



Muthaura v Cabinet Secretary Ministry of Agriculture Livestock Fisheries and Cooperative & 2 others; Kenya Tea Development Agency Management Services & another (Interested Parties) (Employment and Labour Relations Cause E027 of 2020) [2024] KEELRC 326 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 326 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E027 OF 2020**

MA ONYANGO, J

FEBRUARY 14, 2024

**IN THE MATTER OF: ARTICLES 1,2,3,10(2)(A),19,20,21,22,
23,27,28,41,47,118,162 & 258 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: VIOLATION AND/OR THREATENED
VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

IN THE MATTER OF: THE EMPLOYMENT ACT,2007

**IN THE MATTER OF: INTERPRETATION AND GENERAL
PROVISIONS ACT CAP 2 & STATUTORY INSTRUMENTS ACT,2013**

**IN THE MATTER OF: CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES,2013**

BETWEEN

WILSON MATHIA MUTHAURA PETITIONER

AND

**THE CABINET SECRETARY MINISTRY OF AGRICULTURE LIVESTOCK
FISHERIES AND COOPERATIVE 1ST RESPONDENT**

THE AGRICULTURE & FOOD AUTHORITY 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

AND

**KENYA TEA DEVELOPMENT AGENCY MANAGEMENT
SERVICES INTERESTED PARTY**

**KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED .. INTERESTED
PARTY**



RULING

1. This ruling is in respect of the 2nd Interested Party's application dated 2nd December 2020. The following orders are sought:
 - i. Spent
 - ii. That this Petition be transferred to the High Court Constitutional Division at Nairobi and heard back to back and/or consolidated with Nairobi High Court Constitutional Petition No. E243 of 2020, Kenya Tea Development Agency Holdings Limited & 54 Others Versus The Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives & 2 others, Kenya Tea Development Agency Holdings Limited & 54 Others Versus The Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives & 2 others.
 - iii. That in the alternative to prayer (ii) hereinabove, the proceedings herein be and are hereby held in abeyance pending the hearing and determination of Nairobi High Court Constitutional Petition No. E243 of 2020
 - iv. That the Court do issue any other directions as may deem fit and just in the circumstances and interest of justice in this matter
 - v. That costs of this application be in the cause.
2. The application is supported by the grounds stated on the face of thereof and the annexed affidavit of Dr. John Kennedy Omanga in which he deposes that: -
 - a. The instant Petition was instituted by the Petitioner in his capacity as an employee of the Interested Party herein, whereby the principal prayers as sought in the instant Petition include, Prayer (c) thereof, which reads, thus;
 - "c. A declaration that Regulations 22(1),22(3),22(4) and 22(5) of the Crops (Tea Industry) Regulations, 2020 are contrary to Articles 10, 27,41 and 47 of the Constitution and therefore unconstitutional."
 - b. On the 11th August,2020 East African Tea Association institution Mombasa Constitution Petition No. 87 of 2020 in its capacity as a voluntary, non-product organization representing the interests of Tea Producers, Buyers (Exporters) Tea Packers and warehousemen in various African countries. It filed the Petition on its own behalf and on behalf of its members and in which it seeks the following reliefs against the Respondents:
 - i. A declaration that the Crops (Tea Industry) Regulations Implementation Schedule Published by the 1st Respondent on the 3rd August, 2020 and subsequently vide Daily Nation Newspaper on the 10th August 2020 were issued in a manner that is inconsistent with the provisions of the Constitution and the Statutory Instrument Act hence and void for all purposes.



- ii. An order of Mandamus be and is hereby issued compelling the 1st and 2nd Respondent from implementing the Crops (Tea Industry) Regulations, 2020.
- c. On the 10th August 2020, the Interested Parties herein also instituted Nairobi High Court Constitutional Petition No. E243 of 2020 whereby they also sought to challenge the impugned regulations. The orders sought in the petition include the following:
- i. A declaration be and is hereby issued that the Crops (Tea Industry) Regulations, 2020 as published vide The Kenya Gazette Notice Vol. CXXII No. 97 dated 29th May 2020 are unconstitutional, illegal, null and void.
 - ii. An order of certiorari be and is hereby issued to remove into this court and quash the Crops (Tea Industry) Regulations, 2020 as published vide The Kenya Gazette Notice vol. CXXII No. 97 dated 29th May, 2020
 - iii. An order of Prohibition be and is hereby issued directed against the Respondents jointly and severally by themselves, their agents, employees and or any other persons whomsoever or howsoever acting on, with and or under their instructions, forbidding them from unlawfully interfering with the structure, operation, affairs and business of the Petitioners.
 - iv. A declaration be and is hereby issued that the rights of the Petitioners have been violated.
- d. That all the aforesaid three suits arise from a similar set of facts and circumstances and hence they raise the same questions of law and or facts being the impugned *Crops (Tea Industry) Regulations, 2020*. That the substantive issue for determination in all the petitions, including the instant petition revolve around the constitutionality and legality or otherwise of the impugned regulations.
- e. That the trial court in Nairobi Constitutional Petition No. E243 of 2020 having been informed of the existing similar matter in Mombasa being Mombasa Constitutional Petition No. 87 of 2020 has already taken steps and intervened with a view to forestall the foregoing and the matter has now been fixed for directions on the way forward on 3rd December, 2020.
- f. That the court in Mombasa Constitutional Petition No. 87 of 2020 also having been informed of the existence of Nairobi Constitutional Petition No. 87 of 2020, on its own motion did direct that the suit be transferred to Nairobi High Court Constitutional Division to be heard before the same judge alongside Nairobi Constitution Petition No. E243 of 2020 and the case be mentioned before the trial judge on



be affected by the determination of the case. It is further submitted that the orders sought are merely orders seeking consolidation of the suit and not substantive orders that are issued in finality.

7. On the second issue, the 2nd Interested Party submitted that Article 23(3) of the Constitution as read with section 12(1) of the Employment and Labor Relations Court Act empower the Employment and Labor Relations Court to grant reliefs in a constitutional petition. According to the Interested Party, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the Employment and Labor Relations Court Act. It is submitted that the Court cannot therefore purport to entertain Petitions outside the aforesaid matters as its jurisdiction is limited to employment matters and matters related thereto. Reliance was placed on the case of Sollo Nzuki v Salaries and Remuneration Commission & 2 others (2019) eKLR.
8. It is the 2nd Interested Party's submission that whereas it is admitted that there exists an employer-employee relationship between the Petitioner and the Interested Party, no such relationship exists between the petitioner and the Respondents whom the Petitioner seeks reliefs against.
9. It is further submitted that the employment relationship between the Respondents and the Interested Party is a secondary issue and that section 87(3) of the Employment Act clearly stipulates that the section does not apply to a suit where the dispute over a contract of service or any other matter referred to therein is similar or secondary to the main issue in dispute.
10. The 2nd Interested Party submitted that in 'mixed-grill claims like the instant petition the principle of the 'dominant issue' applies. It is submitted that courts have held in various decisions that in the event of mixed-grill claims, the Court with the closest connecting factors/predominant issue in the dispute assumes jurisdiction. To buttress this point, the cases in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (2017) eKLR and Francois Makorani Ddaiddo v Bank of India(K)ltd (2017) eKLR were cited.
11. On the third issue, the 2nd Interested Party submitted that the rationale behind consolidation of suits is to ensure that issues which are essentially the same are heard and determined in one trial to avoid multiplicity of actions. It is further submitted that consolidation of suits provides convenience, saves costs and ensure expeditious disposal of cases hence saving on judicial scant resources. The cases Republic v Paul Kibara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya (2020) eKLR and Hilton Walter Nabongo Osinya & Another v Savings & Loan(K)Limited & Another Nairobi HCCC No. 274 of 1998 were cited.
12. On the last issue, the 2nd Interested Party submitted that the petitions as filed relate to a similar matter being to challenge the impugned regulations as filed and therefore there exists a common issue of law in all the petitions. It is submitted that in the instant case, the Petitioner's predominant issue for determination is the impugned regulations and the High Court is now seized of the issues in High Court Constitutional Petition No. E243 of 2020 as consolidated with Mombasa High Court Petition No. 87 of 2020.
13. The 2nd Interested Party maintains that the Petitioner will not be prejudiced if the matter herein is stayed pending the determination of the High court petition since the issues raised in the instant petition shall be addressed to conclusion in the Nairobi High Court Petition.

The 2nd Respondent's submissions

14. The 2nd Respondent on its part framed the issues for determination to be:
 - i. Whether the High Court has the jurisdiction to hear this matter



- ii. Whether the Application meets the threshold for stay of proceedings

Whether the High Court has the jurisdiction to hear this matter

15. The 2nd Respondent submitted that a determination of whether the impugned regulations contravene Article 41 of the *Constitution* and sections 9, 40 and 45 of the *Employment Act* is clearly an employment and labour relations issue which is a preserve of this honorable court. It is further submitted that this is the issue before this court and is an issue that can only be determined by this court.
16. The 2nd Respondent maintains that the High Court has no jurisdiction to determine the employment and labor relation issues raised in this petition, and it would be a futile exercise to transfer this matter to the High Court for determination. In support of this position, the 2nd Respondent relied on the case of *Medical Research Institute v Davy Kiprotich Koech* (2018) eKLR.

Whether the Application meets the threshold for stay of proceedings

17. It is submitted that the Applicant has failed to satisfy the grounds upon which an order of stay of proceedings would be issued. According to the 2nd Respondent, the Applicant has not indicated the stage of the cases in High Court Petition No. e243 of 2020 as consolidated with Mombasa High Court Petition No. 87 of 2020 and that staying the proceedings in this Petition would defeat the overriding objective of the court under section 3 of the Employment and Labour Relations Court Act, 2011 which is to facilitate the just, expeditious, efficient and proportionate resolution of disputes.
18. The court was urged to dismiss the instant application with costs and deliver the judgment.

Petitioner's submissions

19. The Petitioner in his submission identified the only issue for determination to be whether the instant petition should be transferred to the High Court Constitutional Division at Nairobi for it to be heard back to back and/or consolidated with Petition No. E243 of 2020 or for it to be held in abeyance pending the hearing and determination of the Petition No. E243 of 2020.
20. The Petitioner submits that the dispute before this Honorable court is completely distinct from Nairobi High Court constitutional Petition No. E243 of 2020 in that the gist of the Petition in High Court Constitutional Petition No. E243 of 2020 is to challenge unlawful interference with structure, operation, affairs and business of KTDA, while the instant petition seeks redress of grievances relating to the employment, employment terms, due process rights under the *Employment Act* No. 11 of 2007 and status of employees which can only be dealt with by this Honorable court.
21. It is therefore the Petitioner's submissions that the instant petition raises issues under section 12 of the Employment and Labour Relations Court Act and Article 41 of the *Constitution* which are a preserve of this court. Reliance was placed on the cases in *Cabinet Secretary, Ministry of Mining & Another v National Environment Management Authority & 3 others Ex-Parte Cortex Mining Kenya Limited, Daniel N. Mugendi v Kenyatta University & 3 others* CACA No. 6/2012(2013) eKLR and *Judicial Service Commission v Gladys Boss Shollei & Another* (2014) eKLR.
22. The Petitioner further submitted that the 2nd Interested Party has not met the threshold required to transfer a suit as set out in the case of *Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd* (2012) eKLR.



23. In the end, the Petitioner submitted that the 2nd Interested Party has not demonstrated compelling reasons why the instant petition should be transferred to the Constitutional Court or consolidated with Petition No. E2543 of 2020.
24. The court was thus urged to dismiss the application dated 2nd December 2020 with costs.

Determination

25. This court has taken the trouble of finding out the status of High Court Petition No. E243 of 2020 upon which the 2nd Interested Party pegged the instant application on. I take judicial notice that Mrima, J in his ruling in *Kenya Tea Development Agency Holdings Limited & 55 others v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 others; Kenya Small Tea Holders Growers Association (Kestega (Interested Parties))* [2021] eKLR observed as follows:

“...14. Counsel for the Petitioners submitted that since the matter had been filed in the Employment and Labour Relations Court then this Court lacks the jurisdiction to deal with it. Counsel for the Respondent was of the contrary position.

15. Without placing any meaningful premium on the issue, it is settled that the High Court cannot exercise jurisdiction over matters instituted in the Courts of equal status being the Employment and Labour Relations Court and the Land and Environment Court and vice versa. (See the Supreme Court in *Republic v Karisa Chengo & 2 others* [2017] eKLR). As such, this Court declines jurisdiction over Nairobi High Court Constitutional Petition No. M008 of 2021.”

26. From a reading of this ruling, the High court appreciated that this court being a court of equal status has jurisdiction to deal matters filed before it where such matters touched on issues that are within the jurisdiction of Employment and Labour Relations Court.
27. Article 162 (2) (a) of the *Constitution* establishes the *Employment and Labour Relations Court*. Pursuant to Article 162 (2) (a), Parliament passed the Employment and Labour Relations Court Act, which in addition to establishing the court, sets out the jurisdiction of the court as follows:

“ 12. Jurisdiction of the Court

(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 the provisions 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;”

28. Section 12 of the *Employment and Labour Relations Court Act* gives this court jurisdiction to hear and determine all disputes relating to employment. The Act gives examples of such disputes to include, a dispute between an employer and an employee.
29. From the above provisions of the law, it is clear that in an application of this nature, the court has to establish the following issues in making a determination on whether or not to grant the prayers sought:



- i. Whether an employment relationship exists between the party seeking reliefs before this court and the party against which the relief is sought.
 - ii. Whether the dispute between the parties before the court relates to employment as per Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Act.
30. Noting that jurisdiction is determined on the basis of pleadings, in the instant Petition, the Petitioner seeks the following orders;
- i. A declaration that implementation of the Crops (Tea Industry) Regulations, 2020 published by the 1st Respondent vide Legal Notice Number 97 of 2020 together with the “implementation Roadmap” and “Implementation Timelines” published by the 1st and 2nd Respondents on 3rd August, 2020 threaten the violation of fundamental rights and the requirement for fair labour practices on the part of the Petitioner and other employees of the Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited.
 - ii. A declaration that the implementation of the Crops (Tea Industry) Regulations, 2020 published by the 1st Respondent vide Legal Notice Number 97 of 2020 together with the “Implementation Roadmap” and “Implementation Timelines” published by the 1st and 2nd Respondent on 3rd August, 2020 offend the provisions of section 9, 40 and 45 of the Employment Act.
 - iii. A declaration that that Regulations 22(1), 22(3), 22(4) and 22(5) of the Crops (Tea Industry) Regulations, 2020 are contrary to Articles 10, 27, 41, 47 of the Constitution and therefore unconstitutional.
 - iv. An order compelling the 1st and 2nd Respondents to strictly comply with the requirements of effective stakeholder engagement and public participation in relation to the impact of the Crops (Tea Industry) Regulations, 2020 on the rights of employees of the Kenya Tea Development Agency Holdings Limited and KTDA Management Services Limited.
 - v. Any other or further orders and or directions as may be appropriate in the circumstances including to but not limited to such orders as the Court may be fashioned based on the reliefs sought in the Petition.
 - vi. Costs of this Petition on a full indemnity basis.
31. Prayers (i), (iii) and (iv) in the petition are employment issues which this court is clothed with jurisdiction to hear and determine. These specific prayers cannot be heard before the Constitutional Division of the High Court as they fall within the exclusive jurisdiction of this court.
32. This court however recognizes that the prayers in Nairobi High Court Constitutional Petition No. E243 of 2020 if successful, would obviate the orders sought in the petition herein as the petitioner therein seeks to quash the Crops (Tea Industry) Regulations, 2020 in entirety.
33. Consequently, the orders that recommend themselves in the present application would be to stay the suit herein pending determination of Nairobi High Court Constitutional Petition No. E243 of 2020 which I hereby grant. Should the said petition not be granted then the instant petition can proceed.
34. These orders would however not affect any interim reliefs that may have been granted herein for purposes of conservation of the status of any party.
35. Costs shall be in the cause.



DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE

