



REPUBLIC OF KENYA



Otochi v Kenya Tea Development Agency Holdings Limited & another (Petition E167 of 2023) [2023] KEELRC 3265 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3265 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E167 OF 2023
B ONGAYA, J
DECEMBER 7, 2023**

BETWEEN

ALBERT OTOCHI PETITIONER

AND

**KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED 1ST
RESPONDENT**

KENYA TEA PACKERS LIMITED (KETEPA) 2ND RESPONDENT

JUDGMENT

1. The petitioners filed the petition dated 29.08.2023 through the Teddy & Company Advocates. The petitioner prayed for:
 - a. A declaration that the respondents' actions contravene and are in violation of articles 25 (a), 28 (4) and 41 (1) of the *Constitution of Kenya* and hence null and void.
 - b. An order of compensation for breach of the petitioner's right.
 - c. An order that the respondent bears the costs of the petition herein.
 - d. Any other relief that this court shall deem just, fit and appropriate to grant in favour of the petitioner.
2. The petition is supported by the affidavit by Albert Otochi, the petitioner, sworn on August 29, 2023 and exhibits thereto filed together with the petition. The petitioner's case is as follows:
 - a. The petitioner was employed by the respondents in the capacity of the Managing Director – KETEPA vide the letter dated December 10, 2019.
 - b. That the terms of engagement were on fixed term contract of four (4) years that was to run from February 1, 2020 and was expected to lapse on the January 29, 2024.



- c. That the petitioner performed his duties diligently and to the respondents' satisfaction until June 25, 2021 when the respondents without any justifiable cause proceeded to send him on compulsory leave for a period of ninety (90) days from June 25, 2021.
 - d. That the respondent issued a circular on June 28, 2021 purporting to appoint a replacement of the petitioner in full knowledge that the petitioner was not under any investigations and had not committed any wrongdoing to warrant such an action.
 - e. That as soon as the ninety (90) days compulsory leave period lapsed, the respondent vide the letter dated September 16, 2021 proceeded to send the petitioner on yet another leave, which was termed as annual leave for a period of 18 days. This the petitioner termed as efforts by the respondents to keep him out of employment and out of office without just cause.
 - f. That further on the November 30, 2021, the respondents proceeded to send the petitioner on yet another unwarranted annual leave for a period of thirty (30) days.
 - g. The petitioner states that the respondents' action of sending him on numerous leave was purely cultivated and instigated with the sole intention of keeping him out of office to allow the respondents replace him in his position.
 - h. Further that on January 6, 2022, the respondents sent the petitioner on yet another leave on allegation that there was an ongoing forensic audit.
 - i. That the respondents attempted to illegally suspend and commence disciplinary action against the petitioner as communicated *vide* the respondents' letter dated 28.09.2022. As a result, the petitioner filed Nairobi ELRC No E697 of 2022, Albert Otochi v Wilson Muthaura & another, which matter was heard, concluded and the petitioner allowed to resume normal duties.
 - j. On December 22, 2022, the respondents sent the petitioner to yet another leave for a period of sixty (60) days. That the respondents without any justifiable cause proceeded to further withdraw from his usage the official car and disconnect both his internet and telephone connectivity which rights were guaranteed to the petitioner by virtue of his employment with the respondents.
 - k. The petitioner avers that the respondents' action amount to a breach of his rights as protected under the [Constitution of Kenya](#) and in particular articles 25 (a), 28 (4), 29 (d) and 41 (1) of the [Constitution of Kenya](#).
3. In response to the petition, the respondents filed the replying affidavit sworn by Mathews Odero, the 1st respondent's Group Company Secretary, on 27.09.2023 and filed through the firm of Patricks Law Associates. In the affidavit the respondents state that the instant petition is *res judicata* for the reason that the petition seeks similar orders as those sought in Nairobi ELRC Cause No. E697 of 2022 and can therefore not be entertained by this Honourable Court.
 4. The respondent argues that the instant petition is an employment claim that can be canvassed through the [Employment Act](#). Further that the same is an employment claim that has already been adjudicated upon in Nairobi ELRC Cause No. E697 of 2022 and hence will be in violation of the doctrine of constitutional avoidance for this Court to entertain the petition, the Court having rendered its judgement.
 5. Parties thereafter filed and exchanged their written submissions which this Court has duly considered together with the material on record and makes its findings as follows.



6. To answer the 1st issue the Court returns that the petition is barred by the doctrine of *res judicata* as urged for the respondents. The earlier Nairobi ELRC Cause No. E697 of 2022 was determined by the order given on February 16, 2023. One of the orders was that the disciplinary proceedings continued against the petitioner, therein the claimant, were terminated. The suit and all pending applications were marked settled by consent of the parties. The instant petition while referring to events in that previous suit as well refers to no transactions and events between the parties after that consent. To the extent that there are no events after that consent constituting a new cause of action, the Court returns that the petition is so barred. It is that after the enjoyment of the fruits of the consent order in that previous suit with the same cause of action as the instant petition, the petitioner seeks to unjustly enrich himself by filing the instant petition. In any event, nothing stopped the petitioner from alleging the violations of the Bill of Rights in that previous suit and as was allowed by the Court's Rules of Procedure.
7. To answer the 2nd issue, the court returns that by consent in the said earlier suit, the disputes between parties were conclusively resolved. The present petition is an abuse of court process and an attempt to unfairly circumvent the consent the parties reached in that previous suit. It cannot be that by that consent, the petitioner got reparation for all his injuries as was claimed and being the same alleged injuries herein, the petition is sustained.

In conclusion, judgment is hereby entered for the respondents for dismissal of the petition with orders that the petitioner pays the respondents' costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

