



**Bett v Rorok Tea Factory & 2 others (Petition E003 of 2022)  
[2023] KEHC 2033 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2033 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
PETITION E003 OF 2022  
RL KORIR, J  
MARCH 13, 2023  
IN THE MATTER OF THE CONSTITUTION OF THE  
REPUBLIC OF KENYA 2010  
AND  
IN THE MATTER OF ARTICLES 1, 2, 3, 19(2) (3),  
21, 22, 23, 27, 28, 35, 47, 159, 165 AND 258 OF  
THE CONSTITUTION OF KENYA 2010  
AND  
IN THE MATTER OF THE DOCTRINE OF LEGITIMATE  
EXPECTATION**

**BETWEEN**

**JANETH CHEPKIRUI BETT ..... PETITIONER**

**AND**

**ROROK TEA FACTORY ..... 1<sup>ST</sup> RESPONDENT**

**KAPSET TEA FACTORY COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**HARRY RONO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner filed a Petition dated September 14, 2022 seeking the following orders:-
  - I. A declaration that the Respondents violated the Petitioner's rights enshrined in Articles 27, 28, 35 and 43 of the *Constitution of Kenya, 2010*.



- II. An order directed at the Respondents to activate the Petitioner's growers Number KT0521125 held at Rorok Tea Factory.
  - III. General Damages.
  - IV. Costs of this Petition.
  - V. Any other reliefs as the Court may deem fit.
2. The Petition was supported by a Supporting Affidavit sworn by Janeth Chepkirui Bett on September 14, 2022.
  3. Along with the Petition, the Petitioner filed a Notice of Motion Application dated September 14, 2022 where she sought the following orders:-
    - I. Spent.
    - II. Pending the hearing and determination of this matter, this Court do direct the Respondents to activate the Petitioner's grower's number KT0521125 held at Rorok Tea Factory
    - III. Costs.
  4. The Application was anchored on Articles 22(1), (2) (b), 23 and Article 159(2) b of the [Constitution of Kenya](#), Rule 4(1), (2) and Rule 23 of the [Constitution of Kenya](#). The same was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Janeth Chepkirui Bett.

#### **The Petitioner's/applicant's Case.**

5. It was the Applicant's case that she had been supplying green tea leaf to the 1<sup>st</sup> Respondent through her number KT 0521125. That on June 3, 2021, she received a letter from the Respondents stating that she had exceeded her normal tea productivity per year and that she was to explain the surge in writing within 24 hours. It was her further case that the Respondents went ahead and deactivated her grower's number without giving her sufficient time to respond to their letter.
6. The Applicant stated that after giving her explanation as to the surge in production of the tea leaves, she was invited to the 1<sup>st</sup> Respondent to present her evidence. That she went ahead and presented witnesses who had leased her the extra tea bushes and copies of the respective Lease Agreements. The Applicant further stated that she had leased several tea bushes which she harvested and had the supplies recorded against her grower's number.
7. It was the Applicant's case that despite presenting her evidence, the 3<sup>rd</sup> Respondent accused her of theft and collusion with some of the Respondents' staff. That despite of being accused of collusion, no disciplinary action had been taken against the said staff. It was her further case that as a result of the said claims, her reputation had been greatly tarnished thereby making it difficult to supply her green leaf to any other factory thereby occasioning her huge financial losses.
8. The Applicant stated that at the time her account had been deactivated, she had delivered a total of 21,872 Kgs.

#### **The Respondents' Case.**

9. Through a Replying Affidavit sworn by the 3<sup>rd</sup> Respondent, they stated that the suspension of the Applicant's account was due to her suspiciously high green leaf deliveries that were not commensurate with the known production average.



10. The Respondents stated that between July 1, 2021 and June 30, 2022, the Applicant delivered green leaf weighing 21,872 kgs against her 899 registered tea bushes. That her average production based on the aforementioned numbers was 24.33 kgs per tea bush compared to the known productivity of 2.5kgs per tea bush as determined by the Tea Research Foundation.
11. It was the Respondents case that upon the Applicant presenting her evidence, they found that some Lease Agreements were not executed or attested by the parties involved, that the Agreements neither had their registration details nor did they indicate the number of tea bushes leased and that the said Agreements did not conform to the format shared with their growers through their respective tea buying centre committees.
12. The Respondents stated that the Applicant did not comply with the 1<sup>st</sup> Respondent's by-laws which indicated that a Lease Agreement had to contain the lease period, had to be witnessed by two people, one of whom had to be a tea buying centre committee member and finally that the Lease Agreement had to be endorsed by the Factory Unit Manager.
13. It was the Respondents case that the lessors cited by the Applicant were actively supplying tea to the 1<sup>st</sup> Respondent thereby negating the Applicant's claims. That some of the tea bushes allegedly leased to the Applicant exceeded the Lessor's registered tea bushes i.e. the Lease Agreement of Philip C. Sigilai indicated that he had leased 15,000 tea bushes to the Applicant while he had 10,475 registered tea bushes.
14. The Respondents stated that they had no choice but to suspend the Applicant's tea grower's account in compliance with Clause 28 of the by-laws to pave way for investigations. That investigations were ongoing and would be concluded within 3 months. The Respondents further stated that the allegation of collusion between the Applicant and part of their staff was an outright lie as the Applicant was only called upon to account for her suspiciously high green leaf deliveries.
15. It was the Respondents case that the law imposed an obligation upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to register tea growers and monitor their respective production records with a view of weeding out tea hawking and falsification of green leaf records.
16. The Respondents stated that the Application herein did not raise any constitutional issue. That the issues raised could have been canvassed through a civil suit especially as the relationship between the Applicants and the 1<sup>st</sup> Respondent was contractual. The Respondents further stated that the contract provided for arbitration in the event disputes arose.
17. Parties were directed to canvass the Application through written submissions.

### **The Applicant's Submissions.**

18. The Applicant submitted that nothing had been placed before this Court to show that the format of the Lease Agreements were prohibited as per the Respondents' by-laws. She relied on Section 72 of the [Interpretation and General Provisions Act](#).
19. It was the Applicant's submission that the Lease Agreements were binding to the parties in it and that the Respondents were neither parties nor witnesses to the Lease Agreements. It was her further submission that no complaint had been raised by either the tea pluckers, lessors or other suppliers.
20. The Applicant submitted that the deactivation of her account was not only done arbitrarily, but was done before the Respondents could finish their investigation. That the said action was a contravention of her right to earn a living. It was her further submission that this Application raised key constitutional



questions as it touched on her right to earn a living, access to justice, right to human dignity and fair administrative action. She relied on Articles 23 (1) and 28 of the [Constitution of Kenya](#).

21. In conclusion, the Applicant submitted that she relied on tea farming to provide for her family and that she was bound to suffer irreparable harm if the orders were not granted.

### **The Respondents' Submissions.**

22. The Respondents submitted that the Applicant merely cited a litany of constitutional provisions without pegging them on the ascertainable set of facts to support her claims. That the recital did not in itself raise a constitutional controversy warranting this Court's jurisdiction under Article 22 and 23 of the [Constitution](#). They relied on the case of [Anarita Karimi Njeru v Republic](#) [1979] eKLR to support this submission.
23. It was the Respondents' submission that there was a binding contract for the supply and collection of green leaf between the Applicant and the 1<sup>st</sup> Respondent. That the issue of the deactivation of the Applicant's account was purely a civil matter which could be pursued through an ordinary civil suit. They relied on [Gladys Jepkemoi Kiplagat v Zakayo Cheruiyot](#) [2021] eKLR and [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR to buttress this submission.
24. The Respondents submitted that the Applicant neither followed the necessary steps to lease the extra tea bushes nor did she cause their registration with the 1<sup>st</sup> Respondent. They relied on [Michael Rono vs Tirgaga Tea Factory Ltd & another](#) (2021) eKLR.
25. It was the Respondents' submission that since the matter was being canvassed through a Constitutional Petition, the order sought by the Applicant ought to be conservatory in nature. They relied on [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR and [Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others](#) [2016] eKLR.
26. The Respondents submitted that granting the order was against public interest as it would sanctify the Applicant's acts of green leaf falsification and tea hawking. That the Applicant has failed to meet the conditions necessary for the grant of conservatory orders as enunciated in [Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others](#) (supra) and [Wilson Kaberia Nkunja vs The Magistrate and Judges Vetting Board and others](#) (supra).

### **Analysis And Determination.**

27. I have considered the Notice of Motion dated September 14, 2022 and annexures thereto, the Replying Affidavit dated October 3, 2022, the Applicant's Written Submissions dated October 10, 2022 and the Respondents' Written Submissions dated October 14, 2022 together with the accompanying authorities. I observe that the main prayer in the present application and the Petition are similar and is not in any way conservatory in nature. I therefore discern two issues for my determination as follows:-
  - I. Whether the Applicant's prayer for reinstatement of her KTDA grower's account has merit.
  - II. Whether the Applicant observed the doctrine of constitutional avoidance and doctrine of exhaustion.



## **I. Whether the applicant's prayer for reinstatement of her KTDA grower's account has merit.**

28. From the onset, it was not in dispute that the Applicant was a tea farmer. The Applicant was registered under registration number KT 0521125 and supplied tea leaves to the 1<sup>st</sup> Respondent. The bone of contention was that the 3<sup>rd</sup> Respondent suspended the Applicant's growers account when he noticed that the Applicant had unusual high deliveries.
29. When the Applicant was put to task to explain the unusual high deliveries, she stated that she had leased tea bushes from her fellow farmers, to which she produced the Lease Agreements as her evidence. The 3<sup>rd</sup> Respondent through his Replying Affidavit dated October 3, 2022 found fault with the said Lease Agreements by stating that they did not conform to the official format shared with the growers, that the Lease Agreements were not properly executed specifically that the Applicant did not execute any of the Agreements and that the Agreements did not reflect the number of tea bushes leased.
30. The law governing tea in this country has evolved over time. The *Tea Act* Cap 343 was repealed by the *Crops Act* No 16 of 2013. Section 14 of the *Crops Act* that dealt with registration of tea growers was also repealed by the *Tea Act* No 23 of 2020. The said Acts contained transitional clauses. Section 43 of the *Crops Act*, No 16 of 2013 states that:-
- “Any rule, order, regulation, notification or other administrative act made or issued before the commencement of this Act under any repealed law, if it could have been made or issued under a corresponding provision of this Act, continue in force and shall have effect as if it had been so made or issued”.
- This simply put means that any rules, orders or administrative actions made under the repealed Act (*Tea Act* Cap 343) shall have the same effect in the *Crops Act*, No 16 of 2013.
31. The subsidiary legislation to the *Tea Act* Cap 343 (now repealed) was the *Tea (Licensing, Registration and Trade) Regulations, 2008*. In the First Schedule of the Regulations contains various terms and conditions. Of particular interest to this case is condition VI which states:-
- “Where the grower has leased a tea garden, a Lease Agreement shall be signed between the Lessor and the Lessee and the particulars thereof verified by the respective factory and a copy of the agreement shall be submitted to the respective tea factory before accepting the extra green leaf supply”.
32. Section 77 of the *Tea Act* No 23 of 2020 provides that:-
- “All legal proceedings and claims pending in respect of actions and activities to which this Act apply shall be continued or enforced by or against the Board and the Foundation in the same manner as they would have been continued or enforced by or against the Agriculture and Food Authority and the Kenya Agricultural and Livestock Research Organization had this Act not been enacted.”
33. I have perused the 1<sup>st</sup> Respondent's by- laws that were marked as “HK 8”, specifically at Clause 30 which states:-
- “Leasing of tea farms shall be by a way of written agreement in the form prescribed by the managing agent.



All tea lease agreements or transfers shall be registered I the factory with full knowledge of the committee.

Any lease agreement or transfer undertaken without registration in the factory will not be binding and shall be treated as falsification.

All leases shall involve a lessor and lessee and the lease period. The document must be executed by both parties and must be witnessed by two people, one being a buying centre committee member. The lease document must be endorsed by FUM (Factory Unit Manager), who will enter the same in a register.”

34. It was not in dispute that the Applicant was a registered member of the 1<sup>st</sup> Respondent as she had been delivering green leaf to the 1<sup>st</sup> Respondent and accessing payment through her grower’s account. It was also not disputed that she had 899 registered tea bushes. This in my view, makes the Applicant a registered member of the 1<sup>st</sup> Respondent and therefore subject to her by-laws.
35. At paragraph 11 of her supporting affidavit, the Applicant referred to her exhibits in the Main Petition, being seven (7) Lease Agreements produced and marked as “JK 5(a-f)” between her and various farmers. A cursory look at the Agreements reveals that the Applicant only signed one of the Lease Agreements. Some Agreements contained the Lessors themselves signing as witnesses.
36. In her submissions however, the Applicant seemed to suggest that the said Lease Agreements were not subject to scrutiny as they were binding only as between the parties thereto and that the Respondents were neither parties nor witnesses to the said Agreements. It was her submission that none of the parties to the Agreements had raised any complaint.
37. This Court is at a loss as to what to make of the Applicant’s exhibits, if as it were, they were not open to scrutiny in this Application. As the Applicant has aptly stated, the Lease Agreements were contractual in nature and binding only to the parties. She has however omitted to submit that those were the same Agreements which she expected the Respondent to honour and to therefore believe that she had increased her tea leaf production.
38. The by-laws as stated above provided for leasing of tea farms by a way of a written agreement in a specific form prescribed by the managing agent. The Respondents produced the standard Lease Agreement format as prescribed by the 1<sup>st</sup> Respondent. The same was marked as “HK 7”. The format contained among other things the number of tea bushes and the Land Registration Number on which the tea bushes are grown. The Lease Agreements produced by the Applicant were not the standard format as recommended by the 1<sup>st</sup> Respondent. Additionally, there was no evidence tendered by the Applicant to show that the Lease Agreements had been registered with the 1<sup>st</sup> Respondent as required by the by-laws.
39. The burden of proof is on the Applicant to prove his case. It is trite law that the burden of proof is on the person seeking the aid of the law. In the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR, Majanja J stated:-

“As a general preposition, the legal burden of proof lies upon a party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden. . . is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.....”



40. The Lease Agreements as shown above did not conform to the regulations set in the by-laws. The by-laws were very express that the Lease Agreement should be in the format prescribed by the managing agent. There was no proper execution as all the Lease Agreements bar one did not contain the signature of the Lessee (Applicant). They also did not contain the name and signature of the Factory Unit Manager as required. Without the evidence of registration of the Lease Agreements, the by-laws are very clear that the said Agreements would not be binding and they will be treated as falsification.
41. It is my finding therefore that the Applicant has not discharged her burden of proof. She has not shown the Court that she merits a conservatory order. It is my observation also that the prayer as worded attracts a final order which cannot be granted at this stage.

## **II. Whether the Applicant observed the doctrine of constitutional avoidance and doctrine of exhaustion.**

42. The Petitioner listed numerous Articles of the Constitution as forming the legal foundation of the Petition. These are Articles 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 35, 159, 165 and 258. In stating the particulars of violation, the Petitioner stated that the Respondents had denied the Petitioner the right to fully enjoy their rights as provided by Article 19 of the Constitution. They further stated that the Respondents had failed to observe, respect, protect and fulfil the rights provided under Article 28 of the Constitution.
43. The Applicant anchored her application under Articles 22 (1), (2) (b), 23 and Article 159 (2) (b). Articles 22 and 23 dealt with a person's right to institute court proceedings with a view of enforcing the bill of rights and this Court's jurisdiction to hear and determine applications for infringement of rights respectively. Further, she cited Article 159 (2) (b) of the Constitution which provides for expeditious delivery of justice.
44. I have carefully perused the Petitioner's Supporting Affidavit and submissions. There are no arguments detailing how her constitutional rights have been violated.
45. In the case of Anarita Karimi Njeru v Republic [1979] eKLR the court stated as follows:-
- “...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be ingraind.”
46. The Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR stated as follows:-
- “We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made a reference to in view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting”, without requiring remedy by the 1st respondent”.



47. I am fortified by the above authorities to find that the Petitioner has not particularized the constitutional rights which have been violated by the Respondents and in what manner. All that the Petitioner has done is thrown numerous Articles of the Constitution at the Court without doing more. They ought, as held in *Anarita Karimi* (supra), to have set out the manner in which the many Articles were infringed by the Respondents.
48. I have considered whether the Petitioner sought other reliefs before approaching this Court for constitutional remedies. When dealing with a constitutional petition, courts are guided by various doctrines being the doctrine of constitutional avoidance, doctrine of exhaustion and the doctrine of ripeness.
49. In *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) [22 April 2022] (Ruling), Mativo J (as he then was) stated:-
- “Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.....”
50. The Constitutional Court of Zimbabwe in *Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors* 18 CCZ 3/17 held:-
- “As we have already seen, in the normal run of things courts are generally loathed to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies.”
51. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme Court held that:-
- “.....The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.”
- Similarly the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 [1936].”
52. The Respondents produced a Green Leaf Supply Agreement dated March 13, 2017 between the Applicant and the 1<sup>st</sup> Respondent. The same was marked as “HK 10”.
53. From the analysis of the Application, it is clear to my mind that the Applicant and the 1<sup>st</sup> Respondent were in a contractual relationship for the supply of green leaf. The Contract imposed obligations on both parties for the delivery of green leaf and payment thereof. The Applicant by filing this Application sought to compel the 1<sup>st</sup> Respondent to perform its contractual obligations.



54. I am persuaded by Chacha J in the case of *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR where he stated:-

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

55. In the case of *Bernard Murage v Fine Serve Africa Ltd & others* [2015] eKLR, the Court stated:-

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

56. The doctrine of exhaustion was explained by the Court of Appeal in the case of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where it stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

57. The Contract between the Applicant and the 1<sup>st</sup> Respondents provided at Clause 10 that:-

"Any dispute arising between the parties in connection with this agreement shall be submitted to single arbitration to be appointed by agreement between the parties, or, failing such agreements, within 30 days after one party first serves notice on the other side of such dispute to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators Kenya. Any such arbitration proceedings shall be conducted in accordance and subject to the provisions of the Arbitration Act (Chapter 49) or any other act from time to time in force replacing or amending the same."

58. Clause 43 of the 1<sup>st</sup> Respondent's by-laws provided that:-

"All disputes in relation to the Company's business of management and collection of green leaf under these by-laws shall be handled through the disciplinary process enumerated herein in the first instance....."

59. The Respondents stated that at the time the present Application was being filed, their investigations into the Applicant's unusually high deliveries were still ongoing. The by-laws also provided for an



Appeal Tribunal where an aggrieved party (tea grower or member) could lodge their Appeal. It is my finding that the Applicant did not exhaust the remedies available as per the Contract and the by-laws.

60. It is my finding that this Court's Constitutional jurisdiction did not need to be invoked to deal with a matter was purely civil in nature. I am persuaded by the reasoning of Mutungi J in [Grace Jepkemoi Kiplagat v Zakayo Cheruiyot](#) [2021] eKLR, where he held that:-

“.....there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.”

61. In the end, I decline to grant the orders sought in the Application. The same is dismissed with costs to the Respondent.
62. Having made a finding that the issues raised in the Petition were not prima facie constitutional, the order that commends itself to me is that I strike out the Petition. The Petition dated September 14, 2022 is struck out with no order on costs.
63. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 13<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Ms.Kosgei holding brief Mr. Caleb Koech for the Respondents, Mr.J.K Mutai holding brief for Mr. Koech Gideon for the Petitioner and Siele (Court Assistant)**

