



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okoiti v Board of Directors, Tea Board of Kenya & 2 others; Mutai  
(Interested Party) (Employment and Labour Relations Petition  
E244 of 2023) [2024] KEELRC 1297 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1297 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E244 OF 2023  
AN MWAURE, J  
MAY 28, 2024**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**THE BOARD OF DIRECTORS, TEA BOARD OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE AND  
LIVESTOCK DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**WILLY KIPKOECH MUTAI ..... INTERESTED PARTY**

**RULING**

1. The 1<sup>st</sup> Respondent filed a Notice of Motion dated 17<sup>th</sup> May 2024 seeking the following orders that:
  1. Spent
  2. Pending inter parties hearing and determination of this application, the Honourable Court be pleased to issue an order of stay of execution of the orders issued in the Judgment delivered on 17<sup>th</sup> May 2024.
  3. The Honourable Court be pleased to issue an order of temporary stay of execution of the Judgment and orders made on 17<sup>th</sup> May 2024 for a period of ninety (90) days to allow the 1<sup>st</sup> Respondent file a substantive application for stay of execution at the Court of Appeal.
  4. The costs of this Application be in the Cause.



### **1<sup>st</sup> Respondent Case**

2. The 1<sup>st</sup> Respondent avers that Hon. Lady Justice Anna Mwaure delivered a judgment on 17/06/2024 under which she allowed the Petitioner's Petition and granted prayers i, ii, iii and v of the Petition.
3. The 1<sup>st</sup> Respondent avers that it has filed a Notice of Appeal as it is aggrieved by the judgment and intends to appeal against the findings of the same at the Court of Appeal.
4. The 1<sup>st</sup> Respondent seeks a temporary stay of execution to enable it to file a formal application at the Court of Appeal.
5. The 1<sup>st</sup> Respondent avers that it is necessary for a substantive Chief Executive Officer of the Tea Board of Kenya be in office to guide the running of the tea sector.
6. The 1<sup>st</sup> Respondent avers that there will be no prejudice occasioned by any party if the orders sought are granted.
7. The 1<sup>st</sup> Respondent avers that if the orders are not granted, any intended appeal would be rendered nugatory as the 1<sup>st</sup> Respondent would be forced to carry out fresh recruitment while the Appeal is pending and risk having 2 substantive CEOs if the Appeal is successful.

### **Petitioner's Case**

8. In opposition to the Claim, the Petitioner filed a Notice of Preliminary Objection dated 23<sup>rd</sup> May 2024 on grounds that the Court lacks jurisdiction to suspend its own findings of unconstitutionality.
9. The Petitioner further filed Grounds of Opposition dated 23<sup>rd</sup> May 2024 on the following grounds That:
  1. the Application has no merit and should be dismissed since it is an abuse of Court process.
  2. the orders sought by the Applicant seeking an order to for stay of execution pending inter-parties hearing and determination is misconceived, vexatious and frivolous.
  3. the Application does not meet the threshold of grant of stay of execution.
  4. upon declaration of unconstitutionality the matter in issue (the appointment of the Interested Party as the CEO of Tea Board of Kenya) became null and void and ceased to exist; it cannot be brought back into existence by any machinations or craft of the Court.
  5. Court cannot suspend its declarations and orders of unconstitutionality given its duties as the custodian of the Constitution and especially as provided in Articles 3(1), 10, 159(1) & (2), 160(1), and 259(1) of the Constitution.
  6. any decision by this Court to stay its finding and declaration of unconstitutionality will contravene Articles 2(3) & (4) and 3(1) of the Constitution as read together with Article 165 (3) (d) (i) & (ii).
  7. any stay orders issued will be inconsistent with Article 2(3) of the Constitution to the extent that it will be tantamount to challenging the validity of Article 2(4).
  8. Article 2(4) of the Constitution of Kenya, 2010, is an absolute bar, which prohibits Honourable Court from allowing the continued violation of the Constitution through its order suspending the effectiveness of its own final decision that a matter is unconstitutional.



9. it was against the public interest to suspend the Orders, as that will subject the Tea Board of Kenya to a CEO who is unconstitutionally in office.
10. there was no basis for continuing the tenure of a public officer who acquired office unconstitutionally
11. the applicant has only met one condition which was filing of the application without undue delay as the judgement was delivered on the 17th day of May 2024, and the Application was filed on the same date.
12. Application herein lacks merit and should be dismissed with costs to the Applicant.

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

10. In opposition to the Petitioner's Notice of Preliminary Objection, the 1<sup>st</sup> Respondent filed Grounds of Opposition dated 23<sup>rd</sup> May 2024 on grounds that:
  1. The Court's jurisdiction is founded under Article 162(2) of the Constitution and Section 12 of the ELRC Act and the said Article and Section does not bar the Court from granting an order of stay of execution in constitutional petitions where the Court has issued a positive directive.
  2. Section 12(3) of the aforesaid Act gives the Court power and discretion to order interim preservation orders and any other appropriate reliefs as the Court may deem fit to grant.
  3. Order No. VI granted by the Court is a positive order and which the Court has power to stay and also has power to stay findings of unconstitutionality and order a remedy.
  4. The question of jurisdiction is either territorial or pecuniary or forum and the objection herein fits none of this.
  5. The preliminary objection lacks merit and should be dismissed with costs.

### **Interested Party's Case**

11. In opposition to the Petitioner's Notice of Preliminary Objection, the Interested Party filed a Preliminary Objection dated 23<sup>rd</sup> May 2024 on grounds that:
  1. the Application is incurable defective, incompetent and an abuse of the Court process.
  2. the same is otherwise an abuse of this Honourable Court's process and waste of its precious judicial time.
  3. the Preliminary Objection is therefore simply a misconceived shortcut designed to deny the Applicant the Application for stay when the Court has jurisdiction.

### **Analysis and Determination**

12. The main issue for determination herein is whether the Petitioner's Notice of Preliminary Objection is merited and whether this Court lacks jurisdiction to suspend its own findings of unconstitutionality.
13. The threshold to determine whether a preliminary objection is merited was held in *Mukisa Biscuit Manufacturing Co. Ltd -vs.- West End Distributors* (1969) EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

14. Paragraph 42 of this Court’s Judgment dated 17<sup>th</sup> May 2024 clearly states:

“The said section 13 of the said Tea Act make it abundantly clear the appointment of the Chief Executive Officer shall be competitively recruited. Again, the respondents did not demonstrate how the recruitment was competitive considering the 1<sup>st</sup> interested party was not even the top most according to the score sheet from the interview. That act shows the respondent violated right to fair labour practices contrary to article 41 of the Constitution of Kenya. If there was a good reason and it was not favouritism that caused the respondents to settle for the interested party they should have made it clear in the appointment letter. In the absence of the same then the Court can only hold that there was favouritism in the respondents appointing Dr Willy Kipkoech Mutai as the Chief Executive Officer.”

15. The Court deemed the 1<sup>st</sup> Respondent’s actions as unconstitutional as it was in violation of Article 41 of the Constitution, hence the preliminary objection is clearly based on a point of law and facts which have not been undisputed.

16. This Court ruled in its aforesaid judgment delivered on 17<sup>th</sup> May 2024 that the respondents had contravened article 41 of the Constitution in appointing the 1<sup>st</sup> interested party as the CEO of the 1<sup>st</sup> respondent without complying with the law and failure to appoint its EO competitively. This was against section 13 of the Tea Act and section 10 of the Public Service Values and Principles Act.

17. The petitioner in his submissions of 23<sup>rd</sup> May 2024 affirms that the 1<sup>st</sup> and 2<sup>nd</sup> respondent violated several Constitutional articles and urges the Court to tenure that the appointments of public officers are done in accordance with law and in adherence of Constitutional dictates.

18. In his submissions in Court orally the petitioner says that the Court having determined the unconstitutionality of the appointment of the CEO has no jurisdiction to suspend the same. He quotes article 2(4) of the Constitution of Kenya which provides as hereunder.

“any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.

19. He also depends on articles 23 and 165(3) of the Kenya Constitution which provide jurisdiction to the High Court to hear and determine applications to redress of a denial, violation or infringement of or a threat to a right or fundamental freedom in the bill of rights in Kenya.

20. The preliminary objection before this court simply states:

“the Court lacks jurisdiction to suspend its own findings of unconstitutionality.”

21. It is not in dispute this Court in its judgment found the respondents were unconstitutional in appointing the interested party as its CEO. The Court is now being called upon to give a temporary stay of judgment and decree pending the filing of the appeal in the Court of Appeal. The Court is not being called upon to review or set aside its judgment or order.



22. Generally order 22(24) of the *Civil Procedure Rules* implies a stay of execution can be made by the Court that made the decree or by an appellant Court. The Court that has passed a judgment has mandate to handle matter of stay of execution.
23. This ties well with article 23(3) of the *Constitution* of Kenya which provides as follows
- (3) In any proceedings brought under Article 22, a Court may grant appropriate relief, including —
- (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.
24. Section 12 of the *employment and labour relations act* also denotes jurisdiction to this court and it proceeds as follows:
1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and provision of this act or any other written law which extends jurisdiction to the court relating to employment and labour relations including –
- a. Disputes relating to or arising out of employment between an employer and an employee.
  - b. Disputes between an employer and a trade union.
  - c. Disputes between employers organisations and trade union organisations.
  - d. Disputes between trade unions.
  - e. Disputes between employer organisations.
  - f. Disputes between an employers organisation and a trade union.
  - g. Disputes between a trade union and a member thereof.
  - h. Disputes between an employers organisation or a federation and a member thereof.
  - i. Disputes concerning the registration and election of trade union officials and
  - j. Disputes relating to the registration and enforcement of collective agreements.
25. The Court has carefully considered the authorities cited by the respective parties. The petitioner's authorities to cite a few *Independent Electoral & Boundaries Commission Vs Jane Cheperenger & 2 Others* (2015) eKLR and *Abmed Musa Ismael vs Kumba Ole Ntamonua & 4 Others* 2014 eKLR



basically refer to the situation where preliminary objection are granted and orders of stay. The one of Independent Electoral & Boundaries Commission (*supra*) states :

“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

26. The one of *Abmed Musa Ismael* (*supra*) provides that

“stay orders are granted to preserve the integrity of the appellate process so as not to render any eventual success of a mere pyrrhic victory devoid of substance or succour by reason of intervening loss harm or destruction that turns the appeal into a mere academic ritual.”

27. None of these authorities provide that a Court cannot grant a stay of execution in a matter it has found to be unconstitutional for purposes of giving the respondent an opportunity to appeal the judgment in the appellate Court.

28. In the case of *Ishmail Kagunyi Thande vs Housing Finance of Kenya Ltd* the Court stated

“the jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principals guide the Court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the Court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

29. The petitioner has urged the Court not to err by failing to appreciate articles 2(1), (4) 3, 10, 22, 23 & 258 of the *Constitution*. Once Again the Court has pronounced itself on the unconstitutionality of the actions of the respondents and is not moving from that position. The Court is just giving the respondent equal opportunity to access justice by exercising their right of appeal.

30. The Court is further persuaded by the decision cited by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent of the *Forum for Good Governance and Human Rights vs The Teachers Service Commission and others* petition No E223 of 2023.

“As urged for the petitioner the Court declined to grant compensation or regularize the impugned contracts for intern teachers as per the reason set out in the judgment. Accordingly, the others in the judgment were declaratory as defining the parties respective positions in relation to the constitutional issues that had been raised in the petition. To that extent, there appears to be an order potentially subject to execution flowing from the judgment save for parties taking appropriate steps consistent with the findings and declarations made therein.

The applicant submitted that it had an arguable appeal and if application were not granted, the same would be rendered nugatory. The Court considers that such are considerations beyond the trial Court and such considerations would be made in an appropriate application before the Court of Appeal. The Court is indeed precluded from reconsidering its judgment as though it were a Court of Appeal upon its own judgment. Considerations of whether the appeal would be nugatory or arguable or are found outside the Court’s jurisdiction.



In the interest of justice, it appears to the Court that it would be appropriate if the status quo prior to the judgment to be maintained with respect to the findings and orders of the Court in the judgment, pending a compromise or rearrangement of affairs between parties, or, the applicant filing appropriate application at the Court of Appeal, and of that purpose in those terms, the status quo be maintained until 1/8/2024. Considering the public interest litigation involved no orders on costs of application will issue.”

31. The Court finds the preliminary objection raised by the petitioner has not been justified to be merited in view of the above reasoning and so is dismissed.
32. Further the Court will grant the 1<sup>st</sup> respondent prayer no 2 of their notice of motion dated 17<sup>th</sup> May 2024 for 60 days from today’s date and to further file their record of appeal within those 60 days failing of which these interim orders will lapse and the orders as per the Court’s judgment dated 17<sup>th</sup> May 2024 will take immediate effect.
33. Cost will be in the intended appeal.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28<sup>TH</sup> DAY OF MAY, 2024.**

.....  
**ANNA NGIBUINI MWAURE**  
**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2) (d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

.....  
**ANNA NGIBUINI MWAURE**  
**JUDGE**

