



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 87 OF 2020

BETWEEN

EAST AFRICAN TEA TRADE ASSOCIATION.....PETITIONER

-VERSUS-

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK,

FISHERIES & COOPERATIVES.....1ST RESPONDENT

AGRICULTURE AND FOOD AUTHORITY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

KENYA TEA DEVELOPMENT AGENCY HOLDINGS.....1ST INTERESTED PARTY

AND PROPOSED INTERESTED PARTIES

1. ELIZABETH MUTHONI WAITHANJI

2. HUDSON MOFFAT KAMAU

3. SAMUEL NJUNU MUGWE

4. JOSEPH MWANGI MBOTE

5. JAME MUKUNA KARIUKI

6. NAHASHON NGARE KABUGUA

7. GERALD NGUMBA MWANGI

8. SAMON NG'ANG'A KARIUKI

9. JOHN MWANGI GICHERU

10. GEORGE WAWERU KABUGA

11. JAMES WAMBUGU GACHUNJI

12. JOHN NJIRU KATHANGU

13. JOSEPH MURUMIA NJERU

14. BENSON MUCHANGI P

15. SIMON JOHNSON KARIUKI

16. MWANIKI KATHURI NJAMBURI

17. BLAISE F. KARANJA

18. JOSEPH GITIMU MUNYAGA

19. PETER KINGORI WAMUTITU

20. CHARLES KARANI

21. DANIEL K. WARUI C

RULING

The Application

1. The proposed Interested Parties herein, have filed an application by way of a Notice of Motion dated 5/11/2020 seeking the following orders:

1. THAT this application is certified urgent and service be dispensed with in the first Instance.

2. That this honourable Court be pleased to order that the proposed interested parties be joined as interested parties in this Petition.

3. That this honourable Court be pleased to order that the Petitioner and the Respondents do serve on the proposed interested parties all the pleadings to date touching on the Petition.

4. That Costs of this application be provided for.

2. The application is premised on 7 grounds set out on the face of the Application and supported by Affidavit sworn on 5/11/2020 by **Hudson Moffat Kamau** who describes himself as a small scale tea farmer vide grower number MK0250301, and he is also a shareholder of Makomboki Tea Factory limited. The proposed Interested Parties state that they are small scale tea farmers and/or shareholders of 17 tea factories spread across the country, and that being the primary producers of tea, they are the ones who do the heaviest lifting in the tea value chain yet they are the least paid in the value chain in the tea sector.

3. The Proposed Interested Parties allege that the 1st Interested Party is running a system that is opaque, exploitative and enslaving with rampant delays in payment of bonus that run up to ten months in a year. The ripple effect is that the proposed Interested Parties desperately end up taking loans from the 1st Interested Party subsidiary Greenland Fedha using their unpaid bonus and dividends as security. This has led to untold suffering and a vicious cycle of poverty and enormous disgruntlement of the tea farmer and their liberation now lies in the reforms brought by the Crop (Tea Industry) Regulations 2020, which the Petitioner and the 1st Respondent oppose.

4. The Proposed Interested Parties further aver that they fully support reforms envisaged under the Crop (Tea Industry) Regulations 2020 and have unequivocally voiced their support in various stakeholder meetings conducted by the Cabinet Secretary Ministry of Agriculture Livestock Fisheries and Cooperative in their respective areas. Consequently, the 1st Interested Party who manages Tea Factories in the country and who has taken a diametrically opposite position on the issue of the said reforms and regulations, cannot ventilate the proposed Interested Parties' case before this Court.

5. The proposed Interested Parties state that they have satisfied the criteria for joinder as Interested Parties as was held in the case of **Trusted society of Human Rights Alliance vs. Mumo Matemu (2014) Eklr**, since the Petition before this Court has immense public interest affecting thousands of small scale farmers, and that the remedies sought in this Petition are of a public nature and affect over 6809,000 small scale tea farmers in 17 tea growing counties, and 5,000,000/= people who rely on small scale tea sector to earn a living. Therefore, the proposed Interested Parties' complaint is not one which has a remedy under the Companies Act 2015 and/or the respective Teas Factory Limited Memorandum and Articles of Association.

The Response

6. The application is opposed by the 1st Interested Party vide Replying affidavit sworn on 11/11/2020 by **Dr. John Kennedy Omanga** who is retained as the 1st Interested Party's Company Secretary. The deponent avers that the 1st Interested Party on 11/8/2010 filed a Petition in Nairobi High Court Constitutional Division and that small scale tea factory companies were enjoined thereto as co-Petitioner numbers 3 to 54, and that during the pendency of the said Nairobi Petition the 22 proposed Interested Parties herein have filed an Application seeking to be joined to that petition on grounds which are a replica and similar to the ones constituting the present Application. In the Nairobi Application,

the proposed Interested Parties' Application for joinder was heard on merit, and a ruling reserved for delivery on the 26.11.2020.

7. The 1st Interested Party avers that before delivery of ruling in the Nairobi Petition, the 22 proposed Interested Parties have again sought to interrupt the flow of the instant proceedings by raising similar Application as the one in Nairobi without giving any valid explanation.

8. The 1st Interested Party also states that the case the 22 proposed Interested Parties seek to advance once enjoined can be advanced by the Respondents in their absence, since they are in support of the impugned Regulations. Further, that the issues put forward by the Proposed Interested Parties are of personal interest, which will only introduce a new cause of action yet the Proceedings before this Court are on the impugned regulations.

9. The 1st Interested Party states that the proposed Interested Parties having described themselves as shareholder of small scale tea factory companies, and being in support of the impugned regulation, they ought to provide evidence to demonstrate that they sought and were granted leave to prosecute in Court proceedings that are contrary to the position taken by their respective companies to which they are shareholders yet their companies are co-petitioners in the Nairobi Petition, and that the 1st Interested Party will be prejudiced as it will be required to respond to other issues that will be introduced in support of the impugned regulations.

10. The 1st Interested Party states that the instant Application is an abuse of the Court process, *subjudice* and vexatious and may result to conflict in decision by courts of concurrent jurisdiction.

11. The Petitioner opposed the Application vide Replying Affidavit sworn on 11/11/2020 by **Edward Mudibo**, who is the Petitioner's Managing Director. He depones that the Petitioner represents Producers, Buyers (Exporters), Brokers, Tea packers and Warehousemen across 10 countries in Africa and in its own capacity by running, coordinating and conducting the weekly Mombasa Tea Auctions and that the impugned regulations are affecting and disrupting the running of tea auction process. Therefore, the issues raised in the current Petition do not concern tea farmers and as a result, the issues the proposed Interested Parties wish to introduce will only confuse the main issues in the matters before court.

12. The Petitioner states that the proposed Interested Parties have failed to demonstrate that they would suffer any prejudice if the Application is denied. Therefore, their presence and participation in these proceedings is unnecessary, since their position will be articulated by the Small Tea Holders Growers Association (KESTEGA) which is represented in **Nairobi Petition No. E 243 of 2020**. Consequently, the Petitioner avers that the Application by the proposed Interested Parties is hopelessly incompetent, misconceived and is an abuse of the Court process and the same should be dismissed with costs.

13. The 1st and 3rd Respondents supported the Application by proposed Interested Parties' vide Grounds in support of the Application dated 11/11/2020, as follows:

a. That the Kenya Tea Development Authority (an Interested Party) lacks the authority to oppose the joinder of a party as an Interested Party to this Petition.

b. That proceeding the Petition without the input of proposed Interested Parties' on the impugned regulations will render the Petition a mockery of the law and embarrass the trial of the Petition and Cross-Petition as the regulation 2 of the Tea Regulations 2020 provides for participation of the proposed Interested Parties and the regulations have clauses to address the plight of tea growers which they seek to address.

c. That Rule 10 of the impugned regulations provide that farmers are key in management of the tea sector affairs and they should participate in tea Factory Nomination leading to election of their Board directors.

14. On the 10/11/2020, this Court directed that this Application will be heard on the 12/11/2020. On 12/11/2020 **Mr. Ngunjiri** Learned Counsel for the proposed Interested parties made oral submissions in support of the proposed Interested Parties' case and relied on their written submission filed in Court on 6/11/2020. **M/s. Nkonge** Learned Counsel for the 2nd Respondent submitted that the 2nd Respondent was in support of the instant Application. **Mr. Nguyo** Learned Counsel for the 1st and 3rd Respondent made oral submissions in support of the Application and relied on the filed Grounds in support of the instant Application.

15. On the part of the Petitioner, **M/s. Cheruiyot** relied on the Petitioner's submission filed on the 11/11/2020 in opposition to the instant Application, while **Mr. Milimo** Learned Counsel for the 1st Interested Party made oral submissions and relied on the 1st Interested Party's Affidavit sworn on 11/11/2020.

Determination

16. Upon considering the Application, affidavits in reply, the grounds in support of the Application, and the parties' submissions together with the authorities that they cited, the issue that emerges for determination herein is whether the proposed interested parties have sufficiently demonstrated that they deserve to be admitted to these proceedings as interested parties.

17. Rule 7 of Mutunga Rules provides as follows:

Interested party

1. A person may, with leave of the court make an oral or written application to be joined as an interested party

2. A court may on its own motion join any interested party to the proceedings before it.

18. In the case of **Trusted Society of Human Rights Alliance v Mumo Matemu [2014] eKLR**, the Supreme Court held that:

“An interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or herself appears in the proceedings, and champions his or her cause....”

19. Similarly, In the case of **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR** the Supreme Court cited with approval the case of **Meme v Republic [2004] 1 EA 124** where it was stated circumstances when a party may be joined to proceedings as follows: -

“(i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation.”

20. In this matter, this court shall have to answer to the following sub-issues:

(a) what is the intended interested party’s stake and relevance in the proceedings?

(b) will the intended interested party suffer any prejudice if denied joinder?

(a) what is the intended interested party’s stake and relevance in the proceedings?

21. The proposed Interested Parties have described themselves as small scale tea farmers and shareholders of the listed Tea Factory Companies and they aver that despite them being the primary producers of tea in the country, they have been oppressed by the 1st Interested Party’s system which is opaque, exploitative and enslaving to them, and that the 1st Interested Party deliberately delays their annual tea bonus. Out of desperation the Applicants are forced to get loans from the 1st Interested Party subsidiary “*Greenland Fedha*” using their bonus as collateral. The Applicants now aver that their liberation lies in the reforms brought by the Crop (Tea Industry) Regulations.

22. The Petitioner contends that in the present Petition the impugned regulations have been reduced to the issues and regulations affecting the Tea Auction system. Therefore, the Applicants’ grievances are well taken care of in the Nairobi Petition to which they have already sought enjoyment.

23. Having considered all the arguments on the stake of the Applicants, this Court finds and hold that the Applicants as the primary producers of tea have demonstrated that indeed they stand to be directly affected by any orders that may be made in the Petition because they are in support of the Impugned regulations which they believe will liberate them from the 1st Interested Party’s oppression and manipulation. Consequently, this Court finds that the Applicants have crossed the first hurdle.

(b) will the intended interested party suffer any prejudice if denied joinder?

24. The Applicants have averred that the Petitioner and the 1st Interested Party oppose the reforms in the tea sector as envisaged by the Crops (Tea Industry) Regulations, 2020, which reforms are beneficial to the majority of small scale tea farmers. The Applicants further state that in fact the Petitioner has obtained stay on the implementation of the said regulations pending hearing and determination of the Petition. Therefore, given that the Applicants have taken a diametrically different position in regard to the impugned Regulations, it is clear that neither the Petitioner, the Respondent and/or the 1st Interested Party can ventilate the Applicants’ case before this Court.

25. Mr. Milimo Counsel for 1st Interested Party submitted that the 1st Interested Party is owned by 53 tea factories companies and the shareholders of the tea factories are tea farmers who are about 600 some of whom are the applicants herein. Since the Applicants have elected 12 directors who sit in the 1st Interested Party, then the Applicants as shareholder, have a voice in the Petition through the 1st Interested Party. And although the Respondents support the impugned regulations, this Court finds that the Respondents are incapable of advancing the Applicants cause since the Applicants’ interests are of a personal nature and therefore they will be well advanced by the Applicants themselves. Accordingly, guided by the above authorities and considering the relevant law and the facts of this case, I allow the application and order as follows:-

a. That the proposed Interested Parties be and are hereby enjoined in these proceedings as the Interested Parties Nos. 2 to 22.

b. That the Petitioner, 1st Interested Party and the Respondents do serve on the proposed interested parties all the pleadings to date touching on the Petition.

c. Parties shall bear own costs herein.

Dated. Signed and Delivered at Mombasa this 26th day of November, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Milimo for Interested Party

Mr. Nkonge for 2nd Respondent

Mr. Ngunjiri for Proposed Interested Party

Ms. Cheruiyot for Petitioner

Mr. Nguyo for Attorney General

Ms. Peris Court Assistant

NOTE: This ruling was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver rulings in response to the COVID-19 Pandemic.