

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. E147 OF 2025

(Before D. K. N. Marete)

1. WYCLIFFE OTIENO OGENYA

2. BARBARA WANJIKU WACHUKA

3. BENARD ODHIAMBO MBOYA

4. LILIAN NYOKABI WANJOHI

5. TITUS MUSA OMONDI KHADUDU

6. ANNE MBULA MAKAU

7. EMILIO NYABWARI NYABENDE *(Suing on behalf of themselves and of all other members of the Kenya Union of Community Health Workers (KUCH-W.))*

.....**APPELLANT**

VERSUS

1. REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

**1. KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS (KUDHEIHA WORKERS).....1ST
INTERESTED PARTY**

**2. KENYA ENVIRONMENTAL HEALTH AND PUBLIC HEALTH
PRACTITIONERS' UNION (KEHPHU.....2ND INTERESTED PARTY**

**3. COUNTY GOVERNMENT WORKERS UNION (KENYA).....
.....3RD INTERESTED PARTY**

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 15th May 2025. It is an appeal against the decision of the Registrar of Trade Unions to refuse registration of the Kenya Union of Community Health Workers (KUCH-W), contained in the Notification of Refusal of Registration (Form D) dated 25th April, 2025.

The Memorandum of Appeal sets out the following grounds:

1. *The Respondent erred in holding that the Appellant can be sufficiently represented by the 1st, 2nd and 3rd Interested Parties; there is an error on the face of the notification of refusal of registration in that the Registrar does not indicate whether she received any objection from any registered Trade Union, Federation of Trade Unions or any Employer Organisation or Federation to the registration of the union within 21 days specified in the notice she had issued; the Appellant states that none of the three unions adequately represents the interests of community health workers and that none of the community health workers is a member of the Interested Parties by application.*
2. *The Registrar erred in law by not exercising her mind on the requirements of Section 14(2) of the Labour Relations Act.*
3. *The Registrar erred in law and fact in failing to interpret Section 14(1)(d)(i) and 14(2) of the Labour Relations Act in the context of Section 4(1)(a)(b) and (c) of the Labour Relations Act and more so in the context of Article 41(2)(c) of the Constitution of Kenya, 2010.*
4. *The Registrar erred in law and fact by failing to give life to the provisions of Article 41(2)(c) as read with Article 20 of the Constitution of Kenya, 2010.*

5. *The Respondent has discriminated against community health workers within the meaning of Article 27 of the Constitution.*
6. *Community health workers like clinical officers, doctors and pharmacists whose professions have formed trade unions belong to a profession which is regulated by law.*
7. *The decision of the Respondent is against the weight of both law and evidence.*
8. *The jurisdiction of the Respondent to register a trade union is a jurisdiction to enforce the rights to freedom of association under Article 36 of the Constitution and the right to form, join or participate in the activities and programmes of a trade union under Article 41(2)(c) of the Constitution, and the Respondent grossly misapprehended the said jurisdiction.*
9. *Under the Constitution of Kenya, 2010, the right to form and participate in the activities of a trade union is personal to the individual and other trade unions in existence cannot prevent one's enjoyment of the same.*
10. *The refusal of registration amounts to an unlawful and unjustified limitation of the Appellants' rights under Articles 36 and 41(2)(c) of the Constitution, 2010, in contravention of Article 24 of the Constitution, 2010.*
11. *The Registrar misapprehended the law by unlawfully limiting the right of the Appellants under Article 41(2)(c) of the Constitution, 2010 and requiring the Appellants to tender evidence to show that they suffer a deficiency in representation from existing unions.*

12. *The extent of limitation under Section 14(1)(d)(i) of the Labour Relations Act is not absolute, as the Registrar is granted a discretion to register a new union notwithstanding the existence of a rival trade union in a sector.*

The Appellants pray for orders that:

- a) *The letter of refusal dated 25th April, 2025 and the subsequent Notification of Refusal of Registration through Form 'D' of even date be nullified.*
- b) *This Honourable Court do issue a mandatory injunction requiring the Registrar of Trade Unions to register the Kenya Union of Community Health Workers (KUCH-W) forthwith and issue it with the Certificate of Registration.*
- c) *The Appellants be granted costs of this Appeal.*

The Appellants are seven in number, suing on behalf of themselves and 255 other Community Health Officers, Assistant Community Health Officers, Community Health Assistants and Community Health Promoters all, 262 in total. They submit that they are public servants employed at both national and county government levels who commenced the process of forming KUCH-W in February, 2023. They obtained a certificate of authority from the Acting Registrar on 26th August 2024, held a founding meeting on 22nd January 2025, adopted a constitution and lodged a formal application for registration on 6th February, 2025.

The Appellants submit that the Registrar published the application in the Kenya Gazette and in a daily newspaper on 28th February 2025, that no formal written objections were received from any existing union within the prescribed 21-day period and that the Registrar nevertheless refused registration on 25th April, 2025 following consultation with the National Labour Board. They contend that the Registrar erred in finding that the three Interested

Parties sufficiently represent community health workers and that the right to form a trade union under Articles 36 and 41(2)(c) of the Constitution is a personal right that cannot be extinguished by the mere existence of other unions in a broadly similar sector.

The Appellants place reliance on, among other cases, **David Benedict Omulama & 8 Others v Registrar of Trade Unions & Another [2014] eKLR**, **Seth Panyako & Others v Attorney General [2013] eKLR** and **Peter Karegua Mwangi & 6 Others v Registrar of Trade Unions & Another [2021] KEELRC 1561 (KLR)** for the proposition that the Constitution of Kenya, 2010 has displaced the former restrictive regime governing union registration and that section 14(1)(d)(i) must yield to constitutional imperatives. They further submit that the Registrar failed to exercise the residual discretion under section 14(2) of the Labour Relations Act, 2007.

The Respondent submits that the Registrar acted within her statutory mandate and exercised her discretion judiciously upon consultation with the National Labour Board as required under section 19 of the Labour Relations Act, 2007. Further, they submit that section 14(1)(d)(i) is a lawful and proportionate limitation of the right of association within the meaning of Article 24 of the Constitution that aims at preventing fragmentation of labour representation and safeguarding orderly industrial relations.

The Respondent relies on the authority of **Aviation & Airport Services Workers Union v Registrar of Trade Unions & Another [2016] eKLR** where this Court reversed the registration of a second union in the aviation sector and observed that the sector had not enjoyed industrial peace due to intense rivalry between the two competing unions and internal wrangles within each, all to the loss and detriment of unionisable employees. The

Respondent submits that this is precisely the consequence that section 14(1)(d)(i) is designed to forestall.

The Respondent further submits that the Appellants have not tendered any evidence that the three Interested Parties are unable or unwilling to represent community health workers, or that those workers have sought and been denied membership of any existing union. The absence of formal objections from those unions within the gazette notice period does not create an obligation on the Registrar to register the proposed union. Instead it merely means that no union saw fit to formally object, the Registrar being in any event independently empowered and obliged to satisfy herself on the requirements of section 14.

On the issue of the constitutionality of the matter, the Respondent submits and rests their case on the authority of **Geoffrey Andare v Attorney General & 2 Others [2016] KEHC 7592 (KLR)** that statutory limitations which are reasonable and justifiable in a democratic society and which pursue a legitimate objective are constitutional. The aim of preventing multiplicity and fragmentation of unions — and the consequent destabilisation of collective bargaining — is a legitimate aim, and the limitation imposed by section 14(1)(d)(i) is proportionate to it. The Respondent prays that the appeal be dismissed with costs.

The issues for determination therefore are:

1. Whether the Respondent's decision to refuse registration of KUCH-W was lawful and consistent with the Constitution of Kenya, 2010.
2. Whether the Appellants are entitled to the reliefs sought.
3. Who bears the costs of this appeal.

The 1st issue for determination is whether the Respondent's decision to refuse registration of KUCH-W was lawful and consistent with the Constitution of Kenya, 2010. Here, it becomes necessary to investigate the statutory framework involved. Section 14(1)(d)(i) of the Labour Relations Act, 2007 provides that a trade union may apply for registration if no other trade union already registered is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration. This provision has been the subject of considerable judicial attention this Court has on a number of occasions ordered registration of new unions notwithstanding the existence of existing ones, the consistent thread running through those decisions is that the constitutional right of association, though fundamental, is not absolute and must be weighed against the equally important public interest in orderly and effective industrial relations.

The Appellants have placed heavy reliance on the line of authorities beginning with **Seth Panyako (supra)** and continuing through **Omulama (supra)** and **Peter Karegua Mwangi (supra)**. Those decisions are, with respect, distinguishable from the present case on a material point. In each of those cases the court was satisfied, upon examination of the facts, that the existing unions did not in practice represent the specific constituency of workers seeking registration of the new union. This is in relation to whether members of that constituency had not been recruited, or further that no CBA had been concluded covering them. This is besides the issue as to whether the existing unions lacked the technical capacity to address their distinct sectoral interests. The registration of a new specialist union in those circumstances was justified because the workers in question were, for all practical purposes, unrepresented.

The present case is materially different. The record shows that the three Interested Parties, KUDHEIHA Workers, KEHPHU and the County Government Workers Union are registered unions with existing memberships drawn from across the health and public service sectors within which community health workers fall. The Registrar consulted the National Labour Board as required by section 19 of the Act before arriving at its decision. The Board, upon deliberation, opined that those three unions sufficiently represented the sector targeted by KUCH-W. That opinion was not a mere formality. It was an expert assessment by the body constituted by law for precisely that purpose. As was observed in **Peter Muthoka and Another v Ochieng & 3 Others [2019] eKLR**, the Registrar's discretion under section 14 is a structured discretion to be exercised on settled principles, not a wild and unaccountable one. The Registrar exercised that discretion in the manner prescribed by the Act. There is therefore no basis to interfere with it.

The consequences of permitting the multiplication of unions within a single sector are not merely theoretical. They have been graphically illustrated in the jurisprudence of this Court. In **Kenya National Union of Nurses (KNUN) v Kenya Medical Research Institute (KEMRI) & 2 Others [2020] KEELRC 1577 (KLR)** this Court was confronted with precisely such a situation. Two unions — KNUN and the Union of National Research Institutes Staff of Kenya (UNRISK) — competed for recognition within KEMRI, which had a workforce of 945 unionisable employees. UNRISK had an existing Recognition Agreement and CBA covering all 945 staff. KNUN sought to be separately recognised on the strength of 22 nurses it had recruited out of the 31 nurses in the entire workforce. The Court dismissed the claim, holding that recognition requires a simple majority of the total unionisable workforce within the sector, not a majority of any sub-cadre within that workforce. KNUN's 22 members represented a fraction of the 945 unionisable staff and could not constitute the required simple majority. The Court further accepted the submission that allowing a second

union to represent a narrow cadre within an employer's workforce, in derogation of an existing recognition agreement, would undermine the principles of orderliness in the labour market.

The lesson from the KEMRI case is directly applicable here. The community health workers sector, like all sectors, is governed by the statutory requirement that a union must achieve a simple majority of the total unionisable workforce to obtain recognition and bargain collectively. If KUCH-W were registered, it would face the immediate practical obstacle that the three Interested Parties already hold registration covering the broad public health and county government workforce within which community health workers are employed. KUCH-W's 262 founder members, even if they represent a majority of community health workers specifically, would represent a small fraction of the total unionisable workforce across the county health sector. The result would not be better representation for community health workers. It would be the fragmentation that section 14(1)(d)(i) is designed to forestall with KUCH-W unable to achieve recognition and bargain effectively, while the existing unions are weakened by the attrition of members. The workers themselves would be the losers.

This Court made the same observation in **Aviation & Airport Services Workers Union v Registrar of Trade Unions & Another [2016] eKLR** where the registration of a second union in the aviation sector was reversed on the basis that the sector had not enjoyed industrial peace due to the intense rivalry between competing unions and the internal wrangles that such competition generates. The National Labour Board, whose advice the Registrar is required to seek, exists precisely to evaluate these sectoral dynamics before a decision on registration is taken. It did so here and advised against registration. That advice was neither irrational nor contrary to law.

On the constitutional argument, the right to form a trade union under Article 41(2)(c) of the Constitution is indeed a fundamental right. However, this is not an unlimited right. Article 24 of the Constitution expressly permits rights to be limited by law, provided the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 14(1)(d)(i) of the Labour Relations Act, 2007 is such a limitation. It pursues the legitimate aim of ensuring that workers are represented by unions capable of bargaining effectively on their behalf, that industrial relations in any given sector are orderly and stable and that the fragmentation of bargaining units does not undermine the very collective bargaining process that the Constitution in Article 41(5) also protects and safeguards. The limitation is proportionate: it does not prohibit workers from joining unions: it directs them to unions that are already equipped and mandated to represent their interests.

The Appellants have not tendered any evidence that the Interested Parties have refused to accept community health workers as members, or that they have been approached for representation and found wanting. Their complaint is, at its core, that they would prefer a union dedicated exclusively to their cadre. That preference, while understandable, does not by itself constitute a constitutional right that overrides the legitimate regulatory framework for union registration. As the Respondent correctly submits, the absence of formal objections from the Interested Parties within the gazette notice period does not create an entitlement to registration. The Registrar independently satisfied herself, through the National Labour Board process that registration was not warranted.

On the argument that the Registrar failed to exercise her mind on section 14(2) of the Labour Relations Act, 2007, this is countered by the fact that provision permits the Registrar to register a trade union working in more than one sector if the constitution contains suitable safeguards for the respective sectoral interests of employees. Its purpose is to facilitate multi-

sector unions, not to provide an automatic gateway for registration once a constitution is produced. The Registrar's primary finding under section 14(1)(d)(i) — that sufficient representation already exists — was therefore a complete answer to the application. There was no obligation to proceed to consider section 14(2) once this threshold finding had been made.

On the issue of discrimination under Article 27, the Appellants' argument that other health cadres have their own unions is noted. However, the registration of those unions was the product of specific facts in each case, in which the courts or the Registrar were satisfied that existing unions did not adequately represent the distinct interests of those cadres. No such finding can be made here arising out of the evidence before the court. The Appellants have not demonstrated any concrete failure of representation by the Interested Parties. The comparison with other cadres alone, does not establish discrimination in the constitutional sense.

The 2nd issue for determination is whether the Appellant's are entitled to the reliefs sought. Having found that the Respondent's refusal to register KUCH-W was lawful, constitutionally compliant and procedurally regular, the Appellants become disentitled to the reliefs sought.

On a consideration of the entire record of appeal, the submissions of the parties and the applicable law this Court finds no basis to interfere with the decision of the Registrar of Trade Unions contained in the Notification of Refusal of Registration (Form D) dated 25th April, 2025.

I am therefore inclined to disallow the appeal and order as follows;

- (i) The decision of the Registrar of Trade Unions contained in the Notification of Refusal of Registration (Form D) and the letter of refusal, both dated 25th April, 2025, are hereby upheld.
- (ii) Each party shall bear the costs of the appeal.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Otao instructed by Otao & Associates Advocates for the Appellant
2. Miss Orege instructed by State Law Office for the 1st Respondent
3. No appearance for the Interested Parties