



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KANTAL, JJ.A.)

CIVIL APPEAL NO. 297 OF 2019

BETWEEN

ELLY OKONG'O INGANG'A1ST APPELLANT

LUCAS ONDUSO OMOKE..... 2ND APPELLANT

VITALIS OTIENO MUGA.....3RD APPELLANT

REBECCA MONGERE OCHOI 4TH APPELLANT

JOICE MONGERE OMWAMBA.....5TH APPELLANT

CHRISTOPHER OMWAMBA CHUMA.....6TH APPELLANT

GETUNA MASALA IDINGA 7TH APPELLANT

AND

JAMES FINLAY (KENYA) LIMITED.....RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Radido, J.) dated 28th May, 2019 in
ELRC No. 30 of 2019)

JUDGMENT OF THE COURT

The appellants, **Elly Okongo Ingang'a**, **Lucas Onduso Omoke**, **Vitalis Otieno Muga**, **Rebecca Mongere Ochoi**, **Joice Mongere Omwamba**, **Christopher Omwamba Chuma** and **Getuna Masala Idinga** were either serving or former employees of the respondent, **James Finlay (Kenya) Limited**. The respondent owned and managed tea estates including Tituet- Chomogonday factory, Marinyu, Kaporet and Kapsongoi Kitchembe factory, all situate in Kericho, Kenya.

The respondent is a company incorporated under the Companies Act of Scotland and has its registered office at Swire House, Souter Head Road Altens, Aberdeen, Scotland.

Claiming to have suffered certain bodily or physical injuries while at work in the respondent's various tea estates and factories the appellants elected to file suits, not in Kenyan courts, but travelled all the way to Scotland and approached the **All-Scotland Sheriff Personal Injury Court at Edinburgh** where seven suits – **Court Ref. No. PLC PN 1055, 1056, 1057, 1058, 1052, 1053 and 1051** were filed in respect of each appellant. Motions were taken in the course of those proceedings where the Scottish court was asked, *inter alia*, to order "locus inspections" of the respondents tea estates and factories in Kericho for the purpose of observing the following activities: tea pickers picking tea manually and with equipment, taking measurements of the tea plants and areas workers require to work, including distance workers require to walk to weigh tea; photocopying and videoing work undertaken by the workers; considering Personal Protective Equipment (PPE) available to the workers; weighing the tea baskets when full of tea; observing and videoing picking and transporting and weighting of the tea; observing medical facilities available to the workers, and, weighing mechanical harvesting equipment for one, two and three users. It was proposed in the motions that inspections take place in the week commencing 21st January, 2019 and persons to be present at the locus inspections were named as: Experts – Professor Alan J. Silman, Professor of Musculoskeletal Health, University of Oxford, Dr. Richard Graveling, Principal Ergonomist, Institute of Occupational Medicine, David Maina, Tea Industry Economics Expert, Nigel Melican, Tea Production Technology Expert and Margaret McQueen, Orthopaedic Surgeon. The legal team to comprise Lauren Sutherland, QC, Govel

Evans, Principal Agent, Hugh Solicitors, David Short, Balfour + Manson LLP, Ronald Onyango Solicitor and Barrister, Nairobi. They would be accompanied by a translator and one of the appellants. The Motions were considered and allowed by the Sherriff of the Personal Injury Court on 22nd November, 2018 and appropriate orders were served on the respondent.

In an Originating Notice of Motion (later amended) filed at the Employment and Labour Relations Court (ELRC) at Nairobi in Constitutional Petition No. 30 of 2019 the Court was asked to issue declaratory orders to the effect that the orders issued by the Scottish Court had to be adopted and recognized as orders of the ELRC before being executed as required by **Article 159 (1)** of the **Constitution of Kenya, 2010**. The seven orders issued by the Scottish Court were set out in the Motion and it was further stated that the appellants and their agents must abide by and observe the provisions of the **High Court (Practice and Procedure) Rules Part VII** being part of the written laws of England applicable to Kenya by virtue of **Sections 3(1) (b)** of the **Judicature Act** before conducting any locus inspection as ordered by the Scottish Court; that failure by the appellants to observe the said provisions of law would be in breach of the sovereignty of Kenya and an abuse of protocol as between the two sovereign states of the United Kingdom and Kenya; that execution of the orders of the Scottish Court before being adopted by ELRC would be contrary to the legal spirit set out in the provisions of **Foreign Judgments (Reciprocal Enforcement) Act Cap 43 Laws of Kenya**. It was also stated that the respondent would be in breach of the Kenyan Constitution and other laws were it to allow an inspection visit based on the Scottish Court orders to take place within its estates if such a visit was not sanctioned by Kenyan judicial authority. Further, that any non-citizen visiting Kenya for purposes of execution of such orders was required to comply with the **Kenya Citizenship Act 2011** and be in possession of a valid work permit or process a Special Pass issued under the **Kenya Citizenship and Immigration Regulations 2012**; that in absence of such compliance, if the respondent allowed such locus inspection it would commit an offence under various Kenyan laws.

In opposing the Motion the appellants took the view that the ELRC had jurisdiction in the matter. They stated at paragraphs 4-6 (inclusive) of "Statement for the Respondents":

"4. Compliance by the applicant with interlocutory orders for site visit (hereinafter "the locus inspection orders") made by the All-Scotland Sherriff Personal Injury Court (Sheriffdom of Lothian and Borders at Edinburgh) (hereinafter "The Scottish Court") require only that the applicant permits and facilitates access to its premises under its obligations to the Scottish Court to whose jurisdiction it has willingly submitted. Permitting and facilitating access to its properties is neither prohibited by either the Kenyan Constitution or any provision of Kenyan law nor precluded by any prerequisite legal step by the applicant under the Constitution or any Kenyan legislation.

5. Compliance by both the applicant and the respondents with the orders made by the Scottish Court is a matter of a legal obligation the applicant and respondents have to the Scottish Court and not a matter in the nature of an employment or labour relations dispute between them wherefore it cannot constitute a dispute which this court has jurisdiction to entertain under Section 12 of the ELRC Act.

6. The dispute between the parties as relates to the respondents' claim against the applicant is being litigated before the Scottish Court to whose jurisdiction the parties have willingly submitted and thus constitutes lis alibi pendens which prohibits any purported submission contemporaneously of the same before this court as a violation of international comity. There is therefore no dispute between the parties over which this court has jurisdiction wherefore there is no legal basis upon which the application should be entertained by this court."

The appellants further stated that locus inspection orders issued by the Scottish Court were interlocutory in nature and were not subject to Foreign Judgments (Reciprocal Enforcement) Act as they were not Judgments; that the High Court (Practice and Procedure) Rules were subsidiary legislation to the **Judicature Act Cap 8 Laws of Kenya**; that the Scottish Court had not ordered the taking of any testimony from any witness within the jurisdiction of ELRC; that no Kenyan law prohibited the respondent from complying with locus inspection orders issued by the Scottish Court. The appellants averred that the proceedings before the ELRC were an abuse of the process of the Court intended to frustrate, avoid and otherwise undermine the locus inspection orders issued by the Scottish Court intended to deny the appellants their right to inspect the respondent's premises and that the Motion would violate the appellants' rights to a fair trial under **Article 50(1)** of the **Constitution of Kenya, 2010** and would undermine the courts obligation under **Article 48** of the said **Constitution** not to impede access to justice for the appellants. The replying affidavit of **Gwen Morgan-Evans**, a **Solicitor of the Supreme Court of Judicature** in the United Kingdom repeated the matters above stated by the appellants.

The petition was heard by **Radido, J.**, who in a Judgment delivered on 28th May, 2019 allowed it triggering this appeal premised on Memorandum of Appeal drawn for the appellants by their lawyers, **Behan & Okero Advocates** where eight grounds of appeal are taken. The learned Judge is faulted for finding that interlocutory orders such as the locus inspection orders issued by the Scottish Court required judicial aid as a matter of public policy without stipulating what public policy considerations dictate that requirement. The Judge is also faulted for ignoring the appellants' Article 50 (of the Constitution) rights; that the Judge erred by finding with no basis that **"... the experts authorized by locus inspection orders cannot just travel to Kenya with authority to enforce the locus inspection orders without the consent of the Kenyan authorities, judiciary or executive...."** The Judge is also faulted for what the appellants say is a misapprehension of the status of the experts authorized by the locus inspection orders when the Judge held that upon their arrival

"...in Kenya they became no more than private citizens within the territory of Kenya..." The Judge is also faulted for applying provisions of Civil Procedure Act; invoking the Foreign Judgments (Reciprocal Enforcement) Act against the locus inspection orders and, finally:

"The learned Judge erred in failing to appreciate that by filing and prosecuting the petition the Petitioner's sought to invoke the court's authority to clothe its breach of the locus inspection orders and to frustrate the respondents' actions before the Scottish Court in violation of their rights to access justice and to fair trials."

It is proposed that we allow the appeal and set aside the Judgment of the ELRC and dismiss the petition filed in that Court.

This is a first appeal and we have travelled that rather long route to comply with our mandate under **Rule 29** of the **Court of Appeal Rules** where we are to re-appraise the evidence and draw inferences of fact. It was stated, of that mandate, in the oft-cited case of **Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123** as follows:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

No evidence was taken in the ELRC and the Court relied on pleadings, documents filed and submissions made by the parties.

This appeal came up for hearing before us virtually due to the Covid-19 pandemic on 3rd March, 2021. **Mr. Okero**, learned counsel appeared for the appellants while **Mr. Obura**, learned counsel appeared for the respondents. Both parties had filed written submissions and lists of authorities and what remained was a highlight of the same. Both counsel chose not to exercise their right of a highlight and left the whole matter to us.

We have considered the whole record, submissions made on behalf of the respective parties, cases cited and the law and this is the view we take of the appeal.

The main issue we recognize as calling for our consideration is whether the locus inspection orders issued by the Scottish Court on 22nd November, 2018 could be executed in Kenya without intervention by Kenyan authorities.

It is conceded by both sides that the Scottish Court has not heard the cases; there is no Judgment from that Court; the locus inspection orders issued are interlocutory in nature.

The appellants took the view both in the ELRC and in submissions before us that locus inspection orders were part of an interlocutory discovery process by the Scottish Court and that such process was founded on **Article 35** of the **Constitution of Kenya, 2010** and that the orders were self-executing and did not require any type of domestic (Kenyan) judicial assistance. The appellants also submitted that the respondents only options were to obey the orders of the Scottish Court by facilitating inspection or disobey the orders and face consequences of disobedience by the Scottish Court.

The respondent submitted that there was a question of sovereignty involved and that for the orders of the Scottish Court to be executed or enforced in Kenya the Kenyan authorities including the Judiciary had to be approached for assistance. It was submitted for the respondent that locus inspection orders issued pursuant to the laws of the United Kingdom were void and would so remain unless ratified, adopted or legitimised in Kenya. Further, that the appellants had to abide by the provisions of the Judicature Act, the Foreign Judgments (Reciprocal Enforcement) Act and the Civil Procedure Act and should have moved the Scottish Court for assistance of the Kenyan courts to execute locus inspections orders.

The Judge of the ELRC found that locus inspection orders were part of a discovery process in litigation which was a pre-trial procedure to ascertain facts to be presented in the trial. Examining various laws the Judge found that the Scottish Court was not the “court” contemplated by **Article 159** of the **Constitution of Kenya**; the Foreign Judgments (Reciprocal Enforcement) Act recognised certain Judgments as enforceable in Kenya but was silent in respect of interlocutory orders such as locus inspection orders. He examined issues of public policy and came to the conclusion that the orders issued by the Scottish Court could not be enforced or executed without the involvement of Kenyan authorities.

Upon our own consideration we agree with those findings.

A reading of **Articles 1, 2 and 159** of the **Constitution of Kenya, 2010**, shows that sovereign power belongs to the people of Kenya and the people exercise that power through themselves or through their representatives and that power may be delegated to State organs, like the Judiciary. The Scottish Court is not one of the courts established by the Constitution.

The Foreign Judgments (Reciprocal Enforcement) Act recognizes certain foreign judgments which may be executed in Kenya and there is a procedure in that Act and in the Civil Procedure Act on the manner such Judgments may be enforced or executed. Such procedure will involve the Ministry of Foreign Affairs and the Judiciary for enforcement of the orders.

There is no provision in the Foreign Judgments (Reciprocal Enforcement) Act or the Civil Procedure Act on how an interlocutory order issued by a foreign State may be enforced in Kenya but a broad reading of the statutes would dictate that the foreign court, like the Scottish Court here, be moved to seek assistance of the Kenyan Judiciary and other Kenyan authorities for enforcing orders issued by such a Court.

It will be remembered that in the Motions filed before the Scottish Court it was prayed that the appellants be allowed to bring named experts and a legal team from Scotland to Kenya to make certain observations – of tea pickers picking tea; taking certain measurements of the tea estates and factories, take videos of various activities at the estates and factories and even photocopying of various documents and equipment. Would a sovereign State, and Kenya is one, allow foreigners to walk into its territory and undertake such and related activities without supervision or assistance? The Judge found, and we agree, that there were public policy issues involved in the case where the Scottish Court had issued locus inspection orders to be executed in Kericho, Kenya. He found that judicial aid was necessary as it would ensure that the order of the foreign court was not inconsistent with public policies of Kenya. The Kenyan court whose assistance is sought would examine the case from the foreign court and ascertain whether proper judicial process has been followed in obtaining such orders, whether that process is consistent with Kenyan laws and policy and whether the experts were qualified under Kenyan law to undertake such

exercise, amongst other considerations.

We think that the Judge reached the correct conclusions. The appeal has no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR