



Onyancha & another (Suing on behalf of the proposed, Kenya Medical Doctors’ Union) v Registrar of Trade Union (ROTU) & another (Petition E017 of 2023) [2024] KEELRC 8 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEELRC 8 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E017 OF 2023
HS WASILWA, J
JANUARY 23, 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**

RULING

1. This suit is instituted by a 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 petitioner 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(COSECSEA) 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 the Constitution which provides that every one 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 years 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. Despite serving the petition and all the pleadings in this case, hearing notices and submissions upon the Respondents as evidenced by the affidavits of service sworn by Richard Kamau Lagat on 23rd October, 2023 and 26th October, 2023, the Respondents did not enter appearance or responded to the Petition as such the Petition proceeded undefended.
15. Directions were taken for the Petition to be canvassed by written submission, which the Petitioner filed on 13th October, 2023.

Petitioners' Submissions.

16. 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.



17. The Petitioners submitted that it is import 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.”

18. Based on the foregoing, the petitioner submitted that its 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.
19. 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 reasonable.
20. 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 Gikenya 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 none 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.”



21. 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.”

22. 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.”

23. 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.
24. 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.
25. I have examined all the averments and submissions of the petitioner herein.
26. This petition proceeded exparte because the petitioner submitted that the respondents failed to appear nor file any pleadings despite service.
27. This court vide orders made on several occasions, ordered proper service upon the respondents and there is evidence of service upon the 2nd respondent – the Hon. AG physically and upon the 1st respondent through a Whatapp message to the RTU in her personal capacity.
28. This indeed is improper service and the registrar in her individual capacity asked the petitioner to service her office. There is no evidence that this was done.
29. This court had given directions that the petition proceeds exparte due to service. As I considered this direction, I came to the realization that this direction was made in error on the assumption that there was proper service.
30. I have reconsidered this position and I review my direction given on 31/10/23.



31. I now direct that the petition be served properly by the petitioners upon all parties concerned including this ruling for further consideration by this court to enable the petition proceed appropriately.
32. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 23RD DAY OF JANUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Dr. Apima for Petitioner – present

No appearance for respondents

