



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**APPEAL NO. 21 OF 2019**

**(Being an appeal against the decision of the Director General of the National  
Employment Authority dated 03.04.2019 and 11.04.2019 respectively)**

**AL HAJURA AGENCY LIMITED.....APPELLANT**

**-VERSUS-**

**DIRECTOR GENERAL,**

**NATIONAL EMPLOYMENT AUTHORITY.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> May, 2020)**

**JUDGMENT**

The appellant filed the memorandum of appeal on 26.07.2019 through A.T. Oluoch & Company Advocates and against the decision of the Director General, National Employment Authority being refusal to renew the appellant's registration certificate as conveyed in the letter dated 03.04.2019 and 11.04.2019 signed by Joseph Njue for Acting Director General of the National Employment Authority. The appeal was filed pursuant to section 56(8) of the Labour Institutions Act 12 of 2007 and Regulations and all other enabling provisions of the law.

On 11.10.2019 the appellant changed its advocates to Mutea Muthuri & Associates Advocates. The amended memorandum of appeal was filed on 25.02.2020. The appellant states that it is dissatisfied with the decision of the respondent contained in the letters dated 03.04.2019 and 11.04.2019 and appeals against the whole decision on the following grounds:

- 1) The respondent erred in law and in fact that the appellant had not met the statutory requirements for renewal of a registration certificate as an employment agency.
- 2) The respondent erred in law and fact in failing to register to renew the appellant's registration certificate as an employment agency.
- 3) The respondent erred in law and fact in failing to provide reasons for the failure to renew the appellant's registration certificate as an employment agency.
- 4) The respondent erred in law and in fact in failing to give the appellant an opportunity to be heard.

The appellant prayed for:

- 1) A declaration that the appellant is compliant with the statutory requirements for renewal of a registration certificate as an employment agency.
- 2) An order compelling the respondent to renew the appellant's registration certificate as an employment agency.
- 3) Any other consequential orders the Court may deem fit to grant.
- 4) The appellant be awarded costs of the appeal.

It is not in dispute that the appellant is a company limited by shares and at all material times duly registered under the Companies Act, 2015. The appellant's directors are Susan Wangui Wanjohi and Mariam Mohamed. The appellant is also, at material time, a member of the Kenya National Chamber of Commerce and Industry as well as a member of the Joint Kenya – Arab Chamber of Commerce and Industry. The appellant is also a member of the Kenya Association of Private Employment Agencies. The appellant's undisputed case is that it has held accreditation certificates from the Ministry of Labour as an employment agency since its incorporation in the year 2011 through to the year 2019.

It is the appellant's further case that in February 2019 the appellant applied for the renewal of its registration certificate as an employment agency. The appellant's undisputed case is that its certificate of registration was expiring on 14.03.2019 and in February 2019 it made an application to the respondent for renewal of its registration certificate. By the letter Ref. No. NEA/FE&LE/S/077 dated 03.04.2019 the respondent conveyed his decision to the appellant thus:

**“The Director**

**Al-Hujura Agency Limited**

**NAIROBI**

**APPLICATION FOR ACCREDITATION**

**Reference is made to your application for registration as a private Employment Agency.**

**This is to inform you that your application was processed but was unsuccessful for failing to meet the requirements set out in the Labour Institutions Act, 2007 and Legal Notice No. 110 Labour Institutions (Private Employment Agencies) Regulations, 2016.**

**Signed**

**Joseph Njue**

**For Ag. Director General”**

The appellant responded by its letter dated 09.04.2019 appealing against the decision of being unsuccessful on meeting the requirements set out in the Labour Institutions Act, 2007 and legal notice 110 as referred to in the respondent's letter of 03.04.2019. The appellant explained that since 2014 to 2018 it had been paying for license as required as it waited for jobs to open. Further, it currently had job openings for 300 candidates in process waiting to be granted Saudi Arabian Visas as per the evidence it had furnished. The candidates had been trained by trainers accredited by the respondent for the position of house maids and the appellant had incurred costs in obtaining Visas as per provided evidence. Further, most candidates had undertaken medical examination at a cost of Kshs.1, 068, 000.00 as per the provided evidence. Passport fees for 100 applicants had been paid. Massive resources had therefore already been incurred and 180 candidates who had acquired Visas needed to travel.

The respondent replied by the letter Ref. No. NEA/FE&LE/S/077(2) conveying that the vetting committee had no mandate to hear appeals from private employment agencies. The reply concluded, **“I also wish to draw your attention to section 56(7) of the Labour Institutions Act, 2007 which requires that any person aggrieved by a decision of the Director made in the exercise of his functions under the section may appeal against such decision to the Employment and Labour Relations Court.”**

The appellant moved to file the present appeal.

Regulation 6 (1) of the Labour Institutions (Private Employment Agencies) Regulations, 2016 provides for renewal or replacement of registration certificate. The regulation provides that an application for renewal of a certificate of registration shall be submitted at least one month before its expiry to the Director accompanied by:

- a) proof that the agency has been submitting returns to the Director in the prescribed form;
- b) proof that the agency has renewed the guarantee specified in regulation 3(h);
- c) audited financial statements and accounts; and
- d) a copy of a valid lease agreement in case of change of office location.

Regulation 6(2) states that if the Director is satisfied that the applicant qualifies for renewal of the registration certificate, the Director shall issue the renewal certificate upon payment of the prescribed fee set out in the Second Schedule. The appellant submits that as per the material on record in this appeal and as at the time of making the application for renewal of the certificate of registration, the appellant had complied with all the requirements as per Regulation 6 and it is therefore entitled to the registration.

The respondent filed submissions through Christine Oyugi, Senior Litigation Counsel, for the Attorney General. For the respondent it is submitted that an application for registration of an employment agency such as the appellant is made under section 56 of the Labour Institutions Act 12 of 2007. Under section 56 (2) of the Act such applications for registration shall be vetted by the Inter-Ministerial Committee established under section 54A of the Act. It is submitted that the appellant applied for renewal of licence to operate as a private

employment agency on 14.03.2019 being the same day that the licence expired. Further a request for background check had earlier been made on 11.02.2019 to the National Intelligence Service and a report was received on 26.03.2019 in which the Inter-Ministerial Committee was advised against renewing the appellant's licence. It was on the basis of that report that a letter was written to the appellant regarding processing of its application.

It was further submitted for the respondent that section 6(5) of the Fair Administrative Action Act provide that an administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure. Thus, it is submitted that the respondent was entitled to depart from Article 47(2) on giving of reasons because the intelligence report is classified information under section 37 of the National Intelligence Service Act and section 61 prohibits unauthorised disclosure of such information. It was submitted that the Inter-Ministerial Committee was not under obligation to give reasons for refusal to renew the applicant's registration certificate given the fact that the vetting process and background check was conducted by the National Intelligence Service. Thus the appellant is not entitled to the remedies as prayed for.

The Court has considered all the material on record and the parties' respective positions and makes findings as follows:

1) The material on record shows that the appellant had previously been registered as an employment agency and in the instant case was applying for renewal of the registration certificate. The court finds that the respondent misdirected itself when it was submitted that the appellant was applying for registration and the Court finds that the Inter-Ministerial Committee which is involved at registration stage and the report by the National Intelligence Service as urged were extraneous matters because the case was not about registration. In any event, there was no mention of such intelligence report by the respondent in declining to renew the certificate of registration and no such evidence was provided before the Court. The Court further finds that it was misconceived when it was submitted that in a case of registration the respondent was not under a duty to give reasons for refusal of registration. In particular section 56 (5) of the Labour Institutions Act states, **"The Director may refuse to grant an application made under this Act and give reasons for his refusal."** The Court therefore holds that the provisions of Article 47 of the Constitution on the right to fair administrative action and giving of reasons fully applies to the decisions by the respondent affecting the employment agencies.

2) The preconditions for renewal of certificate of registration are set out in Regulation 6 (1) of the Labour Institutions (Private Employment Agencies) Regulations, 2016. As per section 56 (5) of the Labour Institutions Act the respondent was required to give the appellant reasons for the refusal of the renewal of the certificate of registration. The respondent gave the reasons in the letter of 03.04.2019 thus, **"This is to inform you that your application was processed but was unsuccessful for failing to meet the requirements set out in the Labour Institutions Act, 2007 and Legal Notice No. 110 Labour Institutions (Private Employment Agencies) Regulations, 2016."** The respondent did not set out the particulars of the alleged failure to comply with the statutory requirements.

3) The Court has evaluated and reconsidered the material on record. By the letter Ref. No. NEA/ADM/CON/1/VOL.II (146) dated 20.03.2019 the respondent had written to the Consular, Embassy of the Kingdom of Saudi Arabia confirming that the respondent was a private employment agency duly registered by the National Employment Authority and its certificate of registration had expired on 15.03.2019 but had already applied for renewal of the certificate. The respondent advised the Embassy thus, **"You may therefore consider their registration for the MUSANED subject to meeting your other requirements."** The same was signed by Edith Okoki (Mrs), Ag. Director General. It is now submitted for the respondent that the application for renewal of the licence was submitted by the applicant on 14.03.2019 and further that a background check had been made on 11.02.2019 and an intelligence report thereon submitted on 26.03.2019. The appellant in the affidavits on record repeats that it applied for renewal of the registration certificate sometimes in February 2019. The Court returns that on a balance of probability, the application was timely being at least a month prior to the expiring annual certificate. In making that finding, the Court considers that the respondent has not alleged as a reason for denial of renewal of the licence to have been late submission of the application and the respondent has not offered any explanation for the legitimate expectation that the application was good in law as created in the letter of 20.03.2019 to the Embassy. The respondent has also not explained how a background had been made on 11.02.2019 if the appellant had not by that date applied for the renewal of the certificate.

4) The Court finds that the respondent at all material time failed to particularise the details of the preconditions in Regulation 6(1) of the Labour Institutions (Private Employment Agencies) Regulations, 2016 that constituted the basis for refusal of the renewal of the annual certificate as had been applied for by the appellant. A general allegation of failure to comply with the statutory provisions in circumstances whereby the appellant has exhibited evidence of such compliance is found arbitrary and contrary to the said Regulation 6 and Article 47 of the Constitution as the refusal decision is trapped by the rule against unreasonableness. Thus, the appellant's appeal will succeed as prayed for.

In conclusion judgment is hereby entered for the appellant against the respondent for:

- 1) Allowing the appeal with orders below.
- 2) The declaration that the appellant is compliant with the statutory requirements for renewal of a registration certificate as an employment agency.
- 3) The order compelling the respondent to renew the appellant's registration certificate as an employment agency.
- 4) As time has since run, the renewed certificate to be issued to run for one year from the date of its issuance in terms of Regulation 5(2) and (3) of the the Labour Institutions (Private Employment Agencies) Regulations, 2016.
- 5) The respondent to pay the appellant's costs of the appeal.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 29<sup>th</sup> May, 2020.**

**BYRAM ONGAYA**

**JUDGE**