



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**PETITION 209 OF 2011**

**IN THE MATTER OF ARTCLE 22 AND 23 OF THE CONSTITUTION OF  
THE REPUBLIC OF KENYA  
AND  
IN THE MATTER OF ALLEGED CONTRAVETION OF DUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 41 AND 234 OF THE CONSTITUTION  
OF THE REPUBLIC OF KENYA.**

**BETWEEN**

**JANE WANJIKU MAINA AND 185 OTHERS .....  
PETITIONERS**

**VERSUS**

**THE ATTORNEY GENERAL .....1<sup>ST</sup>  
RESPONDENT**

**KENYA TEA DEVELOPMENT AGENCY  
LIMITED (K.T.D.A) .....2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

1. In their petition dated the 17<sup>th</sup> of September 2011 expressed to be brought under Articles 22 and 23 of the Constitution, the petitioners seek orders against the respondents for alleged violation of their rights under Articles 27, 28, 41 and 234 of the Constitution of Kenya 2010.
2. The alleged violations, according to the petitioners, arise with regard to the publication of **Legal Notice No 44** dated 22<sup>nd</sup> March 1999 by the then Minister for Agriculture which revoked the Kenya Tea Development Authority (KTDA) and provided for the incorporation of the 2<sup>nd</sup> respondent as a limited liability company.
3. The petitioners question their early retirement by the 2<sup>nd</sup> respondent, ask the court to declare that it was

unconstitutional and a violation of their rights under Articles 27, 28, 29, 41 and 234 of the Constitution, and seek general, special and exemplary damages. The petition is supported by the affidavit of **Jane Wanjiku Maina** dated the 17<sup>th</sup> of September 2011.

4. The respondents oppose the petition. A replying affidavit and a supplementary affidavit both sworn by **Mr. David Kamau**, the Manager in charge of Legal and Regulatory Affairs of the 2<sup>nd</sup> respondent on the 17<sup>th</sup> and the 25<sup>th</sup> day of January, 2012 respectively, were filed by the respondents in opposition to the petition.

5. Both parties filed written submissions and the petition was argued before me on the 16<sup>th</sup> of May 2012.

### **The Facts**

6. The petitioners are all former employees of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent is the successor to the state corporation known as the **Kenya Tea Development Authority**, a body corporate established under the provisions of the **Agriculture Act (Cap 318 Laws of Kenya)**.

7. By **Legal Notice No. 44 of 1999** dated 22<sup>nd</sup> March, 1999, the then Minister for Agriculture revoked the incorporation of **Kenya Tea Development Authority** and directed the incorporation of a limited liability company to take over all the rights, duties, obligations, assets and liabilities of the Authority, including all its employees, on the same terms and conditions as were applicable to them as employees of the state corporation. The 2<sup>nd</sup> respondent was incorporated on the 15<sup>th</sup> of May 2000.

8. Between December 2001 and February 2007, the 2<sup>nd</sup> respondent terminated the employment of the petitioners. The grounds for the termination as set out in the letters of termination was that the 2<sup>nd</sup> respondent was undergoing re-engineering and restructuring and there was a need for a reduction in staff.

### **The Petitioners' Case**

9. Mr. Otieno Oyoo presented the case for the petitioners. He submitted that the petitioners had been employees of KTDA which had been in existence since its establishment in 1964 under Legal Notice No 42 of 1964. The Minister for Agriculture had, by Legal Notice No. 44 of 1999, purported to revoke the incorporation of KTDA and to direct the incorporation of the 2<sup>nd</sup> respondent in its place under powers purportedly vested in him by Section 192(4) of the Agriculture Act. Upon incorporation of the 2<sup>nd</sup> respondent, the petitioners continued to work as employees of the 2<sup>nd</sup> respondent without being required to execute fresh contracts with the 2<sup>nd</sup> respondents. The petitioners were terminated from employment on diverse dates between December 2001 and February 2007 before reaching the mandatory retirement age which was then 55 years.

10. Mr. Oyoo submitted that the actions of the Minister in revoking the incorporation of KTDA which was a public body and directing that a limited liability company take over its assets, liabilities and employees was unconstitutional, null and void.

11. He contended further that the actions of the 2<sup>nd</sup> respondent in unilaterally retiring the petitioners who did not have contracts of employment with it were unconstitutional and in breach of Articles 41 and 234 of the Constitution. The 2<sup>nd</sup> respondent did not have power to terminate their employment as such power was vested in the Public Service Commission by Article 234 of the Constitution.

12. The petitioners also allege that the manner in which they were retired, without notice or counseling, was arbitrary and undignified and subjected them to degrading treatment. It occasioned them damage which this court should compensate them for. Mr. Oyoo submitted that this court had jurisdiction as provided under Articles 165 (3)(b) of the Constitution and Article 23(3) to grant the prayers that the petitioners were seeking.

13. The petitioners submitted that contrary to the contention by the respondents, Section 87 of the Employment Act did not oust the jurisdiction of this court to hear the dispute between the petitioners and the respondents; that the issue before the court was the contravention of the petitioners' rights; that in any event, the section provided that actions can only be brought within 3 years of the cause of action arising, and if the petitioners had a cause of action against the 2<sup>nd</sup> respondent, that cause of action would have been time barred. He urged the court to find for the petitioners and to be guided by the decisions in the case of **Rashid Odhiambo Allogoh and 245 Others –v- Haco Industries Civil Appeal No. 110 of 2001 (Unreported)** and **Dominic Amollo Arony -v- The Attorney General High Court Misc. Appl. No. 494 of 2003**.

14. Mr. Oyoo also relied on the case of **Ismael Ombati Ochieng-v-Kenya Tea Development Authority HCCC No. 948 of 2003** which he stated involved a former colleague of the petitioners and in which the majority of the petitioners had been parties. The case had been heard and allowed in favour of the plaintiff but the claims of the petitioners in that case had been struck out for non-compliance with the provisions of Order I Rule 13 of the Civil Procedure Rules. As the names had been struck out on a technicality, it could not be argued properly that the matter was *res judicata*.

15. On the contention by the respondents that the petitioners had not particularized or proved the violation of any of their rights, he referred the court to paragraph 6-8 of the affidavit of **Jane Wanjiku Maina** and submitted that all the breaches of the Constitution were set out there. He also argued that even though the facts on which this matter has been brought occurred before the promulgation of the new Constitution, the petitioners were not precluded from bringing the petition under the new Constitution. He urged the court to find for the petitioners and thereafter place the matter before a judge in the Civil Division for assessment of damages.

### **The 1<sup>st</sup> Respondent's Case**

16. Mr. Siro for the 1<sup>st</sup> respondent submitted that the Minister had issued Gazette Notice No 44 of 1999 which revoked the incorporation of Kenya Tea Development Authority pursuant to powers granted by the Agriculture Act. The Minister also directed that a limited liability company be incorporated. None of the petitioners challenged the Gazette Notice and they all moved to the new company on 1<sup>st</sup> July 2000. Mr. Siro submitted that no-one has ever challenged the transfer to the limited liability company or the validity of the Gazette Notice.

17. The 1<sup>st</sup> respondent therefore contended that the revocation of KTDA was within the law as Section 192(4) of Cap 318 permitted the Minister to revoke or amend an order under the Act, among other things. The KTDA Order, 1999, provided that the company shall be the successor of the Kenya tea Development Authority and the assets of the authority shall be transferred to the company. It provided at Section 8(1) that employees of the authority shall become employees of the agency on the same terms of service. The revocation was within the government's industrialization process in the tea sector and there had been no violation of any of the rights of the petitioners.

### **The 2<sup>nd</sup> Respondent's Case**

18. Mr. Muindi for the 2<sup>nd</sup> respondent relied on the written submissions dated 22<sup>nd</sup> March 2012 and the replying and supplementary affidavits sworn by Mr. David Kamau dated 17<sup>th</sup> and 25<sup>th</sup> January 2012 in opposing the petition. He submitted that the issue raised by the petition was not novel but was a simple matter between an employer and employees. It was not even new to the petitioners as most of them had filed a similar suit. The petition therefore offended the provisions of Section 7 of the Civil Procedure Act as the issues it raised were *res judicata*.

19. Mr. Muindi submitted that the petition raised three issues for determination. The first was the proper forum for an employment suit; the second was whether breaches of constitutional provisions had been particularized or proven, and finally the validity of Legal Notice No. 44 of 1999.

20. The 2<sup>nd</sup> respondent submitted that in the case of **Ismael Ombati Ochieng -v-Kenya Tea Development Authority** (supra), Justice Ang'awa had stated that she had not been addressed on whether a private company had been incorporated. The 2<sup>nd</sup> respondent submitted that the evidence was clear in this case that a private company had been incorporated, and a copy of the certificate of incorporation had been produced together with the legal notice which shows the date of commencement of the new company as 1<sup>st</sup> July, 2000.

21. Mr. Muindi referred to paragraph 9 of the petition in which the claims by the petitioners are set out and submitted that all the issues set out in that paragraph pointed clearly to this being a simple employee-employer relationship. He submitted that Section 87 of the Employment Act, Act No 11 of 2007 does not oust the jurisdiction of this court, but that Article 162 of the Constitution does; that Section 87 of the Employment Act vests power in the Industrial Court to deal with employment disputes, while Section 12 of the Labour Institutions Act vests exclusive jurisdiction on the Industrial Court.

22. He referred the court to the case of **Alphonse Mwangemi Munga & Others –v- African Safari Club High Court Petition No. 564 of 2004** and submitted that this court was being asked to do what the court in that case was being asked to do which was to deal with a matter for which a clear procedure was provided. Where there was a specific procedure provided for, the law required that the procedure should be followed. Mr. Muindi pointed out that the petitioners had brought an earlier suit but had failed to do what they had been directed by the court to do, and the court should not aid the indolent. Further, while the petition was said to be brought on behalf of 185 petitioners, it was actually on behalf of 385 others. There were also clear forgeries of the signatures by the alleged petitioners.

23. With regard to the alleged violation of constitutional rights, the 2<sup>nd</sup> respondent took the position that while the petitioners alleged violations of the Constitution, they had not provided particulars of the alleged violations. The petitioners alleged that they had been subjected to cruel and degrading treatment. The 2<sup>nd</sup> respondent referred to the case of **Samuel Rukenyo Mbura –v- Castle Breweries Ltd High Court Civil Case 1119 of 2003** where the court defines degrading treatment and submitted that dismissal from employment cannot be degrading or inhuman and even if it was, the burden is on the petitioners to show how it is.

### **Issues for Determination**

24. The facts giving rise to this petition took place in 1999, and the petitioners question the validity of the exercise of powers by the then Minister for Agriculture under the Agriculture Act. They question the incorporation of the 2<sup>nd</sup> respondent as a consequence of the exercise of those powers, and the exercise by the 2<sup>nd</sup> respondent of powers as an employer to terminate their services. They allege violation of their constitutional rights under the new Constitution and claim damages for such violation.

25. As submitted by the 2<sup>nd</sup> respondent, this petition raises three issues. The first is whether this is the proper forum for determination of the issues raised by the petitioners pertaining to their employment; the second is whether breaches of constitutional provisions have been made out by the petitioners, and finally the petition raises the issue of the validity of Legal Notice No. 44 of 1999. I will deal with this last issue first.

### **Validity of Gazette Notice No. 44 of 1999**

26. The petitioners allege that the Minister had no power to revoke the incorporation of KTDA and direct the formation of the 2<sup>nd</sup> respondent while the respondents counter that this was lawfully done under the provisions of the Agriculture Act, Cap 318 Section 192(4) of the Act provides as follows:

***“The Minister may, by order in the Gazette, amend or revoke an order, and any order of revocation may provide for winding up the affairs of the authority and for distributing, transferring or otherwise disposing of the property and liabilities of the authority and for all such matters as may appear to the Minister to be connected with or incidental to the dissolution of the authority”***

27. It appears to me that the Minister properly exercised his powers under the above section in revoking the incorporation of KTDA and requiring the formation of the 2<sup>nd</sup> respondent. Indeed, in the case of **Ismael Ombati Ochieng & 9 Others –v- Kenya Tea Development Authority** relied on by the petitioners, Ang’awa J made a specific finding at page 28 of her judgment that

***‘the Minister had powers to dissolve the authority under section 192(4) of the Agriculture Act, Cap 318.’***

28. However, even if this had not been the case, the forum open to any party dissatisfied with the decision of the Minister was to challenge it at the time it was made. It is now not open to the petitioners to raise the issue of the revocation and clothe it in the garb of constitutionality. Counsel for the petitioners conceded that even if the petitioners had a cause of action against the 2<sup>nd</sup> respondent, that cause of action is time barred. Similarly, I believe the opportunity for challenging the decision of the Minister contained in Legal Notice No. 44 of 1999 is long gone. Unfortunately for the petitioners, they have made wrong choices and decisions over the years in pursuing their rights against their former employer, and this challenge to the acts of the Minister 13 years after the event is clearly also ill-advised.

### **Whether the Constitution of Kenya 2010 Has Retrospective Application**

29. The petitioners allege violation of provisions of the Constitution of Kenya, 2010. The respondents submit that no violation of fundamental rights has been particularized or proved. The more critical issue, however, and which I believe this petition turns on, is whether the Constitution can apply to events and alleged violations that took place before its promulgation; in other words whether the Constitution has retrospective application.

30. Article 263 of the Constitution provides as follows:

***‘This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier.’***

31. The Constitution as a whole and the fundamental rights set out in the Bill of Rights in the Constitution can only come into effect with the coming into force of the Constitution. It follows therefore that one cannot claim to enjoy a right or allege violation of a right that had not been recognized by the Constitution in force at the time the events complained of occurred.

32. In the case of **Joseph Ihuo Mwaura & 8 2 Others -v- The Attorney General Petition No. 498 of 2009**, the court observed as follows:

***‘The Constitution promulgated on 27<sup>th</sup> August 2010 is not retrospective hence its provisions would not apply to matters that occurred before the effective date of the Constitution. Unless otherwise provided, the provisions of the Constitution, 2010 cannot govern matters done under a different legal regime.’***

See also the decision of the court in **B.A. & Another –v- Standard Group Limited & Another Constitutional Petition No. 48 of 2011**

33. The matters complained of in this petition occurred between 1999 and 2007, well before the promulgation of the new Constitution. The petitioners allege violation of rights under Articles 27, 28, 41 and 234 of the Constitution. These provisions have no application in light of the finding of non-retrospective application of the Constitution. The petitioners’ claim arose out of their relationship with their employer, the 2<sup>nd</sup> respondent, and should have been litigated in the proper forum within the time period provided for in the law. Their claim cannot now be cured by a petition under the new Constitution.

34. In light of the above matters, this petition must fail, and the same is dismissed with no order as to costs.

**Dated Delivered and Signed at Nairobi this 20<sup>th</sup> day of June 2012**

**MUMBI NGUGI  
JUDGE**