



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, J. MOHAMMED & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 16 of 2011**

**BETWEEN**

**KENYA TEA GROWERS ASSOCIATION ..... 1<sup>st</sup> APPELLANT**

**UNILEVER TEA KENYA LIMITED ..... 2<sup>nd</sup> APPELLANT**

**AND**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION ..... RESPONDENT**

***(An appeal from the Ruling and Orders of the Industrial Court of Kenya at Nairobi (Madzayo, J.)  
dated 1<sup>st</sup> November 2010***

**in**

**Industrial Cause No. 1281 OF 2010)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The appellants are duly registered companies under the provisions of the **Companies Act (Cap 486 of the Laws of Kenya)** and are engaged *inter alia* in the growing of tea and related agricultural practices. The respondent is a trade union catering for employees engaged in agricultural and plantation industry. To appreciate the dispute in this appeal, the relationship between the appellants and respondent is that the appellants own large tracts of land in which they cultivate tea while the respondent is a trade union representing employees of the appellants.
2. On 11<sup>th</sup> October 2010, the appellants received a letter from the respondent in which the respondent issued a seven (7) day strike notice premised on the claim that the appellants had increased the use of tea plucking machines in its operations without prior consultations with the respondent. The respondent claimed that the rise in the use of tea plucking machines by the appellants had impacted negatively on the socio-economic activities of its members. To protect their interest and avert the threatened industrial strike, the appellants filed a Constitutional Petition at the High Court against the respondent being **Nairobi Petition Case No. 62 of 2010**. In the meantime, the respondent moved to the Industrial Court at Nairobi and lodged **Industrial Cause**

**Claim No. 1281 of 2010** and by way of Notice of Motion dated 21<sup>st</sup> October 2010 the respondent sought an injunction to restrain the appellants from unlawfully evicting from their residential houses members of the respondent union who were employees of the appellants.

3. The respondent's Notice of Motion was listed in Chambers on 1<sup>st</sup> November 2010 before Madzayo, J. of the Industrial Court. From the record, it is apparent that the matter was not listed for hearing but to enable counsel for the respondent to study a hard disk. Both counsel for the appellants and respondent were present before the judge. The matter was listed in chambers "to save the dignity of both the court and the lawyers appearing in the matter." The record of proceedings before the judge on 1<sup>st</sup> November 2010 shows that counsel for the respondent Mr. T.J. Kajwang stated as follows: "I was served with the disk. I have had an opportunity to look at it. It is my humble submission that the issues raised therein do not touch on the integrity of the court and or is not injurious to the learned counsels now representing the respondents; but I will leave the court to decide".
4. The learned judge in a brief ruling delivered on 1<sup>st</sup> November 2010 (which is the subject of this appeal) expressed himself as follows:

***"The court has had the benefit of the brief submissions of the learned counsels, Mr. T.J. Kajwang from the firm of Messrs Kajwang & Kajwang Advocates for the claimants, Mrs. E.W.Kinyenye Opiyo for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Miss C. A. Wetende for the 3<sup>rd</sup> respondent. Further the court has perused the documents in the court file. It is the view of the court that there should not be so much acrimony and or misunderstanding between the parties herein, as there exists a recognition agreement. And further, several collective agreements have been executed and or have been operational through the years. ....***

***Therefore the Court Order is that:***

- a. ***The strike action be called off forthwith or with immediate effect.***
  - b. ***There should be no victimization whatsoever of any employee and or employees of the respondent.***
  - c. ***The Labour Commissioner, Ministry of Labour to act as Chairman and set up the mechanism to engage the parties herein for a reconciliation and file the Report on court within 10 days from the date hereof i.e. 11<sup>th</sup> November 2010."***
5. The appellants aggrieved by the ruling and *suo moto* orders made on 1<sup>st</sup> November 2010 lodged the present appeal on 4<sup>th</sup> February 2011 and cited the following grounds in their memorandum of appeal:
    - i. *The court had no jurisdiction to deal with the matter in view of the fact that Constitutional Petitions Nos. 62, 63 and 64 of 2010 were pending and failed to take into account that the Constitutional Court had already issued an injunction relating to the matters.*
    - ii. *The court erred in failing to consider that the strike was a prohibited strike under Section 78 of the Labour Relations Act.*
    - iii. *The learned trial judge erred in ordering that there should be no victimization and thus failed to consider Sections 78 and 80 of the Labour Relations Act.*
  6. The record of proceedings conducted before the Industrial Court judge on 1<sup>st</sup> November 2010, clearly show that the respondent's Notice of Motion dated 21<sup>st</sup> October 2010 was not heard and

- argued on the date. We find that the orders made on 1<sup>st</sup> November 2010 were made at the court's own motion. Subsequent to the orders of 1<sup>st</sup> November 2010, the respondent's Notice of Motion was argued *inter partes* and a ruling delivered on 22<sup>nd</sup> March 2011. In this ruling, the trial court granted the injunctive orders as prayed for by the respondents.
7. Aggrieved by the ruling made on 22<sup>nd</sup> March 2011, the appellants have filed another appeal now pending before this Court as **Civil Appeal No. 268 of 2012** between the same parties herein arising from the same cause of action. The second Civil Appeal No. 268 of 2012 is not the appeal now before this Court. The instant appeal arises from the appellant's grievance from the ruling and orders made on 1<sup>st</sup> November 2011.
  8. At the hearing of the instant appeal, learned counsel Ms. Kimani Waweru appeared for the appellants while learned counsel Mr. T.J. Kajwang urged the appeal for the respondent.
  9. Counsel for the appellant reiterated the grounds in support of the appeal urging that the Industrial Court had no jurisdiction to make the orders of 1<sup>st</sup> November 2011 while Constitutional Petitions Nos. 62, 63 and 64 of 2010 between the same parties and arising from the same cause of action were still pending before the High Court; that in the constitutional petitions, interlocutory conservatory orders had been issued prohibiting the respondent's members from engaging in a strike; that the respondent's members who are employees of the appellants despite the existence of the prohibitory orders engaged in a strike and that is why the appellant desired to take disciplinary action and this led the respondent filing action before the Industrial Court; that the Industrial Court erred in issuing the orders of 1<sup>st</sup> November 2010 particularly stating that there should be no victimization whatsoever of any employee and or employees of the respondent; that this order contradicts the interlocutory order issued in the Constitutional Petition on 14<sup>th</sup> October 2010 that restrained the respondent and its members from causing, effecting, inciting or otherwise calling for a strike by the appellant's employees; that by issuing the orders on 1<sup>st</sup> November 2010, the Industrial Court erred and protected the employees from their disobedience of the High Court order issued on 14<sup>th</sup> October 2010. Counsel for the appellant further submitted that the trial judge erred in failing to consider that the strike that was called by the respondent was illegal under the provisions of **Section 78** of the Labour Relations Act.
  10. The respondent in opposing the appeal submitted that an appeal to this Court is on matters of law; that cursory perusal of grounds of appeal in the memorandum shows that issues of mixed law and fact have been raised. It was submitted that the Industrial Court judge properly exercised his jurisdiction under **Section 87** of the then **Employment Act** and there is no question of want of jurisdiction on the part of the trial court; it was further submitted that the order made on 1<sup>st</sup> November 2010 requiring the Labour Commissioner to engage the parties for a reconciliation and file the report in court had been implemented and is spent; that the parties herein held a meeting as per the order and a report was filed at the Industrial Court; that the constitutional petitions referred to by the appellants have not been heard and determined on merit; that a second appeal between the parties herein is pending before this Court as Civil Appeal No. 268 of 2012; that in the second appeal, the contested issues and grounds of appeal arise from the *inter partes* hearing and ruling delivered by the trial court on 22<sup>nd</sup> March 2011. Counsel urged this Court to dismiss the appeal.
  11. We have considered the grounds of appeal and submissions by counsel. Both counsel concurred that the order made on 1<sup>st</sup> November 2010 by the trial court requiring the Labour Commissioner to engage the parties in reconciliation had been complied with. This particular order has been overtaken by events and it would be in vain for this Court to make any orders regarding the same. As was stated by this Court in **Republic -v- Professor Mwangi S. Kaimenyi ex parte KIPPRA, Civil Appeal No. 160 of 2008**, a court cannot act against a non-existent decision.
  12. We note that the ruling and orders the subject of this appeal are *suo moto* made by the Industrial Court judge prior to *inter partes* hearing of the respondent's Notice of Motion dated 21<sup>st</sup> October

2010. The aforesaid Notice of Motion was finally heard *inter partes* and a ruling on merits delivered on 22<sup>nd</sup> March 2011. An appeal against this ruling has been lodged before this Court as Civil Appeal No. 268 of 2012. It is our considered view that a *suo moto* or an interlocutory order made prior to an *inter partes* hearing automatically lapses and is spent and discharged upon a ruling or judgment delivered after *inter partes* hearing. In the instant appeal, we hold that the *suo moto* interlocutory orders made by the trial court on 1<sup>st</sup> November 2010 no longer exist as it automatically lapsed and was discharged and or spent after the ruling delivered on 22<sup>nd</sup> March 2011.

13.As regards the other grounds of appeal urged by the appellant, we take cognizance that there is pending before this Court Civil Appeal No. 268 of 2012 between the parties herein. This pending appeal arises from the ruling delivered on 22<sup>nd</sup> March 2011 after the *inter partes* hearing of the respondent's Notice of Motion dated 21<sup>st</sup> October 2010; the legality or otherwise of the industrial strike at the centre of dispute between the parties is a matter to be determined in the pending appeal; as to whether the trial court had jurisdiction to hear and issue the orders given in the ruling of 22<sup>nd</sup> March 2011 while three constitutional petitions were pending before the High Court, these are pertinent issues now awaiting to be urged in the pending appeal. In **Kenya National Examination Council -v- R ex parte Geoffrey Githenji Njoroge & 9 Others, Civil Appeal No. 266 of 1996**, it is stated that it has always been a policy of the law to prevent a multiplicity of suits on one issue. With this policy in mind, it is our view that it would be inappropriate for us to pronounce ourselves and pre-empt or prejudice the decision in the pending appeal where the contested issues shall be comprehensively urged by the parties.

14.The final orders of this Court are that this appeal has partial merit to the extent that the *suo moto* interlocutory orders made by the trial court on 1<sup>st</sup> November 2010 no longer exist and lapsed into the ruling delivered by the trial court on 22<sup>nd</sup> March 2011. Further, this Court would be acting in vain to set aside or pronounce itself on orders that have either been overtaken by events or no longer exist. As the appeal is partially successful, each party shall bear its own costs.

***Dated and delivered at Nairobi this 31<sup>st</sup> day of July, 2015***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

