



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Constitutional Reference 378 of 2012**

**PETERSON KARIUKI MACHARIA .....1<sup>st</sup>  
PETITIONER**

**LEWIS GICHIRA NJOROGE .....2<sup>ND</sup>  
PETITIONER**

**VERSUS**

**TEA BOARD OF KENYA .....RESPONDENT**

**JUDGEMENT**

**Introduction**

1. This petition relates to a dispute between the petitioners, the Gatara Tea Leaf Collection Centre and the Githambo Tea Factory in which the petitioners had been registered as tea growers and to which they had been delivering green leaf tea.

2. The petitioners state that they are tea growers licensed under registration Nos. GB0800388 and GB080620 and Nos. GB080371 and GB080642 respectively and that they have leased tea bushes from other farmers. They therefore pick tea from about 5000 tea bushes each. They aver that they have been delivering tea leaves to Gatara Tea Leaf collection Centre which is under Githambo Tea Factory Limited, a factory licenced by the respondent to manufacture their tea; that they were the Chair and Vice Chair of the committee running Gatara Tea Leaf Collection Centre until October 2010.

3. The 1<sup>st</sup> petitioner alleges that he was allotted a piece of land known as L.R.8/Gatara/41/1 which Gatara Tea Leaf Collection Centre also claims ownership of, and he therefore filed a suit against it, the respondent and the Muranga County Council as he was of the view that there had been a double allocation of the land.

4. Following the filing of the suit, the Gatara Tea Leaf Collection committee refused to accept delivery of tea from the two petitioners claiming that the 1<sup>st</sup> petitioner had ‘grabbed’ the plot which forms the dispute in Muranga PMCC No. 108/2012. Following the refusal to accept their tea, the petitioners filed Muranga PMCC No 150/2012 against Gatara Tea Leaf Collection Centre and Kenya Tea Development Agency. The petitioners aver that numerous orders were made directing the defendants in that case to accept the petitioners’ tea but the said orders were disobeyed. They state that the suit was later withdrawn for want of jurisdiction.

**The Petition**

5. In the petition dated 15<sup>th</sup> August 2012 which is supported by the affidavit of the 1<sup>st</sup> petitioner, **Peterson Kariuki Macharia**, sworn on the same date and a further affidavit sworn by the 1<sup>st</sup> petitioner on 19<sup>th</sup> of September 2012, the petitioners seek the following orders:

- a) **A declaration that the petitioners are entitled to the secure protection of the law in accordance with Articles 25,26,27(1), 40 and 50 (1) of the constitution of Kenya be made.**
- b) **A declaration that the petitioners rights under Articles 25(a)(b) and (c), 27(1) 29(f), 30(1),40(a) and 50(1) of the constitution of Kenya have been and are being contravened by the Respondent be made.**
- c) **An order do issue restraining and or prohibiting the respondents and or the respondent's agents, officers or any authority acting on its behalf from interfering with the petitioner's right to access and deliver tea leaves to Gatara Tea Collection Centre.**
- d) **Any other order which this Honourable court shall deem just to grant for the purpose of enforcing and securing enforcement of the constitutional provisions therein above disclosed.**
- e) **An order do issue compelling the respondents to prevail on its agents or any authority acting on its behalf more so Githambo Tea Factory Limited and the committee Gatara Tea collection Centre to accept tea leaf delivery by the petitioners.**
- f) **Costs of this petition be provided for**

6. The respondent opposes the petition and has filed a replying affidavit sworn by **Peris W. Mudida** on 11<sup>th</sup> September 2012. Both parties filed written submissions which were highlighted before me on 6<sup>th</sup> November 2012. While the petitioners' written submissions state in the opening paragraph that they are directed at the application dated 15<sup>th</sup> August 2012, they in fact address the petition and ask the court to grant the orders sought in the petition. In their oral submissions before me, Counsel for both parties made submissions on the petition and the orders sought therein.

### **The Petitioners' Case**

7. Relying on the facts set out in the petition and the affidavits in support, Counsel for the petitioners, Mrs. Kingoo Wanjau submitted that the petitioners have not been able, since February 2012, to deliver their tea to the collection centre as the personnel at the centre have declined to accept their tea, and the tea factory has also refused to accept their tea; that the refusal to accept their tea amounts to cancellation of their licence granted to them under the provisions of the Tea Act; that they have filed suit against the respondent as the Githambo Tea Factory is an agent of the respondent; that the respondent is a statutory body and is answerable to the people of Kenya for its decisions; that the petitioners cannot lodge their claim under the Agricultural Appeals Tribunal contemplated under section 26 of the Tea Act as the Tribunal, which should have been established under Part XV of the Agriculture Act, has not yet been established, and that therefore the only option open to the petitioners was to file a constitutional reference against the respondent as it has the statutory duty to regulate the acts and conduct of its agents such as the Githambo Tea Factory, and that Since Githambo Tea Factory is a licensee of the respondent, the respondent has power to regulate its functions and to compel it to accept the petitioners' tea.

8. The petitioners state they are unable to deliver their tea for processing, and they also cannot uproot their tea as this is prohibited; that their tea has therefore been rotting in their farms. They argue that the failure to accept their tea amounts to a cancellation of their licences, yet their licences can only be cancelled or suspended by the respondent under Regulations 42 if the licensee has committed a criminal offence under the Tea Act.

9. The petitioners allege that the respondent is in breach of their constitutional rights by meting out unjustified punishment to them. They allege that the fact that the petitioners sued Gatara Tea Leaf

Collection Centre with regard to the parcel of land does not amount to a criminal conviction to justify the cancellation of their licenses. They argue that they have been left destitute by the refusal to accept their tea and cannot meet their daily needs, including education for their children.

10. To the submission by the respondent that it does not have a contract with the petitioners, they contend that Githambo Tea Factory is an agent of the respondent and therefore the respondent is responsible for the acts of its agent. They therefore contend that the respondent is in breach of their constitutional rights under Articles 29 and 30, that they have the right not to be subjected to cruel and degrading treatment or to be subjected to slavery and servitude as provided in Article 30(1).

11. Mrs. Kingoo Wanjau submitted that the petitioners could not bring a constitutional claim against Githambo Tea Factory as it is a private entity and is therefore not amenable to judicial review or constitutional proceedings; that tea growing is controlled by the Tea Act, and that under this Act, disputes relating to tea growing must be referred to the Agricultural Tribunal to be established under the Agriculture Act; that only matters of law can be referred to the High Court under section 196 of the Agriculture Act. She submitted, further, that since the Agricultural Tribunal has not been established, and Section 26 says that all disputes shall be resolved in that Tribunal, the petitioners would have no remedy if the court found that it had no jurisdiction, and in any event, the fact that the petitioners can go to another court does not preclude them from coming to this court.

12. To the contention by the respondent that if they have a dispute with Githambo Tea Factory they can move to another, the petitioners submit that they do not have the option of moving from one tea factory to another as they have chosen Githambo Tea Factory because of its proximity and convenience.

### **The Respondent's Case**

13. The respondent through its counsel, Mr. Keengwe, submitted that this court has no jurisdiction to hear and determine this matter, and even if it had, the respondent had not had a hand in the alleged breaches of the petitioners' constitutional rights. The respondent was a creature of the Tea Act as amended in 1999, 2008 and 2011; that from 1999, the tea industry had been liberalized and the only function left to the respondent in the liberalised sector is that set out in section 3 and 4 of the Act; that it does not issue licences to individual farmers but to brokers, importers, and packers, among others.

14. The respondent submitted therefore that it did not issue the licences alleged to have been cancelled, and that the only information it receives with regard to individual farmers is from manufacturers; that as a regulator, it cannot be the principal of the tea factory as alleged by the petitioners, and that the days of regulation of tea growing are long gone; that anyone who wishes to grow tea can do so and register with the factory he wishes to deliver tea to; that the relationship between the tea grower and the tea factory is a contractual agreement and the grower is at liberty to contract with any factory or to uproot his tea and plant something else.

15. According to the respondent, Githambo Tea Factory is a limited liability company which has established tea collection centres such as Gatara. The respondent has no shares in it and cannot intervene in its affairs so long as it complies with the conditions of its licence. It therefore urged the court to dismiss the petition as it raised no constitutional issue and was a matter of contract which should be determined in the appropriate forum.

### **The Law**

16. The petition before me seeks the court's intervention in the alleged violation of the petitioners' constitutional rights. Consequently, as is now trite law, the petitioners must demonstrate, with a reasonable degree of precision, the constitutional provisions violated, and the manner in which they have been violated See *Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272 and Trusted Society of Human Rights –v-Attorney General & Others High Court Petition No. 229 of 2012.*

17. The petitioners allege violation of their rights under Articles 25(a)(b) and (c), 27(1) 29(f), 30(1),

40(a) and 50(1) of the Constitution. Article 25 contains the constitutional provisions with regard to the rights that cannot be limited under Article 24 and does not therefore contain any substantive rights. Article 27 contains the non-discrimination provisions, while Article 29 contains the constitutional guarantee of freedom and security of the person and prohibits, among other things, subjecting anyone to cruel and degrading treatment. At Article 30(1), the Constitution prohibits the subjection of any person to slavery or servitude, while Article 40 protects the right to property, and Article 40(1)(a) guaranteeing to everyone the right to own property of any description. Finally, Article 50(1), violation of which the petitioners also allege, guarantees to every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an independent court or tribunal.

18. The issue that the court is called upon to determine is whether the facts of this case disclose any violation of the petitioners' rights, and if any such violation is disclosed, by whom such violation has occurred, and the remedies available to the petitioners. A determination of this, however, is predicated upon a finding on the liability of the respondent as principal for the acts of the Githambo Tea Factory, its agent according to the petitioners. If the relationship of principal-agent cannot be established, then there is no basis for determining the issues related to the alleged violation of the petitioners' constitutional rights.

19. The genesis of the dispute, as the facts set out above indicate, is a dispute between the 1<sup>st</sup> petitioner and Gatara Tea Leaf Collection Centre over a parcel of land. As a result of this dispute, the Tea Collection Centre declined to accept the petitioners' tea, and the Githambo Tea Factory, which has set up the Gatara Tea Leaf Collection Centre, also declined to accept the petitioners' tea. The petitioners allege that this is a dispute that ought to be resolved by the Agricultural Tribunal referred to under Section 26 of the Tea Act, but since the Tribunal has not been established, their only recourse is to this court. They also argue that since the Githambo Tea Factory with which they have a dispute is a limited liability company and therefore not amenable to judicial review or constitutional applications, they have elected to file this petition against the respondent as the Githambo Tea Factory is the respondent's agent and the respondent has a statutory duty to compel its agent to accept their tea.

### **Whether the Tea Factory is the Agent of the Respondent**

20. The respondent is established under Section 3 of the Tea Act, Cap 343, Laws of Kenya. The Preamble to the Act states that it is an Act of Parliament to make provision for regulating and controlling the production, manufacture and trade in tea, and for connected purposes. Among the functions of the Board set out in Section 4 of the Act is the licensing of tea factories and the registration of persons dealing with tea, such dealers being defined to include management agents, brokers, buyers, exporters, packers and blenders.

21. Section 8 of the Act requires tea growers to register with the tea factory to which they deliver their green tea leaf by providing such particulars as the Board may require, and it makes it an offence to carry on business as a grower without being registered or to give false information upon registration. Section 12B of the Act requires the Board to maintain a register of growers, including the full name of the factory, the date of issue of its licence, the particulars of numbers of registered growers, and any other particulars that the Board may require.

22. The provisions of the Act thus make it clear that the Board is a regulator which registers tea factories, among other entities dealing with tea, and requires certain information from them with regard to the growing of tea.

23. The petitioners argue that the respondent has a duty to control the acts of its agents, and is therefore liable for the violations committed by Githambo Tea Factory. My reading of the Tea Act and the regulations made thereunder does not disclose power vested in the Board to regulate the relations between tea factories and the growers who are registered with them. Further, there is nothing in the Act that can lead to the conclusion that Githambo Tea Factory, or indeed any other tea factory, is an agent of the respondent and therefore that the respondent is liable as principal for the acts of the agent. Black's Law Dictionary, 9<sup>th</sup> Edition, defines an agent as **'One who is authorised to act for or in place of another; a representative'**. In my view, an agent of the respondent can only be such a person or entity as

the respondent has delegated any of its functions under Section 4, should such delegation be permissible under the Act. In this case, Section 4(3) of the Act empowers the respondent to delegate its powers to the Managing Director or any of its members, or an officer whom it has employed.

24. It cannot, therefore, be said that the respondent, whose statutory function is to control and regulate the tea industry, is the principal of the Githambo Tea Factory. A regulator cannot be the principal of a player in the industry which it regulates: an analogy can be drawn with, for instance, the insurance or transport industry. It would be to stretch things somewhat to argue that the Insurance Regulatory Authority or the Transport Licensing Board has a principal-agency relationship with an insurance company or a transport operator respectively. Githambo Tea Factory is a player in the tea industry and obtains its licence from the respondent. It is, however, as the petitioner admits, a limited liability company with power to sue and be sued. It cannot be said to be the agent of the respondent. I therefore find and hold that the petitioners are non-suited against the respondent.

25. Having found that there is no principal-agent relationship between the Githambo Tea Factory Limited and the respondent, I need not go further to examine whether or not there has been a violation of the petitioners' constitutional rights. The violation of rights that the petitioners may have suffered can only have arisen from its relationship with the Githambo Tea Factory Limited, which is a legal entity capable of being sued in its own name. The fact that orders had been made against the Githambo Tea Factory which it had failed to obey should have given rise to an application for contempt, and the court would have visited the appropriate sanctions on the factory for disobedience of its orders.

26. Further, the petitioners had (and I believe still have) a claim in damages against the tea factory for any loss they may have suffered as a result of its refusal to accept delivery of their tea. This is because it is apparent, on the basis of the limited material before me, that the dispute between the Gatara Tea Leaf Collection Centre over a parcel of land (which was, and I believe still is the subject of a suit before the court) does not give the Gatara Tea Leaf Collection Centre or the Githambo Tea Factory any legal justification for declining to accept the petitioners' tea if they are duly registered with the factory and have been compliant with whatever rules or by-laws that the factory may have required the tea growers registered with it to comply with. See, for instance the situation that was the subject of the appeal before the court in **Elizabeth Wangari Muiga vs. John Chege Njiru and Another Nyeri High Court Civil Appeal Number 11 of 2010**. Indeed, it is puzzling that the factory declined to accept tea even from the 2<sup>nd</sup> petitioner who, from the material before me, had no dispute with the collection centre or the factory.

27. These are matters, however, which can best be dealt with in an ordinary civil claim where oral and documentary evidence can be adduced and tested through cross-examination.

28. In the circumstances, this petition is hereby struck out with no order as to costs.

**Dated Delivered and Signed At Nairobi this 14<sup>th</sup> Day of December, 2012**

**MUMBI NGUGI**

**JUDGE**

**Mrs. King'oo Wanjau instructed by the firm of King'oo Wanjau & Co. Advocates for the Petitioners**

**Mr. Keengwe instructed by the firm of Keegwe & Co. Advocates for the Respondent**