



Republic v Counselors & Psychologists Board & 2 others; Ndinda & another (Exparte) (Judicial Review Application E002 of 2023) [2025] KEELRC 1226 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1226 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E002 OF 2023**

**M MBARŪ, J
APRIL 30, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNSELORS & PSYCHOLOGISTS BOARD 1ST RESPONDENT

THE REGISTRAR OF TRADE UNIONS 2ND RESPONDENT

MINISTRY OF LABOUR & SOCIAL PROTECTION 3RD RESPONDENT

AND

JOSEPHINE NG'ANG'A NDINDA EXPARTE

HENRY SANYA MANGENI EXPARTE

JUDGMENT

1. The ex parte applicants initiated these proceedings in person. Midway, they secured legal representation.
2. The ex parte applicants filed an application dated 6 October 2023 seeking orders under the provisions of Order 53, Rules 3 and 4 of the Civil Procedure Rules, Section 8(2) of the *Law Reform Act*, and Order 51, Rule 1 of the Civil Procedure Rules.
 1. An Order of mandamus to compel the Registrar of Trade Unions to issue a Certificate to the proposed Kenya Union of Psychologists, Counsellors and HIV testing services;
 2. An Order of Certiorari to remove to this court and quash the decision of the Counsellors and Psychologists Board dated 18 September 2023 to register and impose fees on counsellors and psychologists countrywide.



3. Any further relief that this court may deem fit to grant.
4. Costs be provided for.
3. The ex parte applicants have supported their application through the Affidavit of Josephine Ndinda Nganga, the 1st ex parte applicant. She said they applied to the 2nd respondent, Registrar of Trade Unions, to establish the Kenya Union of Psychologists, Counsellors and HIV testing services on 15 August 2023, and 2 promoters signed it. The Registrar of Trade Unions (RTU) received the application and, under section 12 of the [Labour Relations Act](#) (LRA), was required to issue a certificate within 30 days. Despite several requests, the RTU did not comply or give reasons. This is in breach of the mandatory provisions of the LRA and the rights of freedom of association of the proposed members of the Kenya Union of Psychologists, Counsellors and HIV testing services. This contravenes [the constitution](#); it is ultra vires and abusive of office. The RTU has breached the rights of the ex parte applicants to form a trade union of their choice as guaranteed under Article 41 of [the Constitution](#).
4. The Counsellors and Registration Board (Board) has, through a notice dated 18 September 2023, started the first registration of counsellors and Psychologists without notice, public participation and consultations with the proposed members of the proposed Kenya Union of Psychologists, Counsellors and HIV testing services. The notice criminalises those who practice without registration and specifically includes counsellors and psychologists in employment.
5. In the affidavit, Ms Nganga avers that the Board purports to act under the Registration of Counsellors Regulations of 2023, which is illegal because it fails to adhere to the [Statutory Instruments Act](#) of 2013 provisions and public participation requirements. The respondents have violated the fair and effective action rights of the proposed Kenya Union of Psychologists, Counsellors, and HIV testing services members. Unless the court intervenes and issues the orders sought, they shall suffer irreparable loss and damage.
6. The Board has acted discriminatively and with bias and impartiality against the counsellors by failing to recognise holders of certificates or experience, thereby threatening the livelihoods of these persons who provide essential services in the mental health sub-sector. The Board has cherry-picked elite counsellors for registration by failing to adopt a phased registration and administer an examination to assess competence as provided under section 23(c) of the [Counsellors and Psychologists Act](#).
7. In her affidavit and further affidavit, the 1st ex parte applicant avers that as the promoter of the proposed union and the interim secretary general, having served as a counselling psychologist for 15 years as an employee of the Ministry of Health, she is conversant with the matters herein. Ms Nganga avers that she has been working in the corridors of justice, representing herself and other workers with only a piece of paper to show that workers have appointed her to represent them since 2014, as her costs and expenses exceed the request. Urgent need for an interim certificate of registration for the trade union will ease the burden.
8. Ms Nganga avers that the instant application arises from a meeting held by the Board as a consultative meeting and public participation held virtually on 1 August 2023, directing all and notifying the members of over 3000 of the commencement of the registration process for counsellors and psychologists. The Board also informed the members that they would pay Ksh 10,000 registration fees annually for certificate holders and an extra Ksh 8,000 licence fee. Such offends the mandatory provisions of the [Statutory Instruments Act](#).
9. Through a notice dated 18 September 2023, the Board directed the payment of fees without adequate consultation. The process of making the statutory instruments was unconstitutional and devoid of consultation. Section 22 of the Act requires the gazettal of the statutory instrument.



10. The ex parte applicants decided to protect their colleagues by registering a trade union. Despite providing all the necessary documents and making the required payments, the RTU has refused to issue the requisite certificate. The orders sought should issue to allow the quashing of the notice of the Board dated 18 September 2023 and to compel the RTU to issue the certificate for the promotion of the proposed trade union.
11. In reply, the first respondent filed the Replying Affidavit of Matilda Mghoi, the registrar, who avers that the instant application is meant to mislead the court and should be dismissed with costs. The ex parte applicants want to register as counsellors and psychologists, yet they do not meet the qualifications provided for in the law.
12. In the Supporting affidavit of the 1st ex parte applicant, she avers that the Board has refused to recognise holders of certificates or their experience in the registration process. However, under section 23 of the [Counsellors and Psychologists Act](#), it is couched in mandatory terms, and those who can be registered are holders of diplomas on the part of counsellors, holders of diplomas for psychologists, having passed the prescribed examination, and upon satisfying the Board that they have good moral character. The ex parte applicants do not meet these requirements and are not eligible for registration under the law.
13. Mghoi avers that the Board published the notice dated 18 September 2023 to inform all its stakeholders of its intention to commence implementing the regulatory provisions of the Act, particularly sections 23 to 27 of the Act relating to registration.
14. Contrary to the allegations, the Board started the registration process after several meetings with its stakeholders before the notice was issued. These consultations marked the beginning of the registration process since the Minister and the Board could not impose rules, including payment of fees to the profession, without consultations. The meetings and consultations were conducted under the principles of good governance under Article 10 of [the constitution](#).
15. Mghoi avers that the ex parte applicants did not attend the public participation meetings organised by the Board. The Union proposed by the ex parte applicants was not registered, and the applicants were members of existing associations. The Board called meetings on two separate occasions through notices dated 3 July 2023 and 29 July 2023. 21 association heads attended the first meeting, and 1,612 participants attended the second meeting. Both meetings produced various recommendations, including revising the registration fees downwards.
16. Following the consultative meetings, the Board informed its stakeholders to submit memoranda as rejoinders to the intended regulatory changes. The Board received responses and grievances. The Board seeks to streamline a profession at the forefront of curbing one of the biggest challenges in today's society, mental health, and where previously, none of the counsellors or psychologists performing had been registered.
17. The Board is bound to ensure the highest healthcare standards available to the public, as failing to do so would be a more significant harm than the personal prejudice of the ex parte applicants. The rights of the ex parte applicants cannot override those of the public or the care of qualified and certified practitioners within the counselling and psychology profession. The regulations alluded to by the ex parte applicants are complementary to the provisions of the [Counsellors and Psychologists Act](#), particularly on the processes of registration and licensing, and details for the same. They are therefore exempted from the provisions of the [Statutory Instruments Act](#), mainly the Regulatory Impact Assessment.
18. The ex parte applicants are fueled by unwarranted and unfounded claims and want to disrupt registration, which is undertaken within the legal framework of the [Counsellors and Psychologists Act](#).



They are both aware that they are not qualified as persons for registration. If they had submitted their applications, they should have waited for a decision from the Board.

19. The Board is seeking that the application be dismissed with costs.
20. In reply, the second respondent filed the Replying Affidavit of Ann Kanake, the Acting RTU. Kanake avers that by letter dated 15 August 2023, the ex parte applicants applied for a certificate to promote the establishment of the Kenya Union of Psychologists, Counsellors, and HIV Testing Services under section 12 of the LRA. In the application, the ex parte applicants stated that the proposed union would draw its members from the psychologists, counsellors, and HIV testing services sector.
21. The applicants have not been issued a certificate to promote the establishment of the proposed union as provided under Section 12 of the LRA. The applicants are not promoters, interim officials, or members of the proposed union and therefore do not qualify and have not fulfilled the conditions set out under Section 12(3) of the LRA. Although section 12(3) of the LRA provides that the RTU should issue a certificate to promote the establishment of a trade union within 30 days upon receipt of an application, the issuance is not automatic. The same should be done upon fulfilling conditions under sections 12(3) (a) and (b) of the LRA.
22. A certificate to promote a trade union can be issued where the application is not defective and the proposed trade union's name is not the same as an existing trade union or sufficiently similar to mislead or cause confusion.
23. On 4 September 2023, the 1st ex parte applicant visited the office of the RTU to follow up on the application's progress. An explanation was given concerning the application and the conditions prevailing. While considering an application seeking to promote a proposed trade union, the RTU must look at the scope of the representation and the sector from which the applicants will recruit members, once the promotion certificate is issued. This is to ensure that the applicants do not recruit members from an industry where a registered trade union already exists to limit the proliferation of trade unions in the same sector and to avoid inter-union rivalry and wrangles for peaceful industrial relations.
24. Kanake avers that under section 14(1)(d)(i) of the LRA, 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 applicants seek registration. In the Support affidavit for the 1st ex parte applicant, she avers that she has been representing other workers in court without an interim certificate of registration and that the promotion certificate will ease her burden and that of her interim committee colleagues. A certificate to promote the establishment of a trade union is issued under Section 12 of the LRA and not an interim certificate of trade union registration. There is no provision under the LAR for issuing an interim certificate of registration. Once a certificate to promote the establishment of a trade union is issued by the RTU, the promoters are at liberty to recruit members of the proposed trade union. However, the promoters are not allowed to represent workers in court, as stated by the 1st ex parte applicant. Representation of workers in court is not a lawful activity that the ex parte applicants can undertake without the certificate as required under Section 12(4)(a) of the LRA. Only a trade union registered under Section 19(1) of the LRA can undertake such a process under Sections 14, 18 and 19 of the LRA. Hence, the grounds upon which the ex parte applicants have given for obtaining the promotion certificate are not lawful or valid.
25. Kanake avers that the office of RTU is required, before issuing a promotion certificate, to go through *the constitution* of other registered trade unions to confirm that no other trade union is already registered to represent the whole or a substantial interest in respect of the same registration under considerations



provided under section 14 of the LRA. The application by the ex parte applicants and the sectors they seek to address are already represented by other trade unions.

- a. The Kenya National Union of Medical Laboratory Officers, whose membership is open to all registered medical laboratory officers, certified, licensed or authorised to practice medical laboratory;
 - b. The Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals (KUDHEIHA Workers), whose membership includes sectors which the ex-part applicants seek to address;
 - c. The Kenya Medical Practitioners, Pharmacists and Dentists Union, whose membership includes persons the ex parte applicants seek to represent;
 - d. The Kenya National Union of Nurses, who include persons the ex parte applicants seek to represent;
 - e. The Kenya Union of Clinical Officers, whose membership covers holders of diplomas in clinical medicine and surgery and those specialising in clinical medicine, including persons the ex-part applicants seek to represent.
26. Consequently, if the ex parte applicant's application is to be allowed, the RTU should be allowed to scrutinise it vis-à-vis section 12 of the LRA provisions, and if they are aggrieved, there is a right of appeal.
27. The alleged violations of *the constitution* are incorrect, as the 2nd respondent addressed the application based on the law. There is no breach of Article 41 of *the Constitution* as alleged as held in Malindi ELRC Appeal No.1 of 2019 The Promoters of Kenya Salt Workers Union (Lawrence Majali & 5 others v The Registrar of Trade Unions that the right to under Article 36 and 41 of *the Constitution* are not absolute and can be restricted under article 24 of *the constitution*.
28. The application is incompetent, contravenes section 51(4) of the Civil Procedure Code, and should be struck out with costs.
- Parties filed written submissions.
29. The pleadings, affidavits, and written submissions were all assessed. The issues that emerge for determination are whether an order of mandamus should be issued compelling the RTU to issue a certificate to the proposed union and whether an order of certiorari should be issued removing and quashing the decision of the Board dated 18 September 2023 to register and impose fees on counsellors and psychologists countrywide.
30. The ex parte applicants opted to move the court through judicial review proceedings.
31. The ex parte applicants seek an order of mandamus to compel the RTU to issue a Certificate to the proposed Kenya Union of Psychologists, Counsellors, and HIV testing services. They filed an application dated 15 August 2023.
32. The RTU acknowledged receipt of the application in a reply dated 4 September 2023 and indicated that it would be considered according to the pending work schedule.
33. The ex parte applicants moved the court with the instant application on 25 September 2023, seeking leave to move the court on these proceedings. The substantive application was filed on 6 October 2023.



34. The mandate for the order of mandamus is defined in the case of Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 others [1997] KECA 58 (KLR) to include that;
35. The order of mandamus is of a most extensive remedial nature. It is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is like a public duty. Its purpose is to remedy the defects of justice. Accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right. It may arise in cases where, although there is an alternative legal remedy, that mode of redress is less convenient, beneficial and effectual.
36. In effect, this means that an order of mandamus will compel the performance of a public duty imposed on a person or body of persons by a statute where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An applicant must establish the right in law, and the public officer's failure to perform the duty imposed by law.
37. The ex parte applicants have relied on the provisions of Section 12 of the LRA. Indeed, they applied to the RTU on 15 August 2023.
38. Under section 12(3) of the LRA, the RTU is allowed 30 days to issue a certificate upon receipt of the application by the proposed promoters of a trade union unless the application is defective or the proposed name of the trade union is of an existing trade union or is sufficiently similar to another trade union and, if allowed, would cause confusion.
 - (3) The Registrar shall issue a certificate within thirty days of receiving an 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 to mislead or cause confusion.
39. Upon receiving the application, the RTU replied and indicated that it would be considered based on the pending work schedule. No decision was issued allowing or rejecting the application.
40. Under the LRA, what is contemplated is the decision of the RTU on the application and based on which, an applicant(s) should file an appeal under Section 30 of the LRA as held in Daniel Ndung'u & another v Registrar of Trade Unions [2021] KEHC 13417 (KLR). The delay in the response by the RTU does not justify the actions by the proposed promoters of the trade union to proceed and commence various actions for the union without the requisite certificate from the RTU. Action taken for and on behalf of an entity not authorised under the LRA is unlawful, as held in Mwangi & 2 others v Registrar of Trade Unions & another [2024] KEELRC 13291 (KLR).
41. Without the written response of the RTU rejecting or allowing the application dated 15 August 2023, moving the court through judicial review proceedings cannot cure the process's invalidity.
42. Under section 30 of the LRA, the proceedings herein are premature, and an order of mandamus cannot be issued.
43. The ex parte applicants address various reasons in the application in Ms Kanake's replying affidavit. Once formalised, they are at liberty to address such reasons as appropriate.



- 44. On whether an order of certiorari quashing the decision of the Board dated 18 September 2023 should be issued, the basis of the same is premised on the court granting the order of mandamus addressed above. Without the requisite certificate to promote the proposed union, the judicial review proceedings contended that the ex parte applicants have no standing for or on behalf of counsellors, psychologists, HIV testing service providers, or persons for connected purposes to undertake these proceedings.
- 45. In the Supporting Affidavit, the 1st ex parte applicant has attached her certificate as an associate counsellor. Such a position is not defined under the Counsellors and Psychologists Act as one of the professions certified by the Board or under the Scheme of Service for Psychological Counsellors. The certificate attached was issued under the Kenya Counselling and Psychological Association (KCPA), which is legally and foundationally different from the registration contemplated under the Counsellors and Psychologists Act, under the 1st respondent Board.
- 46. Under these judicial review proceedings, unlike in a claim or petition, where a party may allow another to proceed and make a claim on their behalf through a letter, in this case, the ex parte applicants have moved the court on their own behalf. Where the ex parte applicant has successfully prosecuted claims for other workers, the orders of certiorari sought in this regard are without the requisite foundation.
- 47. The order sought to be quashed through the order of certiorari issued on 18 September 2023 has taken effect. The Board has undertaken nationwide consultations and received feedback. The essence of the order of certiorari is to quash a decision that has not taken effect, as held in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] KECA 729 (KLR).
- 48. The standing of the ex parte applicant is hence addressed, and the premature invocation of the order for mandamus against the RTU, the orders sought cannot be issued as couched. The ex parte applicants moved the court and based on various of their applications seeking to stop the respondents from making responses herein, the delay apparent on their part, including the court inviting them to show cause why these proceedings should not be dismissed, without any merit, the matter is hereby dismissed.
- 49. On costs, the ex parte applicants acting in person were pursuing rights for and on behalf of others. They have since moved to the Kituo cha Sheria and are receiving pro bono service. Accordingly, each party is to bear its costs.
- 50. Accordingly, the application is dismissed. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF APRIL 2025

**M. MBARŪ
JUDGE**

In the presence of:
Court Assistant: Japhet

..... and

