



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E243 OF 2020

Consolidated with

PETITION NO. 334 OF 2020

BETWEEN

KENYA TEA DEVELOPMENT AGENCY

HOLDINGS LIMITED & 55 OTHERS.....PETITIONERS

AND

THE CABINET SECRETARY,

MINISTRY OF AGRICULTURE, LIVESTOCK,

FISHERIES & CO-OPERATIVES & 2 OTHERS.....RESPONDENTS

AND

KENYA SMALL TEA HOLDERS GROWERS

ASSOCIATION (KESTEGA).....INTERESTED PARTIES

RULING NO. 3

1. There has been attempts by the Government of Kenya, in the recent past, to initiate several reforms into the tea sector. It is not lost to anyone in this country that the tea sector is not only one of the main pillars of the economy, but also key in foreign exchange earnings. Currently, Kenya is rated second to China in tea exports.
2. The sector commands a considerable fraction of the Kenyan population. The sector includes many players among them farmers, factory owners, workers, agents, brokers, tea auctions, and many others.
3. It is, therefore, on the foregoing basis that any intended reforms in the tea sector must be carefully undertaken.
4. The consolidated Petitions herein, are among many other matters filed in Court, in one way or the other, challenging the reforms. In particular, the matters revolve around **The Crops (Tea Industry) Regulations, 2020** contained in Gazette Notice No. 4469 dated 25th June 2020 issued by the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives and **The Tea Act**, No. 23 of 2020. The Act became operational from 11th January, 2021.
5. With such a state of affairs, Courts ought to consider the best practices in case management so as to avoid instances where different Courts render different decisions on similar issues. Such eventualities will not only cause confusion in the tea sector, but also embarrass the administration of justice. For instance, in the consolidated Petitions, two Courts rendered different judicial opinions on the same issue. It is that position which necessitated the transfer of one of the Petitions from the High Court at Mombasa to the High Court in Nairobi. There is, therefore, the need, and for orderly conduct of all matters on the reforms in the tea sector, that all such matters be dealt with together.

6. I am further persuaded that dealing with all related matters together will not in any way impede on any party's right to access to justice guaranteed under Article 48 of the Constitution given that Courts now conduct virtual proceedings throughout the country.
7. Be that as it may, this ruling is in respect of the Notice of Motion dated 4th March, 2021. The application seeks to amend the Notice of Motion dated 10th August, 2020.
8. The application is filed by the 55th Petitioner herein, East African Tea Trade Association. It was heard on 11th March, 2021.
9. The rest of the Petitioners did not oppose the application. The application is, however, opposed by the Respondents and the Interested parties.
10. In urging this Court to allow the application, Counsel for the 55th Petitioner/Applicant called upon the Court to note that the amendment seeks to bring the real issue in controversy to the fore. Relying on several decisions including *Central Bank Kenya Limited vs. Trust Bank Limited & 5 Others (2010) eKLR* and *Rodgers Mogaka Mogusu vs. George Onyango Oloo (2014) eKLR* the Applicant submits that any amendment necessary for determination of the real issues in dispute ought to be generally allowed. Further, under Rule 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred as 'the Mutunga Rules'), amendments are generally allowed at any time.
11. It is also submitted that the amendment is not seeking to introduce any new cause of action and that the application is filed without any delay. Counsel for the Applicant conceded that he realized the need to amend the application as he was preparing for the hearing and promptly attempted an oral application for amendment. Counsel further submits that in any event, costs are adequate compensation and that no prejudice will be occasioned to any party in allowing the amendment.
12. Supporting the application, Counsel for the 3rd to 54th Petitioners drew the Court's attention to the distinction between amending a pleading and amending the relief. Counsel submits that the Court has powers to grant any relief including a conservatory relief or even one in the nature of a structural interdict. It is submitted that even where there is no request for a conservatory order still the Court has the jurisdiction to issue such a relief in circumstances that the Court considers necessary.
13. The application is opposed by the Respondents and the Interested Party. The Hon. Attorney General appearing for the 1st and 2nd Respondents relied on a Replying Affidavit in opposition to the application. The Hon. Attorney General accuses the Applicant of indolence and mischief and that the application is a ploy for the Applicant to continue enjoying *ex parte* conservatory orders against the Respondents. As such, it is submitted, the Respondents suffer prejudice as the implementation of the policy changes by the Government are hindered by the orders and that costs are not adequate to compensate such prejudice. While referring to the decision in *Central Bank Kenya Limited vs. Trust Bank Limited & 5 Others*, the Hon. Attorney General pointed out that the Court of Appeal was very clear that an amendment which is likely to prejudice the other parties ought not to be allowed.
14. The Hon. Attorney General further submits that in the event the amendment is allowed then the conservatory orders be vacated. Counsel relied on *Fredrick Mwangi vs. Garam & Housing Finance Ltd* where the Court allowed an amendment, but declined to extend the conservatory orders on account of prejudice.
15. Counsel for the 3rd Respondent associated herself with the submissions by the 1st and 2nd Respondents. It is argued that whereas the Court has the discretion to allow the amendment, the application ought to be disallowed as no basis in law has been laid for such grant. Counsel further submits that the Applicant ought to instead file another matter.
16. Counsel for the Interested Parties, as well, opposed the application. He relied on a filed Case digest and Grounds of opposition. Counsel also associated himself with the submissions made by Counsel for the 1st to 3rd Respondents.
17. Counsel further argues that there is no nexus between the application sought to be amended and the intended amendment. In view of the lacuna, Counsel submits that the conservatory orders in place be discharged more so given that there is no averment in the application for extension of the said orders.
18. On the issue of prejudice, Counsel reiterated that there is immense prejudice in allowing the application since there is dire need for the intended sector reforms.
19. In the end, Counsel submits that in the event the application is allowed, then Article 50 (1) of the Constitution calls for all parties to be accorded an opportunity to respond to the amended application.
20. In a rejoinder, Counsel for the Applicant submits that the amendment does not take away the initial prayers in the application sought to be amended, but only adds another prayer. Counsel pointed out that an application to vacate the interim orders is still pending and clarified that the issue in *Fredrick Mwangi* case (supra) was amendment of an affidavit and not an application or a pleading. Counsel prays that the application be allowed.
21. I have, with care, considered the application alongside the submissions and decisions referred to.
22. As said, the application for amendment is the Notice of Motion dated 4th March, 2021. It seeks two prayers. They are as follows: -

1. Leave be granted to the 55th Petitioner/Applicant to amend the Notice of Motion dated 10th August, 2020 and insert any prayer 2a

the following:-

“THAT pending hearing and determination of the petition filed herewith, this Honourable Court be pleased to issue a conservatory order on terms that the Crops (ta) Industry Regulations Implementation Schedule published by the 1st Respondent on 3rd August, 2020 and subsequently vide Daily nation newspaper dated 10th August, 2020 be suspended.

2. Costs of this application be in the cause.

23. The Notice of Motion dated 10th August, 2020 (hereinafter referred to as ‘**the original application**’) which is sought to be amended has the following prayers: -

1. That this application be certified as urgent and service hereof be dispensed with in the first instance.

2. That pending the hearing and determination of this application, this Honourable court be pleased to issue a conservatory order on terms that the Crops (Tea Industry) Regulations Implementation Schedule published by the 1st Respondent on 3rd August, 2020 and subsequently vide Daily Nation Newspaper dated 10th August, 2020 be suspended.

3. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue a declaration that the Crop (Tea Industry) Regulations Implementation Schedule published by the 1st Respondent was issued in a manner that is inconsistent with the Provisions of the Constitution and the Statutory Instruments Act hence null and void for all purposes.

4. That pending the hearing and determination of this petition, this Honourable court be pleased to issue a declaration that the Crops (Tea Industry) Regulations Implementation Schedule published by the 1st Respondent was issued in a manner that is inconsistent with the provisions of the Constitution and the Statutory Instruments Act hence null and void for all purposes.

5. That, Pending the hearing and determination of the Petition, the Honourable court be pleased to issue an order of Certiorari to remove into this court and quash the 1st Respondent’s Crop (Tea Industry) regulations Implementation Schedule published on 3rd August, 2020 and subsequently on the Daily News Paper dated 10th August, 2020 for being invalid, null and void.

6. That such further and other reliefs be granted to the application as this court deems fit.

7. Costs of this application be borne by the Respondent.

24. Rule 18 of the Mutunga Rules provides as follows: -

Any party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.

25. Indeed, the amendment must be sanctioned by the Court. In doing so, the Court ought to exercise its discretion judiciously.

26. The Court of Appeal in **Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of 1991** (unreported) while citing with approval the decision in *St Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR, set out the principles governing the amendment of pleadings as follows: -

a) *The power of the court to allow amendments is intended to determine the true substantive merits of the case.*

b) *The amendments should be timeously applied for.*

c) *Power to amend can be exercised by the court at any stage of the proceedings.*

d) *That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.*

e) *The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.*

27. In **Harrison C. Kariuki v Blueshield Insurance Company Ltd** [2006] eKLR the Court referred to the Court of Appeal in *Central Kenya Ltd v. Trust Bank Ltd* [2000] EALR 365 and held that: -

The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no injustice if the other party can be compensated by an appropriate award of costs for any expense The main aim is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.

28. In its disposition, the 55th Petitioner through Counsel, Mr. Mwangi Kibicho, deponed that the intended amendment is necessary to allow

the determination of the real issues in controversy between the parties by preserving the substratum of the Petition. Counsel further deponed that the amendment will not in any way occasion prejudice to the Respondents and that the error sought to be cured by the amendment was solely caused by Counsel and ought not to be visited upon the 55th Petitioner.

29. As is settled in law, the primary consideration by a Court in applications for amendment is to accord a party the opportunity to fully present its case for the Courts consideration. That is the rationale behind the generally acceptable position that amendments ought to be freely allowed unless otherwise demonstrated. I must add that there is considerable wisdom in dealing with all related issues in a single matter. The approach saves on the limited judicial time and takes care of the possibility of parties filing other related or similar suits. Courts are also called upon under Article 159(2)(d) of the Constitution to deal with the substance of the matters in place of procedural considerations.

30. Having said so, I will now consider the nature of the amendment. I have reproduced above the prayers sought in the original application and the intended amendment. The conservatory prayers sought in the original application are pending the hearing and determination of the application. There is no prayer in the original application seeking the grant of conservatory orders pending the determination of the Petition. That is the limb which the 55th Petitioner intends to introduce in the original application *vide* the amendment.

31. The intended amendment, therefore, does not introduce any new issues. The intention of the amendment is, in other words, to say that, if the Court finds that the conservatory orders ought to issue, then may the Court consider issuing the orders to the determination of the Petition.

32. The Court issued interim conservatory orders pending the determination of the original application. In the event the amendment is not allowed, then it means that the original application is spent. The 55th Petitioner, or any other Petitioner, may consider filing another application to take care of the situation. Such state of affairs, will no doubt, prolong the settlement of the interim issues. As a result, the finalization of the Petitions will be delayed.

33. On prejudice, it is vehemently contended that the grant of the orders sought will prolong the sufferance on the Respondents who are not able to implement the intended Government policies through the Regulations. It is further contended that if the amendment is allowed then the interim orders should not be extended so as to strike a balance between all the parties.

34. The amendment seeks to introduce a prayer in the application. That does not mean that the Court, after allowing the amendment, must also allow the prayer sought. The considerations to be taken by a Court as to whether an amendment be allowed are different from those in applications for conservatory orders.

35. There are many ways in which a party may be prejudiced in a matter. However, in this application, this Court is of the considered position that the manner in which the issue of prejudice has been presented ought to be considered in the application for conservatory orders.

36. Deriving from the foregoing, I find the application merited. I will further consider appropriate orders with a view of having all pending Petitions in the whole country which, in one way or the other, challenge the reforms undertaken within the tea sector be heard together.

37. In the end, the following orders do hereby issue: -

(a) The 55th Petitioner, be and is hereby, granted leave to amend the Notice of Motion dated 10th August, 2020 in terms of prayer 1 of the Notice of Motion dated 4th March, 2021. The amended application shall be filed and served within 3 days of this order.

(b) Any party seeking to oppose the amended application shall file and serve a response within 7 days.

(c) The 55th Petitioner shall then file and serve any supplementary response together with further written submissions, if need be, within 5 days of service.

(d) Upon service, parties shall be at liberty to file further submissions on the amended application within 5 days.

(e) All pending Constitutional Petitions in the country challenging *The Crops (Tea Industry) Regulations, 2020* contained in Gazette Notice No. 4469 dated 25th June 2020 issued by the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives and *The Tea Act, No. 23 of 2020* or in any other manner challenging the reforms within the tea sector shall be transferred to the Constitutional and Human Rights Division of the High Court at Nairobi.

(f) The Deputy Registrar of this Division shall, within 10 days, extract and serve a copy of the relevant part of this Order upon all the Deputy Registrars in all the High Court stations in the country. Further, any party being aware of any pending Constitutional Petition challenging *The Crops (Tea Industry) Regulations, 2020* and *The Tea Act, No. 23 of 2020* or in any other manner challenging the reforms within the tea sector shall forthwith furnish the Deputy Registrar with the details of the matter.

(g) This matter, together with all the other matters contemplated in (e) above, shall be fixed for further directions on 19/05/2021 before the Duty Judge.

(h) The interim orders issued in this matter shall remain in force.

(i) Costs of the Notice of Motion dated 4th March, 2021 shall be in cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF APRIL, 2020

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Kibicho, Counsel for the 55th Petitioner/Applicant.

Mr. Millimo, Counsel instructed by the firm of Messrs. Millimo, Muthomi & Company Advocates for the 1st and 2nd Petitioners.

Mr. Ngatia, SC, instructed by the firm of Messrs. Ngatia & Associates Advocates for the 3rd to 54th Petitioners.

Mr. Nguyo Wachira, Counsel instructed by the Hon. Attorney General for the 1st and 2nd Respondents.

Miss. Mukhonge, Counsel holding brief for Mr. Gitobu Imanyara for the 3rd Respondent.

Mr. Ngunjiri, Counsel for the 3rd to 24th Interested Parties.

Elizabeth Wambui – Court Assistant