



**Kenya National Federation of Sugar Cane Farmers (KNFSF) Transmara Branch v  
Company (Petition E001 of 2022) [2022] KEHC 14448 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14448 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
PETITION E001 OF 2022  
F GIKONYO, J  
OCTOBER 31, 2022**

**BETWEEN**

**KENYA NATIONAL FEDERATION OF SUGAR CANE FARMERS (KNFSF)  
TRANSMARA BRANCH ..... PETITIONER**

**AND**

**TRANSMARA SUGAR COMPANY ..... RESPONDENT**

**RULING**

**Preliminary Objection: Jurisdiction, Exhaustion and Standing**

1. The respondents have taken out preliminary objections on four fronts; the first one is jurisdictional; the second is on the principle of exhaustion; third, standing; and fourth, the appropriateness of a constitutional petition to initiate a claim of alleged breach of contract. I will not follow the order they appear above as some are closely or inextricably bound.

**Appropriateness of Petition**

2. The respondents argued that, the cause of action is alleged breach of contract, which should be litigated in an ordinary civil suit, rather than in a constitutional petition. They explained that a petition seeks redress for infringement of a right or fundamental freedoms but not to seek remedy for breach of contract. They cited the case of *Paul Okutoyi vs Habil Olaka & another* [2018] eKLR in support of this argument.
3. The petitioner thinks otherwise; that the cause of action is infringement of right and fundamental freedoms enshrined in the *Constitution*, and thus, perfectly before the court.



## Exhaustion

4. On exhaustion, the respondent posit that the contract in issue has provided for alternative dispute mechanism as first port of call in case of any dispute arising from the contract. And, that the petitioner did not exhaust that remedy before coming to court.
5. The petitioner takes a different view; that courts have recognized exceptions to the doctrine of exhaustion to redress peculiar circumstances. They specifically cited section 9(4) of the *Fair Administrative Action Act* which prescribes exception to the rule on exhaustion where it is in the interest of justice. According to them, in the case of *Krystaline Salt Ltd vs KRA* [2019] KLR, a court may permit a party to approach the court directly when the internal remedy is futile or ineffective.

## Jurisdiction

6. Objection to jurisdiction was premised upon the argument that matters of acknowledgement of a person as a member of a trade union are labour-related, thus, falling within the jurisdiction of the Employment and Labour Relations Court under article 162 of the *Constitution* and *Employment and Labour Relations Act*.
7. The petitioner's position is that, the *Constitution* in article 22 and 258 gives any party including a trade union standing to file suit on behalf of its members for infringement or violation of right or fundamental freedoms in the bill of rights.
8. In sum, whereas the respondents are of the firm belief that the preliminary objections should succeed, the petitioner is of the contrary view; that these are not preliminary objections in the sense of the law for they consist in matters of law and fact which would require probing of evidence to prove.

## Analysis and Determination

### Nature of preliminary objection

9. A preliminary objection should not require probing of evidence to prove, yet, so potent to terminate the case in limine. See *Mukhisa Biscuits* case. Jurisdiction is thus, of preliminary significance and should be determined as such.

### Of ELRC as the Court With Jurisdiction

10. Quick glance of pleadings and the contract contained in the minutes provided, show that the contract in issue is between sugarcane farmers, on the one hand, and sugarcane processor and manufacture of sugarcane products, on the other hand. It is not a contract of employment.
11. Thus, the dispute is the breach of the said contract specifically; varying transport levies or charges unilaterally and without following due process. Such dispute is not of employment or labour-related in the sense of the *Employment and Labour Relations Act*. And, merely that the trade union is the petitioner does not make the dispute or the proceeding of employment or labour-related or labour. I do not therefore see the basis of the argument that, the dispute falls within the jurisdiction of the Employment and Labour Relations Court. The objection on jurisdiction falls.

### Appropriateness of Petition

12. I have found that the contract herein is not of employment or labour relations. Nevertheless, the petitioner claims that their claim is based on infringement of right to fair administrative action. The true position, however- arising from the pleadings- is that, the cause of action herein is alleged breach of



contract. The fact that the alleged breach of contract consists in the unilateral action by the respondents in varying transport charges or levies is a matter of proof and evidence to be tried within the cause of action-alleged breach of contract. Such incident of breach of contract, although anchored upon the requirements of fair administrative action does not elevate the claim of breach of contract into a constitutional issue to be litigated through the procedure of constitutional petition. The breach is capable of and should be competently argued in a suit for breach of contract.

13. Be that as it may, is the inappropriateness of a constitutional petition to initiate this claim fatal?
14. The mind of the court is thrown back to article 159(2)(d) of the *Constitution* that; justice shall be administered without undue regard to procedural technicalities. This elegant provision is not, however, a panacea for all procedural ills. Elevating all breaches to constitutional issues or points produces grave danger inter alia; (i) proliferation of ordinary claims into constitutional petitions; thus, (ii) depreciation of the value of constitutional remedy for breach or violation of rights and fundamental freedoms in the bill of rights.
15. Doubtless, a petition seeks redress for infringement of a right or fundamental freedoms and is not meant per se to seek remedy for breach of contract. See the case of *Paul Okutoyi vs Habil Olaka & another* [2018] eKLR.
16. I may exercise imagination further; elevation of ordinary suits into constitutional claims will possibly impact the jurisdiction of the magistrates' court in so far as they do not have jurisdiction to try violations of rights and fundamental freedoms.
17. Just thinking aloud; there are marked differences in substance and form between a suit commenced by way of a plaint and a proper constitutional application- I wonder how they may be reconciled without introducing great muddle-up and making the proceedings untidy and difficult. For instance, under order 2 rule 3 of the *Civil Procedure Rules*: "...every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits..."
18. Again, a plaint requires a verifying affidavit.
19. In contrast, note the requirements in *Mutunga Rules* on pleading of evidence, and filing of a supporting affidavit, and the possibility of hearing the petition on affidavit evidence only.
20. Whereas, this is a perfect case which should ordinarily be commenced by way of an ordinary suit- a plaint supported by a verifying affidavit- but since the proceedings are on a matter subject of arbitration agreement, I will be hesitant to strike the suit down. In connection thereto, at the right point, I will make appropriate orders as guided by the law.
21. Meanwhile, let me determine the other point of objection.

### **The Doctrine of Exhaustion**

22. The foregoing notwithstanding, does the proceedings offend the principle of exhaustion?
23. The doctrine of exhaustion is a preclusion doctrine. It has been invoked on the basis that the contract provides for alternative dispute resolution mechanism which has not been exhausted.
24. Article article 159(2)(c) of the *Constitution* is relevant. It requires; in exercising judicial authority the court should be guided by the principle inter alai that "...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall



be promoted, subject to clause (3); as long as they are not in contravention with the Bill of Rights; repugnant to justice and morality; or results in outcomes that are repugnant to justice or morality; or inconsistent with the Constitution or any written law.

25. The law, the way I understand it, is that, a party should exhaust internal remedy or alternative dispute resolution mechanisms provided by the parties in the contract before approaching the court for remedy. And, where proceedings are brought in a matter which is the subject of alternative dispute resolution mechanisms, the court should decline jurisdiction or stay the proceedings, and refer the parties to the alternative dispute resolution mechanism. Except of course courts may permit a party to depart only in the interest of justice, or where the internal remedy is ineffective or futile or illegal. See also section 6 of the Arbitration Act.
26. Nothing shows the internal remedy or alternative dispute resolution mechanism herein is ineffective or futile or illegal. Nothing shows that arbitration agreement is null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties.

### **Conclusion and Orders**

27. Time to repay my debt. Accordingly, as these proceedings are brought in a matter which is the subject of an arbitration agreement, the remedy that commends itself to me is;
- i) This matter is hereby referred to the internal remedy provided in the contract between the parties for resolution.
  - ii) In consequence thereof, these proceedings are stayed and the matter remains undetermined.
  - iii) In the circumstances of this case, and in facilitation of the consensual nature of arbitration, the court's attitude should be pro-arbitration. In light thereof, each party shall bear own costs of the objections and referral request. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 31<sup>ST</sup> DAY OF OCTOBER, 2022.**

**F. Gikonyo M.**

**Judge**

In the presence of:

1. Mr. Kasaso – CA
2. Miruka for Petitioner/Applicant
3. Ogutu Mboya for Respondent/Defendant - absent

