



Ashira & 6 others (All suing on behalf of the proposed Kenya Environmental Health and Public Health Practitioner’s Union) v Registrar of Trade Unions; Public Health Officers and Technicians Council & 2 others (Interested Parties) (Appeal E144 of 2021) [2022] KEELRC 13311 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13311 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E144 OF 2021
J RIKA, J
NOVEMBER 30, 2022

BETWEEN

BROWN ASHIRA 1ST APPELLANT
KENNETH OGENDO 2ND APPELLANT
DR. SUSAN MAMBO KAGUCHIA 3RD APPELLANT
DOREEN NASIKE NGUTUKU 4TH APPELLANT
KENNEDY OMOLO 5TH APPELLANT
PHILIP KIPKOSGEI SOGOTIO 6TH APPELLANT
MOHAMMED ALI 7TH APPELLANT

**ALL SUING ON BEHALF OF THE PROPOSED KENYA ENVIRONMENTAL
HEALTH AND PUBLIC HEALTH PRACTITIONER’S UNION**

AND

REGISTRAR OF TRADE UNIONS RESPONDENT

AND

**PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL ... INTERESTED
PARTY**

MOHAMMED BAGAJO INTERESTED PARTY

DANIEL ANDATI OKWARA INTERESTED PARTY



JUDGMENT

1. The Appellants, are Public Health Officers.
2. They were granted a Promoter's Interim Certificate by the Respondent on 21st May 2020, upon their application dated 11th May 2020.
3. They, alongside 46 other colleagues, met on 27th May 2020, and resolved to form a Trade Union, known as Kenya Environmental Health and Public Health Practitioners' Union [KEHPHPU]. They state that they have over 6,000 members, who work within the scope of environmental health and public health.
4. They specify that they have recruited members from the following areas: food safety and control; port health, vermin and vector control; sanitation engineering, epidemiology and disease surveillance; solid and waste management, climate change and pollution; community health, focusing on households; occupational health; and alcohol and tobacco control.
5. They submitted their application for registration to the Respondent, in the prescribed form dated 27th July 2020. They exhibited all the required documents, including the minutes of the meeting where the proposal to form their Trade Union was made, and the constitution of the proposed Trade Union.
6. The Respondent published Gazette Notice No. 108855 of 18th December 2020, and a similar Notice in the Standard Daily Newspaper of 24th December 2020, calling on any objection to grant of registration, to be made to the Respondent in writing.
7. There were 2 Objectors: Kenya Union of Domestic, Hotels, Education Institution and Hospital Workers [KUDHEIHA] and Union of Kenya Civil Servants [UKCS]. Both Objectors stated they sufficiently represent the area sought to be represented by the Appellants, environmental health and public health practice. The Appellants replied to the Respondent explaining that the Objectors did not represent them, and none had negotiated nor concluded any CBA, relevant to the Appellants.
8. The Respondent wrote to the Appellants declining registration, through form D, issued under section 20 of the [Labour Relations Act](#), 2007.
9. It was explained by the Respondent, that environmental and public health practitioners are engaged in health institutions like hospitals, the public service and other government agencies and are consequently sufficiently represented by the existing trade unions in these areas. It was noted that those employed in the public sector are sufficiently represented by the Union of Kenya Civil Servants [UKCS], while those working in hospitals and other health institutions are already represented by Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers [KUDHEIHA]. Under its constitution, UKCS represents all public civil servants, while KUDHEIHA represents all persons employed in the public and private hospitals [except doctors, nursing homes, dispensaries, clinics, chemists, pharmacies and other allied institutions, providing associated services].
10. The Appellants, in their Appeal against the decision of the Respondent, filed in Court on 23rd November 2021, submit that the Respondent did not show that the Objectors represent the Appellants. It was not shown by the Respondent that the Objectors represent Appellants' colleagues in NGOs, who work as Program Officers, Field Technicians and Project Officers. It was not shown that the Objectors represent Appellants' colleagues who work in industrial settings as Occupational Health and Safety Officers or Food Safety Experts.



11. The Appellants state that on 8th December 2021, they sought information from the Regulator, the Interested Party herein, on the number of registered Environmental and Public Health professionals in Kenya. The Regulator disclosed that there are 6,110 of them, 3,667 in the County Governments, 1,170 in the National Government and 1,273 in NGOs. None is represented by KUDHEIHA or UKCS. In addition, there are 1,250 Interns and 2,232 Students at the Universities, and eligible for registration as Union members.
12. The Appellants posit that the health sector is diverse, comprising of independent, but inter-related professional and labour relations interests. There are different labour relations challenges. It is misleading to hold that KUDHEIHA and UKCS represent all public civil servants and hospital workers. The Appellants' area of representation, transcends hospital environment. The proposed Union constitution covers areas which are not covered under the Objectors' constitution.
13. The Appellants invoke freedom of association under *ILO Declaration of Philadelphia 1944*; *ILO Declaration on the Fundamental Principles and Rights at Work* [1988]; the *Universal Declaration of Human Rights* [1948]; *ILO Convention No. 087 on Freedom of Association; Protection of the Right to Organize* [1950]; and *ILO Convention 098 [1964] on the Right to Organize and Collective Bargaining*.
14. They invoke the organic law of the Republic of Kenya, under articles 36 and 41; and sections 4, 12, 13, 14, 18, and 19 of the *Labour Relations Act*, 2007. They submit that the Registrar of Trade Unions, the Respondent herein, has a statutory mandate to register Trade Unions, and in considering registration, must act fairly, reasonably and not whimsically, capriciously, frivolously and callously. They pray the Court to allow the Appeal, overturn the decision of the Respondent, and order the Respondent to register their Trade Union.
15. The Respondent filed a Replying Affidavit, sworn on 31st January 2022. She explains that indeed, the Appellants lodged an application for registration, as stated in their Appeal. The application was processed as required under the *Labour Relations Act, 2007*. A Notice inviting objections, elicited 2 objections from KUDHEIHA and UKCS. The Respondent sought the advice of the National Labour Board under section 31 [1] [3] of the *Labour Institutions Act*. The advice she received was that the Appellants, are sufficiently represented by the existing Trade Unions. The Respondent therefore declined registration, and communicated to the Appellants through form D. The Respondent retains the discretion whether to register a Trade Union. The Appellants seek to have the law disregarded, and certificate of registration issued to them. Registration is not automatic. If it was, there would be a multiplicity of Trade Unions, covering groups with similar interests. The Appeal is devoid of merit, and ought to be declined with costs.
16. The Regulator, 1st Interested Party supports the Appeal. It submits that it is a statutory regulatory body, established by the *Public Health Officers [Training and Licencing] Act* No. 12 of 2013. It regulates the training and practice of Public Health Officers and Technicians in Kenya. It advises the Government of Kenya on all aspects thereof. It concedes that the Appellants are registered Public Health Officers. They wrote to the 1st Interested Party, seeking information on the number of registered Public Health Officers and Technicians, and were advised by the 1st Interested Party that the number is 6,110.
17. The 1st Interested Party submits that the scope and practice for various health service sector Workers, presents different labour relations challenges and work environment. They are based in sectors beyond the hospital environment, and need labour union representation. They are not sufficiently represented by the Objectors.
18. The 1st Interested Party submits that there are different Trade Unions in the health sector, representing Health Practitioners, based on their different labour-related challenges, occasioned by the scope of



practice, despite working in a shared health sector. Among the registered Trade Unions in the sector are: Kenya Medical Practitioners, Pharmacists and Dentists Union [KMPPDU]; Kenya National Union of Nurses [KNUN]; and Clinical Officers Union [KUCO]. Each represents identifiable areas, with unique labour related challenges.

19. The 1st Interested Party submits that registration of the Appellants' Trade Union shall benefit its professional membership, and shall not curtail the rights of the Objectors. The 1st Interested Party submits that it regulates the profession, and its members who include the Appellants, know their areas of activities. There is no Trade Union representing the 6,110 professionals identified from the 1st Interested Party's database. There is huge gap, in trade union representation in this category of health professionals. The Objectors have not produced any evidence, to establish that they represent any of the professionals registered by the 1st Interested Party. The Respondent did not discharge her burden of proof in showing that the Objectors sufficiently represent the Appellants' interests. The 1st Interested Party associates itself fully with the Appellants, invoking articles 36 and 41 of the *Constitution* and Sections 4[1] [a] [b] and [c], 14[1] and 14[2] of the *Labour Relations Act*, in asking the Court to allow the Appeal.
20. The 2nd and 3rd Interested Parties were added to the Appeal, through orders of the Court made on 28th July 2022, and upon their application dated 19th May 2022.
21. They agree that Public Health Workers, Officers and Practitioners are a distinct category of Health Professionals. Others such as Clinical Officers, Nurses and Doctors have their Trade Unions. The Appellants are professionals who deal with environmental health and are registered under the *Public Health Officers [Training, Registration and Licensing] Act* No. 12 of 2013. They are regulated by the 1st Interested Party. The 2nd and 3rd Interested Parties submit that this category of Public Health Professionals deals with prevention and support, while the Doctors' practice is curative. Public Health Officer are regulated by other policy instruments such as " Public Health Officers and Technicians Council: The Scope of Practice for Public Health Officers and Public Health" dated 8th August 2018. This policy defines the scope of Public Health Officers' Practice. The 2nd and 3rd Interested Parties therefore agree that Public Health Officers are unique in terms of their practice and mandate. This why there is a Council, the 1st Interested Party herein, to regulate them. The Respondent did not have good ground, to warrant rejection of the Appellants' registration.
22. The 2nd and 3rd Interested Parties however, submit that the Appeal is sub judice. They claim that they sought to register Kenya National Health of Public Health Workers. Registration was declined, resulting in an Appeal which is pending at the Court of Appeal, being Civil Appeal No. E023 OF 2021, *Mohammed Bagajo & Another v Registrar of Trade Unions*. Their view is that there is need for this Court to hold its Judgment, to avoid a situation where it issues a Judgment, at cross-purposes with the Judgment to be delivered at the Court of Appeal. The issues raised in this Appeal are substantially the same, with those raised by the 2nd and 3rd Interested Parties in their Appeal to the Court of Appeal. While they agree with the submissions of the Appellants and the 1st Interested Party, the 2nd and 3rd Interested Parties pray the Court to stay its Judgment, pending the outcome of the Appeal at the Court of Appeal.
23. The issues are twofold: whether the decision of the Respondent declining registration of the Appellant's Trade Union registration, should be overturned and registration granted; and, whether the Court should defer its Judgment, pending an Appeal filed by the 2nd and 3rd Interested Parties, at the Court of Appeal.



The Court Finds: -

24. To start with the 2nd issue, the Court does not think there is any reason to defer Judgment, on the ground that there is a related Appeal, pending at the Court of Appeal.
25. A copy of the Memorandum of Appeal filed by the 2nd and 3rd Interested Parties, through the Supporting Affidavit of the 2nd Interested Party sworn on 19th May 2022, does not have the registration number of the Appeal; it is undated; and it is unsigned. The Court has no way of confirming that indeed, such an Appeal was filed.
26. The Appellants are indicated on the Memorandum of Appeal to be Mohamed Bagajo and Daniel Andati Okwara. It is not indicated that they are appealing on behalf of any proposed Trade Union.
27. The Appeals do not involve the same parties. They relate to different applications for registration as Trade Unions, and different legal challenges. The Court is persuaded that it should not defer its Judgment, pending the outcome of an Appeal whose full details have not been disclosed by the 2nd and 3rd Respondent. The Parties, the facts and legal history of the 2 Appeals, if indeed there are 2 Appeals, do not seem to this Court to be the same.
28. Should it turn out that there is such an Appeal pending before the Court of Appeal, whose decision is at odds with the Judgment herein, there is no risk at all of conflict and embarrassment to the administration justice, because this Court's decision can always be revisited on reviewed, or further appealed. The greater risk of embarrassment is in deferring to an Appeal which has not been shown to exist, or to relate to the Appellants, and the issues raised on Appeal.
29. The UKCS and KUDHEIHA are very old Trade Unions. They were established during the colonial days. The economy was not as large, as it is today. Areas of trade union representation were not as diverse, as they are today. Professionals were few and far between. The health sector was not populated with wide, diverse and specialized professionals as it is today.
30. Consequently, it was allowable for the UKCS to represent the Civil Service wholesale. The Civil Service of the last century, is not the Civil Service of today. KUDHEIHA could in the past, represent a wide range of unrelated industries. KUDHEIHA was in schools, hospitals, hotels and domestic homes.
31. Logically, such Trade Unions, with wide areas of representation, can hardly be said to sufficiently represent any areas they profess to represent. The economy has grown, with new trades, tools of production and professions coming into place. There are areas of specialization within the Public Health Sector, which are beyond the reach of the UKCS and KUDHEIHA.
32. In concluding that the Appellants are sufficiently represented by UKCS and KUDHEIHA, the Respondent failed to appreciate the width of the areas the Objectors allege to represent, and whether such representation, can be said to sufficiently represent professional groups within the public service.
33. The Interested Parties submit that there are other professional groups, which have registered their own Trade Unions, reflective of the unique labour relations challenges, existing in the particular sectors. They include KMPPDU, KNUN and KUCO. A few years back, it would be argued that members of these Trade Unions could be represented by the older, widely-representative Trade Unions, but Courts and generational wisdom in the Trade Union Movement, have since altered this way of thinking.
34. New professions have emerged, with new tools of production and technologies. These professions, trades and industries cannot be represented by the old behemoths of Trade Unions like UKCS and KUDHEIHA, who are claimed to bestride the labour movement like colossi. There are emerging



professional groups who cannot be lumped together with the general health service sector, or the multiple industries, traditionally represented by KUDHEIHA. An Environmental Health and Public Health Practitioner has no community of interest with a Domestic Help, represented by KUDHEIHA, or a Clerk at Ardhi House, represented by UKCS.

35. It was held by this Court in Appeal No. E145 of 2021 *Anne Wangari Mugambi & 4 others v the Registrar of Trade Unions*, that the Appellants, who are Public Prosecutors are entitled to register their own Trade Union, because they do not share a community of interest with members of Trade Unions existing in the Public Service. This reasoning applies to the Appellants here.
36. They have the support of the Interested Parties, who include their Regulator, the 1st Interested Party herein. They and the Interested Parties have clearly shown that they are a distinctive group, with an identifiable and unique community of interest. The 1st Interested Party has confirmed their numbers at 6,110. It has confirmed that they are not represented by any Trade Union. The 1st Interested Party as the Regulator, cannot be doubted on the number of professionals under its mandate, and on its familiarity concerning the unique labour relations challenges, that arise in the profession. The law recognizes the separateness of the Appellant's profession from the rest of the health sector. There is a specific Regulator, and Act of Parliament, governing the profession. The Respondent erred, by advising that the Appellants could be lumped with other professionals in the Civil Service represented by UKCS, or with other professionals and non-professionals that are represented by KUDHEIHA.
37. There is no reason for the Respondent to withhold registration, in violation of the Appellants' fundamental rights and freedoms, guaranteed under articles 36 and 41 of the *Constitution*. The Appellants were denied their statutory rights, under sections 4 and 14 of the *Labour Relations Act*. The Court agrees with the Appellants, that the Respondent acted against *Freedom of Association and Protection of the Right to Organize ILO Convention*, 1948 [No. 87] among other international laws, in declining registration.
38. The submission made by the Respondent, to the effect that she acted according to the advice of the National Labour Board, does not justify refusal to register the Appellants. In Appeal No. E 145 of 2021 above, the Court held that while the National Labour Board is mandated to advise the Respondent on registration of Trade Unions, the role of registration, and ultimate responsibility on registration, rests with the Respondent. This is why the Respondent, and not the National Labour Board, is the Respondent, in Appeals where the Respondent declines registration of a Trade Union. No Labour Institution should stand in the way of legitimate exercise of trade unionism, and the freedom and right of association, as guaranteed in the Constitution of Kenya.

It is ordered: -

- a. The Appeal is allowed.
- b. The decision of the Respondent, contained in FORM D, declining registration of Kenya Environmental Health and Public Health Practitioners Union [KEHPHPU] is hereby quashed.
- c. The Respondent shall immediately register Kenya Environmental and Public Health Practitioners Union [KEHPHPU] by issuing the Appellants a certificate of registration; and by entering the name of the Trade Union in the appropriate register of Trade Unions.
- d. No order on the costs.



DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 30TH
DAY OF NOVEMBER 2022.

JAMES RIKA

JUDGE

