2) A candidate with a record of conviction should be employed only with the concurrence of the Public Service Commission.

(3) A candidate whose appointment in the Public Service had been terminated for any reason including resignation shall not be employed without prior approval of the Public Service Commission

While Regulation 16 of PSC Regulation 2020 provides:

16 (1)

'In selecting candidates for appointment or promotion, the provisions of section 36 of the Act and section 10 of the Public Service (Values and Principles) Act, 2012 shall apply and the Commission or authorized officer, as the case may be, shall have regard to— Criteria for appointment and promotion. No. 1A of 2015.

(a) merit, equity, aptitude and suitability;

(b) the prescribed qualifications for holding or acting in the office including abilities, skills, knowledge, experience and personal qualities relevant to carrying out of the duties;

(c) the efficiency of the public service;

(d) the provable experience and demonstrable milestones attained by the candidate and potential for development;

(e) integrity of the candidate; and

(f) the standards, values and principles set out in Articles 10, 27, 54 (2), 55 (c), 56 (c), 232 and Chapter 6 of the Constitution: Provided that the Commission or authorized

officer shall ensure that officers at entry level and at other levels to be determined by the Commission shall be vetted by competent state agencies before taking up positions in the public service'

The Petitioner was of the wrong view that Ms. Kanake had not been appointed as a Deputy Registrar as at the time she was appointed Acting Registrar. Appointment in a probationary capacity equals a full appointment in terms of the law, only subject to confirmation.

Ms. Mathenge was simply deployed back to her substantive position and any dispute regarding that deployment may only be contested by her against her employer.

The court is not aware of any dispute brought by Ms. Mathenge against her employer as alleged by the Petitioner or at all. Ms. Mathenge had no entitlement to remain in the acting capacity and could like anybody else apply to be substantively appointed as Registrar of Trade Unions as and when the position is advertised.

The court returns that the petition does not disclose any reasonable case against the Respondents. The petitions lack merit with regard to the appointment of Ms. Kanake as Acting Registrar and are dismissed accordingly.

Registration of 7th Respondent as a Trade Union

In Nairobi ELRC Appeal No. 9 of 2018, in which the 7th Respondent challenged refusal by the Registrar of Trade Union to issue the certificate sought by the promoters of the 7th Respondent, the court delivered a judgment on 22/3/2019 allowing the appeal and the Registrar was directed to issue the certificate of recruitment and same was issued.

The 7th Respondent's promoters made an application for registration of the 7th Respondent within 6 months and the Registrar declined the application. The decision was challenged in Kisumu ELRC Appeal No. 5 of 2020. The court delivered judgment dated 7/2/2024 allowing the Appeal and the court directed the Registrar of Trade Unions to register the 7th Respondent.

On 29/8/2024, the 7th Respondent was duly registered as a Trade Union and a certificate of registration issued accordingly.

This petition challenges a process concluded upon following of due process and supported by two judgments that were not appealed to the Court of Appeal. The court notes that the Petitioner participated and is fully aware of the due process followed in the registration of the 7th Respondent. The court is of the conclusion that the Petitioner is opening up matters already determined by the courts and is doing so in bad faith knowing that it did not appeal the decisions of the court and the matters are therefore *res judicata*.

That no valid constitutional issues have been raised here pursuable in law to open matters concluded by courts with jurisdiction.

The Petition No. E140 of 2024, lacks merit in the challenge of the registration of the 7th Respondent and equally lacks merit in challenging the appointment of Ms. Kanake in Acting position of Registrar of Trade Unions.

In sum the petition lacks merit in these respects and is dismissed accordingly.

Equally petition E160 of 2024 lacks merit in all respects and is also dismissed in its entirety.

The court notes that Petition E140 and E160 constitute private litigation disguised as public interest litigation to the extent the same challenges appointments and deployment of officers who have capacity to personally come to court in respect of any disputes that affect their contracts of employment between themselves and their employer.

The Petitioners have to this extent abused the provision of Article 23 of the Constitution on matters that lack merit completely and in respect of the union registration a matter that is *res judicata*.

To this extent this court is inclined to condemn the Petitioners to pay the costs of the respective petitions.

However, the court will not do so this time round but let this serve as a warning that unnecessary litigation may lead the courts to do so and order cost against them in future.

In conclusion the two petitions no. E140 and E160 of 2024 are dismissed with no order as to costs .

Dated at Nairobi this **2nd Day of October 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Wat for Petitioner

Ms. Sumba for Petitioner

Mr. Ogono for PSC

For Respondents:

Ms. Ochieng

Mr. Gichuhi

Ms. Aluoch

Mr. Kemboi – Court Assistant