



**James Finlay Kenya Limited v Anganga & 1043 others; Hugh Campbell, QC (Interested Party) (Petition E133 of 2022) [2022] KEELRC 12963 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12963 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E133 OF 2022**

**J RIKA, J**

**OCTOBER 28, 2022**

**BETWEEN**

**JAMES FINLAY KENYA LIMITED ..... PETITIONER**

**AND**

**ALICE BOSIBORI ANGANGA & 1043 OTHERS ..... RESPONDENT**

**AND**

**HUGH CAMPBELL, QC ..... INTERESTED PARTY**

**RULING**

**Petition**

1. The petitioner filed this petition on July 26, 2022.
2. It is described in the petition as a company incorporated under the [Companies Act](#) of Scotland, with its registered office in Scotland.
3. It owns and operates tea estates in the Republic of Kenya, employing thousands of employees, who are Kenyan citizens.
4. The 1,044 respondents, are present or past unionisable employees of the petitioner. They have presented group proceedings against the petitioner in the Scottish Court of Session under reference No GPI /22, through a representative party.
5. The employees' claim before the Scottish Court, is that they suffered musculoskeletal injuries, arising from common conditions of employment in the estates owned and/or operated by the petitioner, in the Republic of Kenya.
6. The petitioner feels that the respondents ought to have submitted their grievance to the Kenyan jurisdiction, because they are Kenyans, who are domiciled in Kenya; their contracts of employment



were made in Kenya; alleged violations occurred in Kenya; those contracts and alleged work injuries are subject to the Kenyan labour law; and the parties have in place, through the relevant trade union and employer organization, recognition agreement and collective bargaining agreement, all executed in Kenya. The proper forum to ventilate and determine the issues in dispute, in the view of the petitioner, is the Kenyan jurisdiction. The petitioner holds that the dispute has the most real and substantial connection, with the Kenyan jurisdiction.

7. The petitioner seeks the following final orders: -
- a. Declaration that the respondents' action of instituting proceedings in the Scottish Court of Sessions in GP1/22, on alleged violation of their rights arising out of employment contracts executed between themselves and the petitioner is in violation of the Constitution of Kenya, and an affront to the sovereignty of Kenya.
  - b. Declaration that the respondents' action of instituting proceedings in the Scottish Court of sessions in GP1/22 is in violation of the petitioner's rights under article 50[1] of the Constitution of Kenya.
  - c. Declaration that the respondents' action of instituting proceedings in the Scottish Court of sessions in GP1/22 is in violation of the petitioner's right under article 27[1] of the Constitution of Kenya.
  - d. Declaration that the respondents' action of instituting proceedings in the Scottish Court of sessions in GP1/22 is in violation of the petitioner's rights under article 47 of the Constitution of Kenya.
  - e. Declaration that the Director of Occupational Health and Safety Services of the Republic of Kenya, has original and exclusive jurisdiction to deal with work injury claims arising within the Republic of Kenya, in line with article 159 of the Constitution of Kenya and section 16 of the Work Injury Benefits Act, 2007.
  - f. Declaration that any appeal from the decision of the Director of Occupational Health and Safety Services touching on proceedings involving work injury claims by an employee, or any other dispute involving employment, should be referred to the Employment and Labour Relations Court, which is the only court that has jurisdiction to entertain such matters, as provided for at section 87 of the Employment Act 2007.
  - g. A permanent anti-suit injunction do issue, against the respondents jointly and severally, prohibiting them, by themselves or through any of their agents and/or representatives from prosecuting or proceeding in any manner whatsoever, or further, with GP1/22 against the petitioner before the Scottish Court of Sessions, Scotland.
  - h. A permanent anti-suit injunction do issue against the respondents jointly and severally restraining them, by themselves or through their agents and/or representatives from initiating any, or further actions or proceedings, or filing any suit or claim against the petitioner herein in any court or tribunal, or forum, outside of the Republic of Kenya with regard to any work injury claims arising in Kenya.
  - i. Costs of the petition be provided for.

### **Interim Anti-Suit Injunction**

8. In an application dated July 26, 2022, filed under certificate of urgency, simultaneously with the petition, the petitioner sought an order of interim anti-suit injunction against the respondents,



directed at that their group proceedings reference No GP 1/22 at the Scottish Court of Sessions, Scotland.

9. The specific orders sought in the application are: -
- a. The application is certified urgent, service is dispensed with in the first instance, and the application heard ex parte.
  - b. The honourable court do issue an interim anti-suit injunction against the respondents jointly and severally prohibiting them, by themselves, jointly and severally, or through any agents and /or representatives from prosecuting or proceeding in any manner whatsoever with group proceedings reference No GP 1/22 filed against the petitioner before the Scottish Court of Sessions, Scotland, pending the hearing inter partes of this application.
  - c. The honourable court do issue interim anti-suit injunction against the respondents jointly and severally restraining them from initiating any other or further actions or proceedings or filing any suit or claim against the petitioner herein in any court/ tribunal or forum outside of the Republic of Kenya, with regard to any work injury claims arising in Kenya, pending the inter partes hearing of this application.
  - d. The honourable court do grant the applicant/ petitioner leave to serve the respondents with the interim anti-suit injunction order issued by the court by way of substituted service by advertisement in one [1] of the daily newspapers with national circulation, within the Republic of Kenya.
  - e. That due to the number of the respondents involved, the respondents be directed to provide their e-mail address to the petitioner by sending it to the e-mail of the petitioner's advocates, being [informairobi@oburambeche.co](mailto:informairobi@oburambeche.co) so that the petitioner can in turn serve them with the summons, the petition and the application filed in the court.
  - f. That the honourable court further directs that the interim anti-suit injunction order issued, summons, the petition and the application be posted on the general employees' notice boards within the petitioner's premises.
  - g. That upon hearing inter partes, the honourable court do issue an interlocutory anti-suit injunction against the respondents jointly and severally, prohibiting them by themselves or through any agents and/or representatives from prosecuting or proceeding any further with group proceedings reference No GP1/22, filed against the petitioner before the Scottish Court of Sessions, Scotland, pending hearing and determination of the petition.
  - h. That upon the inter partes hearing of this application, the honourable court do issue an interlocutory ant-suit injunction against the respondents jointly and severally restraining them from initiating any other or further actions or proceedings, or filing any suit or claim against the petitioner herein in any court/ tribunal or forum outside of the Republic of Kenya, with regard to any work injury claims arising in Kenya, pending hearing and determination of the petition.
  - i. Costs of this application be provided for.
  - j. The court be pleased to grant any further orders it deems fit in the interest of justice.
10. The application was placed before the duty judge Hon Justice [Dr] Jacob Gakeri, on July 28, 2022, who ordered that: -



- a. The application is certified urgent.
  - b. The application be served upon the respondents and be responded to, within 14 days.
  - c. The application is allowed in terms of prayers [a] [b] [c] [d] [e] and [f]
  - d. The application be placed before the duty judge on August 25, 2022 for further directions on disposal
11. Interim anti-suit injunction orders, therefore issued as prayed in the application, and specified at paragraph 9 of this ruling.

### **Interlocutory Orders.**

12. On August 25, 2022, the file was placed before the undersigned judge as directed on July 28, 2022.
13. There was no response filed by the respondents within 14 days as ordered, or at all, and the interim anti-suit injunction orders, granted on July 28, 2022, were confirmed. The application was uncontested, and interim orders were confirmed, becoming interlocutory orders, to stay in force, pending hearing and determination of the petition.
14. The court further ordered that the respondents, file their response to the petition within 14 days, with the petition reserved for further mention on September 12, 2022, when directions would issue on the mode of hearing and disposal.
15. The respondents and the interested party do not appear to have filed their response to the petition, by the time the petition was mentioned on September 12, 2022. They opted to file a notice of preliminary objection dated September 10, 2022.

### **Notice of Preliminary Objection.**

16. There are 7 grounds listed in the notice of preliminary objection. The grounds appear repeated. These are: -
  - i. The jurisdiction of this court [ELRC] is grounded on the provisions of section 12 of the [Employment and Labour Relations Court Act](#) and article 162 [2] [a] of the [Constitution](#), which jurisdiction is determined to entertain labour disputes as provided for, but the issues raised by the petitioner in its petition are constitutional violations of the petitioner's rights as enshrined in the bill of rights which violations cannot be entertained by this court for though this court has the status of the High Court, article 165[ 3] [b & d] of the [Constitution](#) vests only the High Court with the jurisdiction to entertain violations in the bill of rights.
  - ii. The averments set out in the petition raise serious constitutional issues which are not a dispute between employer and employee as envisaged by section 12 of the [Employment and Labour Relations Court Act](#), for the petitioner's averments clearly contend that breach of its fundamental rights and freedoms do not fall within the confines of section 12 of the Act.
  - iii. That, jurisdiction of this court is confined to matters falling within article 41 of the [Constitution](#) as read with section 12 of the [Employment and Labour Relations Court Act](#) and the petition as drafted and the constitutional questions and issues raised do not relate to employment and labour relations.



- iv. That, the petitioner in its petition seeks an interpretation of the sovereignty of the republic and constitutionalism of the republic's statutes which interpretation is vested in the High Court, not this honourable court.
  - v. That, this court in its ruling of August 25, 2022 has accepted that the petitioner's petition seeks to enforce the supremacy of the Constitution and sovereignty of the Republic which questions fall under the mandate of the High Court as defined by article 165 [3] of the Constitution.
  - vi. That without jurisdiction, this court cannot act.
  - vii. That jurisdiction of this court is determined by statute.
17. Parties were directed by the court on September 12, 2022 to file and exchange submissions on the preliminary objection. The respondents confirmed filing and service of their submissions upon mention on September 20, 2022. The petitioner undertook to file and serve its submissions on or before September 26, 2022. The parties' advocates agreed to highlight the submissions, on September 28, 2022.

### Submissions.

18. The advocate for the respondents and the interested party, Dr John Khaminwa adopted his written submissions and a list of 14 authorities, in urging this court to decline jurisdiction and defer to the jurisdiction of the High Court of Kenya. He underscored that matters touching on the supremacy of the Constitution and sovereignty of the Republic, are in the jurisdiction of the High Court. The ELRC is confined to matters under article 41 of the Constitution and section 12 of its constitutive Act [ELRC Court Act]. Jurisdiction is determined on the basis of pleadings. The petitioner pleads the issue of sovereignty. The petition is no longer about human rights.
19. The respondents and the interested party in supporting their preliminary objection, invoke the Constitution of Kenya; the ELRC Act; Labour Relations Act; Work Injury Benefits Act; ELRC [Procedure] Rules 2016; and a number of judicial authorities among the leading ones, Owners of the Motor Vessel "Lillian S" v Caltex Oil [Kenya] Limited [1989] e-KLR and Republic v Karisa Chengo & 2 others [2017] e-KLR.
20. Mr Geoffrey Obura, advocate for the respondent, adopted his written submissions and a list of 12 authorities in urging the court to decline the preliminary objection. He submits that the ELRC has jurisdiction, so long as violations are connected with employment and labour relations. The approach adopted by the respondents and the interested party, in their preliminary objection is narrow. Sovereignty is bestowed on the people of Kenya by the Constitution. It is delegated to certain Institutions, including the judiciary. The ELRC is a component of the judiciary, with the authority to protect the Constitution. The respondent is merely delaying disposal of the petition through the preliminary objection.
21. The authorities cited by the petitioner in urging the court to dismiss the preliminary objection, include James Finlay Limited v Elly Okong'o & 6 others, petition No 30 of 2019 [where the court held that enforcement of orders issued by the Scottish Court in Kenya, impacted the right to fair hearing and the sovereign and territorial integrity of Kenya. This ruling was upheld on appeal at the Court of Appeal of Kenya]; United States International University [USIU] v The Attorney-General & others [2012] e-KLR; and Prof Daniel N. Mugendi v Kenyatta University & others [2012] e-KLR.
22. The issue raised in the preliminary objection is whether the ELRC has jurisdiction to hear and determine the petition.



## The Court Finds: -

23. Superior Courts in Kenya have consistently reaffirmed that the ELRC, has jurisdiction to enforce and interpret the Constitution, on matters relating to employment and labour relations.
24. Jurisdiction is granted by article 162[2] of the Constitution.
25. There is no truth at all, in the submissions of the respondents and the interested party, that the jurisdiction of this court is limited to article 41 of the Constitution, while the statutory jurisdiction is confined to disputes prescribed under section 12 of the ELRC Act. There are many other articles in the Constitution, which relate to employment and labour relations. The petitioner has invoked articles 1, 2, 27, 27, 47, 50 among others, all relating to this employment and labour relations dispute, and within the jurisdiction of the ELRC. The ELRC has a jurisdiction to enforce and interpret all articles in the Constitution, so long as the subject matter is related to employment and labour relations.
26. It is the duty of all courts under article 20[3] to apply provisions of the bill of rights. Article 22 grants all persons the right to institute court proceedings, claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened. The contemplated court proceedings, are not limited to the High Court of Kenya. It is a misperception of the Constitution, to submit that the ELRC is restricted to article 41 of the Constitution and section 12 of the ELRC Act.
27. Judicial authorities that have affirmed the constitutional jurisdiction of the ELRC include United States International University [USIU] v The Attorney-General [2012] e-KLR; Prof Daniel Mugendi v Kenyatta & others [2012] e-KLR; Okoiti v Attorney-General; Njenga [interested party] [ 2022] KEELRC 2 [KLR]; and the Supreme Court of Kenya decision, Law Society of Kenya v Attorney-General [2019] e-KLR. The court adopts these judicial authorities in addressing the preliminary objection.
28. The petition herein is between an employer and an employee. The ELRC clearly has personal jurisdiction over the parties. Secondly, the subject matter is a dispute over work injuries, which the petitioner submits, has been filed at the wrong territorial jurisdiction, resulting in certain constitutional, employment and labour relations violations against the petitioner. The ELRC clearly has subject matter jurisdiction.
29. The last aspect of the preliminary objection concerns the jurisdiction of the ELRC on the subject of sovereignty. This is an issue which was litigated, in a matter concerning James Finlay and its employees, and dealt with authoritatively, by the court [Radido J] in ELRC petition No 30 of 2019, James Finlay v Elly Okong'o & 6 others. The ruling of the ELRC dealt with the issues of sovereignty and territoriality, and was challenged on appeal, at the Court of Appeal in Elly Okong'o Ingang'a & 6 others v James Finlay [Kenya] Limited [2021] e-KLR. The ruling was affirmed, with the Court of Appeal posing the question: “ 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? ” In dispute was an order of locus inspection issued by a Scottish Court, which was sought to be executed in Kenya, without intervention by Kenyan authorities. The Court of Appeal did not find the ELRC to lack jurisdiction, in dealing with the subject of sovereignty and territoriality, relating to employment and labour relations.
30. Employment and labour relations frequently transcend national boundaries. Disputes relating to sovereignty and territoriality, within the field of employment and labour relations, are likely to arise, and whenever they do, they are to be dealt with, in the employment and labour relations jurisdiction.



31. Article 1 of *Constitution* confers all sovereign power to the people of Kenya. State organs enjoy delegated sovereign power. The judiciary is among the state organs which enjoy delegated sovereign power of the people. The court agrees that the ELRC is a component of the judiciary, and has the jurisdiction to promote and protect the *Constitution*.
32. The High Court is established under article 165 [1] of the *Constitution*. The ELRC, and the Environment and Land Court [ELC], are founded pursuant to articles 162 [2] [a], and 162[2][b] respectively. Each court has its own subject- matter jurisdiction. A dispute relating to sovereignty in the context of employment and labour relations, is properly exercised by the ELRC. If the dispute is about sovereignty, in the context of ownership, occupation or use of the James Finlay estates, it would properly be litigated at the ELC. A question may arise whether James Finlay remits taxes in Kenya or Scotland, which would implicate issues of sovereignty, and involve the constitutional division of the High Court. Questions of sovereignty and territoriality, can be manifested in any of the courts' areas of specialization. It is wrong to view the subject, as falling indivisibly, within the ambit of the High Court.
33. Lastly, the court must express concern that, the respondents, when directed to file their response to the petitioner's interlocutory application and response to the petition, neglected to do so within the prescribed time, for whatever reason. Why file a notice of preliminary objection, without the other pleadings?

It is ordered: -

- a. The preliminary objection is declined with no order on the costs.
- b. Directions scheduled to be given on September 12, 2022, are given as follows: -
  - i. The petition shall be disposed of through written submissions.
  - ii. The petitioner to file and serve its submissions within 14 days.
  - iii. The respondents and the interested party, to file and serve their submissions within 14 days of service.
  - iv. Mention on December 2, 2022, when a date for the judgment shall be reserved.

**DATED, SIGNED, AND DELIVERED ELECTRONICALLY AT NAIROBI, THIS 28<sup>TH</sup> DAY OF OCTOBER 2022.**

**James Rika**

**Judge**

