

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC PETITION NO. E054 OF 2025

BERNARD MAGONYA.....1ST PETITIONER

MICHAEL BARASA.....2ND PETITIONER

VERSUS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

JUDGMENT

The Petitioners applied for a recruitment certificate under section 12(1) of the Labour Relations Act, 2007 to the Registrar of Trade Unions which section provides:-

“12(1) No person shall recruit members for the purpose of establishing a trade union or employers’ organization unless that person has obtained a certificate from the Registrar issued under this sections.”

In terms of the letter attached to the petition, the Petitioners intended to register Tourism Workers Union.

That on 5/12/2024, the Petitioners visited the office of the Registrar to follow up on the application and were verbally advised to go and redraft the application letter by expounding on the necessity of the recruitment certificate.

That the Petitioners wrote a letter dated 5th December 2024, expounding on the need for the proposed trade union and the Respondent acknowledged receipt of the same on 3rd February 2025.

That on 11th March 2025, the Petitioners once more visited the office of the Registrar to follow up on the matter and the Registrar served them with a letter declining registration.

The Petitioners state that the Registrar misdirected herself by invoking section 14(d) of the Labour Relations Act which refers to the registration certificate to deny the Respondent the certificate for recruitment under section 12(1) of the Act.

That the Respondent did not observe values and principles of governance enshrined under Article 10 of the Constitution.

That the Respondent violated Articles 19, 20(4), 36(1)(2), (3) and 41(c) of the Constitution. That Article 36 and 41 grant every person the right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind and that a person shall not be compelled to join an association of any kind and any legislation that requires registration of an association of any kind shall provide that registration may not be withheld or withdrawn unreasonably and there shall be a right to have a fair hearing before a registration is cancelled.

That Article 41(2)(c) provides that ***“Every worker has the right:- to form, join or participate in the activities and programs of a trade union;”***

That the Respondent's decision violated the constitution and the court be pleased to issue the following reliefs:-

- (a) A declaration be and is hereby issued that the Respondent's decision in her letter dated 12th February 2025 and served upon the Petitioners on 11th March, 2025 is in contravention to the constitutional rights and freedoms of the Petitioners provided in the Bill of Rights.
- (b) A declaration be and is hereby issued to set aside and or quash the Respondent's decision dated 12th February, 2025 against the Petitioners.
- (c) A declaration be and is hereby issued that the Petitioners' applications dated 12th November 2024 and 5th December, 2024 for the recruitment certificate complied with the law and be granted by the Respondent to the Petitioners forthwith.

Replying Affidavit

The Respondent filed replying affidavit dated 10th April 2025 sworn to by Ann K. Kanake, the Registrar of Trade Unions in which she acknowledges receipt of an application for the issuance of a promotional certificate for a proposed trade union under the name Tourism Workers Union.

That under section 14 (1) (d)(i) of the Act, a trade union can only apply for registration if there is no other trade union already registered which is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the Petitioner seek registration.

The Petitioners indicated that the scope of the workers they intended to represent were drawn from employees working as wardens and animators in the regions of Masai Mara, Samburu, Amboseli, Tsavo, Voi, Naivasha and Mount Elgon among other regions currently not in the Union whilst the

constitution of Kenya Game Conservancy Tours & Safari Workers Union provides that its membership includes any person working in the national parks, game and other tourism related fields

That the Respondent factored in all the provisions of sections 12 and 14 of the Act in declining to issue a promotion certificate, and consequently gave her reasons for the decline in writing as outlined in the Labour Relations Act. That the petition is misconceived, misplaced and without any legal backing.

DETERMINATION

The parties and the Respondent filed written submissions which the court has carefully considered together with the depositions by the parties and the issues for determination are:-

- (a) Whether the Petitioners have violated the doctrine of constitutional avoidance.
- (b) Whether the Respondent violated Petitioners' rights under Article 36 and 41(c) of the Constitution

It is not in dispute that the Respondent declined to issue a certificate to recruit members of a proposed union applied for by the Petitioners in terms of section 12(1) of the Labour Relations Act 2007.

It is also not in dispute that the letter refusing the grant of the recruitment certificate was dated 12th February 2025 and the Registrar relied on the provisions of section 14(1) of the Labour Relations Act which provides that:-

“14(1) A trade union may apply for registration if

(c)no other trade union already registered is---

(d)(i) in the case of a trade union of employers or employees, sufficiently representative of the whole or of a substantial proportion of the interest in respect of which the applicants seek registration.”

The Respondent stated that she looked at the constitution of existing trade union and in particular, the Kenya Game Conservatory Tours and Safari Workers union and was satisfied that the constitution of the union provides that the membership includes any person working in national parks, game reserves and other tourism related fields.

The court was referred to the case of ***Kenya Plantation and Agricultural Workers Union versus Omulama and 9 others (The Kenya Expert – Floriculture, Horticulture and Allied Workers Union (KUFHU) represented by its promoters [2020] KESC 59 (KLR)*** where the Supreme Court in making their decision stated:-

“...we have to make it clear from the onset that section 14(1)(d) of the Labour Relations Act does not operate in a vacuum. The Registrar has to make an inquiry on any objection before arriving at a decision to reject or allow an application.

The court further stated that ‘....Generally speaking the regulation of registration of trade union and imposition of reasonable conditions for their registration are not unconstitutional limitations of the right and freedom to form and join a trade union nor is the specific limitation that a trade union is not qualified to be registered if there is in existence another

trade union which is sufficiently representative of the whole or a substantial proposition of the interest sought to be protected by a proposed trade union. The latter condition has existed since 1952 and has achieved stability in industrial relations and fostered economic stability. It is a reasonable and justifiable condition in an open and democratic society.'

The court was further referred to the case of ***Kenya Salt Workers Union (represented by its promoters and applicants) and 6 others versus Registrar of Trade Unions. Kenya Chemical Workers Union (Interested Party) [2025] KECA 119 (KLR)***, in which the court held that there are limitations to the rights under Articles 36 and 41(c) of the Constitution of Kenya 2010. That in terms of Article 24(1) of the Constitution which provides:-

“24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;***
- (b) the importance of the purpose of the limitation;***
- (c) the nature and extent of the limitation;***
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

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

The court was referred to the case of Osicho versus the Registrar Trade Unions, ELRC Appeal No. 7 of 2016 in support of the submission by the Petitioners that the Registrar invoked the wrong provision of the law being section 14(1) (d)(i) of the Labour Relations Act where the court stated:-

“The issue of another union with similar objective does not come in at this stage of recruitment. Rejecting the application of the application to recruit members for purposes of registration is denying them their labour rights as envisaged under Article 41 of the Kenya Constitution.”

At this stage the court refers to the provisions of section 30 of Labour Relations Act which provides:-

“Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court (read ELRC) against that decision within thirty days of the decision.”

Here is an express and clear statutory provision of Labour Relations Act, 2007 which guides a person aggrieved by a decision of the Registrar on how to approach the court.

In a blatant breach of the doctrine of constitutional avoidance, the Petitioners chose to bring this petition dated 26th March 2025 to challenge the decision of the Registrar. The petition was brought outside the 30 days period within which an Appeal could be brought against the decision of the Registrar.

The doctrine and necessity of the requirement not to elevate every dispute to a constitutional matter where we have statutory provision to address the matter were eloquently stated by **Nduma J in Adika v Embassy of Sweden Nairobi (Employment and Labour Relations Petition E144 of 2023) [2024] KEELRC 2608 (KLR) (24 October 2024) (Judgment)** where it was held that;

*“The Petitioner has admitted that indeed that there is an alternative remedy available at the Retirement Benefit Tribunal on the matter of payment of interest but the tribunal is devoid of jurisdiction to determine the constitutional issues raised here to wit deprivation of property rights under section 40 of **the constitution**, violation of economic and social rights under Article and unfair administrative action in violation of Article 47 of **the Constitution** which the court is now seized of.*

Upon careful consideration of all the above issues, this court is of the finding that the petitioner ought to have first referred this

matter to the Retirement Benefits Tribunal. The petitioner is guilty of not exhausting alternative remedies.

Furthermore, the court finds that it is not necessary to determine the constitutional issues raised in this petition to afford the petitioner appropriate relief of payment of interest that is due and owing to him by fact of late payment by the Respondent. The Petitioner ought to have avoided this suit in favour of other appropriate statutory remedies available to him”.

The court has handled many appeals under section 30 of Labour Relations Act, including the case quoted by the Petitioners in their submissions namely ***Osicho versus the Registrar Appeal No. 7 of 2016 (Supra)***.

It is without doubt that the Petitioners were aware that they had a right of appeal against the decision of the Registrar under section 30 of the Labour Relations Act but chose not to follow the statutory law

The court is satisfied that this was a deliberate failure to observe the doctrine of constitutional avoidance which in the court’s view and finding is fatal to this petition and the court finds so.

For completion, the court is satisfied that the provision of section 14 of Labour Relations Act apply to the entire process of registration of a union from the time of application of a certificate under sections 12, 13, 14 and 15 which speak to the ***“Establishment and Registration of Trade Unions and Employer organizations”*** which is the title of Part III of this Act.

This provision must be read and interpreted as a whole without one provision nullifying another. Section 12(1) speaks to obtaining a certificate from the Registrar for the purpose of establishing a trade union or employer organization. That the trade union intended to be established must be known and disclosed to the Registrar from the outset for the Registrar to make a considered decision whether to issue the certificate for the purpose of, recruitment, promotion and eventual registration of the union. The provision of section 14(1)(b)(i) come into play in that whole consideration and the said provision cannot be excluded for consideration on the basis of being too early in time or irrelevant at the point of applying for the certificate.

Accordingly, this petition fails even on the merit. The Petitioners have not proved that the Registrar violated their rights under Articles 36 and 41(c) of the Constitution of Kenya 2010.

In the end this petition is dismissed for two reasons:

- (a) For the violation of the doctrine of constitutional avoidance and
- (b) For lack of merit.

Dated at Nairobi this **30th Day of October 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Wanyaga for Petitioners

Ms. Aluoch for Respondent
Mr. Kemboi – Court Assistant

ORIGINAL