



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

ELRC PETITION NO. 2 OF 2021

IN THE MATTER OF CONTRAVENTION OF ARTICLES 1(1), 2(4), 3(1), 10(1,2),19(3),20(1,2,3,4),22(1, 2b),23 (3), 24(1), 27(1,2) & (3), 41(1), 43(a, b,c,d,e,f),47(1,2), 50(1), 54(1e,2), 73(1a), 1b) 159(1) & 258(1) OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF SECTION 13, 18(1) (b) OF EMPLOYMENT ACT, 2007.

BETWEEN

LAMECK MIGIRO.....1ST PETITIONER

JEFF MESOCHO.....2ND PETITIONER

BENUEL BOSIRE.....3RD PETITIONER

HENRY KOECH.....4TH PETITIONER

CYRUS VOGG.....5TH PETITIONER

MUTEMBEI ROYFORD.....6TH PETITIONER

KENNETH MWANGI MUHIA.....7TH PETITIONER

MUGO D.K.....8TH PETITIONER

LUCY MWENDA.....9TH PETITIONER

THOMAS NYAGETARI.....10TH PETITIONER

JOSEPH KIPSANG.....11TH PETITIONER

KENNEDY BIEGON.....12TH PETITIONER

PHILIP A. MURAGE KINYUA.....13TH PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

1. This Ruling is in respect of the petitioners Application dated 28th January, 2021 filed through the firm of Ochieng Teddy Advocates seeking for the following orders;

1) That the application be certified urgent, fit and proper to be heard exparte and service thereof be dispensed with in the first instance.

2) That, pending hearing and determination of this Application, a conservatory Order be and is hereby issued suspending the implementation and or further implementation of Sections 34(4), 34(5),34(6) & 34(7) of the Tea Act 2020.

3) That pending the hearing the determination of the Petition herein, a conservatory Order be and is hereby issued suspending the implementation and or further implementation of Sections 34(4), 34(5),34(6) & 34(7) of the Tea Act, 2020.

4) That, the Cost of this Application be borne by the Respondent.

2. The Application is supported by the grounds set out therein and in the Supporting Affidavit of the 7th petitioner, **Kenneth Mwangi Muhia**, sworn on 28th January, 2021.

3. The Petitioners aver that, the Tea Act 2020, which was assented to on 23rd December, 2020 was published and commenced operation on 11th January, 2021. Upon implementation, some of the offending provisions of the impugned Tea Act, 2020 shall have the following adverse consequential effect;

a) For the key employees, the term of payment of their employment will be changed which change will effectively deny them remuneration for the services they render to the Tea Factories.

b) For the Company Secretarial post and all employees under the Corporate Affairs of the Managing Agent of the Small Holder Tea Factories, their offices shall be abolished by operation of law, rendering them redundant.

c) For all other staff under the KTDA Management Services, they shall be subjected to job losses and unemployment due to the unsustainability of their employer as the resources to pay the said employees have been taken away by reduction of the Management fee.

d) The Tea Act, 2020 shall change the terms of the employment contract between the Petitioners and the employers without involving them as parties to the contract effectively breaching their constitutionally granted right of fair hearing and fair administrative action.

e) The implementation of the Tea Act, 2020 shall lead to unwarranted and unnecessary massive loss of employment during such difficult times in the Covid-19 era at no fault on the Petitioners or their employers.

4. That, the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives has proceeded to issue a letter dated 14th January, 2021 but served upon the Petitioner's employers on 23rd January, 2021, stipulating thus inter alia that;

“In order to facilitate proper transition to the Tea Act, 2020, it is essential that the status quo i.e the state of affairs obtaining on the date the Act came into force, shall be maintained. This therefore means that no tea Company Factory nor KTDA and its affiliate companies shall act in any way that affiliates or defeats the objectives of the Tea Act, 2020.

5. Accordingly, the petitioner avers that, the purpose of the said letter was to specifically underscore that; cooperate malfeasance is explicitly covered in the Companies Act, and that Regulatory action will be taken against anyone that acts to subvert the enforcement of the Tea Act, 2020.

6. That, by virtue of the aforesaid letter, the Petitioners herein are set to lose their employment without being accorded fair hearing without no fault of their own.

7. It is stated that, such consequences arising from the implementation of the Tea Act, 2020 has violated and threatened to violate the Petitioner's rights as guaranteed under the Constitution of Kenya, 2010 and the provisions of the Employment Act, 2007.

8. The petitioner particularized the said breach and violation of the constitutional rights as follows;

i. That whereas Article 27(3) has guaranteed the rights of the Petitioners to equal treatment including the right to equal opportunity in political, economic, cultural and social spheres, Sections 34(4), (5), (6) and (7) of the Tea Act, 2020 have denied the Petitioners herein the said right by:

a) Denying them the opportunity of being retained in the employment of a Managing Agent.

b) Denying them the opportunity of receiving emoluments and salaries from persons they are rendering services to.

c) Denying them the opportunity of receiving proper and reasonable working conditions from their employer by reducing the income the employer is getting in the services it offers.

ii. Whereas Article 27(4) of the Constitution of Kenya has guaranteed the right of the Petitioners not to be discriminated upon directly or indirectly on any ground including, race, sex pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; Sections 34(4), (5), (6) and (7) of the Tea Act, 2020 have violated the Petitioner's right by discriminated upon the Petitioners and other employees from employment, by virtue of them being associated with the Management Agent, KTDA MS.

iii. Whereas Article 41(1) of the Constitution of Kenya has guaranteed the right to fair labour practices which include the right to be given a fair hearing before any adverse action is taken against any employee, Sections 34(5) and (6) of the Tea Act, 2020 have breached the Petitioners and other employee's rights by:

a) Abolishing their offices without the Petitioners being granted an opportunity to be heard.

b) Changed the Petitioners terms of employment by denying them remuneration for services rendered, without them being granted an opportunity to be heard.

iv. Whereas Article 41(2) (a) of the Constitution of Kenya has guaranteed the Petitioner's right to receive fair remuneration, Section 34(4) and (5) of the Tea Act, 2020 has breached the Petitioners herein above right by denying the Petitioners the right to receive fair remuneration by taking away their remuneration being paid by the Tea Factory.

v. Whereas Article 43(1) of the Constitution of Kenya has guaranteed the Petitioners economic and social rights including the highest standard of health, accountable and adequate housing, freedom from hunger, social security and education, Sections 34(4), (5), (6) and (7) of the Tea Act, 2020 have violated the Petitioners' rights hereinabove by denying them their source of livelihood & income hence, limiting their right to have access to the said social and economic rights hereinabove.

vi. Whereas Article 47(1) of the Constitution of Kenya guarantees the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, Section 34 (4) of the Tea Act has violated the petitioner's rights by not granting them reasonable explanation for the reduction of the rate of management fee which will have the effect of denying them; Substantive Remuneration without explanation, Change the terms of agreement without an explanation and abolish the positions in the management contracts without any reasonable explanation.

vii. Whereas Article 50 (1) of the Constitution of Kenya guarantees the right to fair hearing, Section 34 (4) (5) of the Tea Act, 2020 violates the petitioner's rights herein stated by denying them an opportunity to be heard on the changes made in their employment contracts.

viii. Whereas Article 54 (1) (e) of the Constitution of Kenya guarantees the right to disabled persons to access materials and devices to overcome constraints arising from the person's disability, Section 34 (4) (5) of the Tea Act, 2020 has denied some of the petitioners their source of livelihood which they used to access material to overcome their disability constraints hence in violation of their rights.

ix. Article 54 (2) of the Constitution of Kenya guarantees that five percent of the members of the public in elective and appointive bodies are persons with disabilities, Section 34 (4) (5) of the Tea Act, 2020 violates the petitioner's rights hereinabove by denying them employment in the various appointive bodies which will not meet the threshold as set in the Constitution of Kenya.

x. Whereas Article 24 (1) (e) of the Constitution of Kenya directs that a fundamental freedom shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, Section 34 (4) (5) (6) and (7) of the Tea Act, 2020 has limited the rights of the petitioner as enshrined under Articles 27 (1), (3), 41(1) (2), 43(1), 47(1), 50 (1), 54 (1) (e) and 54 (2) by:

a) Unlawfully bringing in new provisions to a statute without subjecting the provisions to public participation.

b) Unlawfully bringing provisions that are unreasonable and contrary to the purpose of the Tea Act, 2020.

c) Failing to specifically express the intention to limit the rights herein and the nature and extend of that limitation.

9. It is averred that the implementation of the impugned provisions of the Tea Act, 2020 has the effect of violating various provisions of the Constitution and throwing into disarray the principle of supremacy of the Constitution as enshrined under Article 2 of the Constitution of Kenya, 2010.

10. It was stated that unless the implementation of the impugned sections of the Tea Act 2020 are stopped by an order of this Honourable Court, the State through the provisions of the Tea Act, 2020 shall continue unabatedly to trample on the Petitioner's right as guaranteed under the Constitution of Kenya, rendering the Petition an academic discourse, overtaken by events and moot.

11. The Respondent opposed the said application and filed a Replying Affidavit sworn by Honourable **Peter Gatirau Munya**, the cabinet secretary of the ministry of Agriculture, livestock, fisheries and cooperatives, on 15th March, 2021.

12. The Respondent states that legislations passed by parliament are presumed to be Constitutional and that the burden of proving that the Tea Act Is Unconstitutional lies on the petitioners.

13. He stated that the test of whether the Tea Act is Constitutional or not cannot be tested and determined in an interim application and hence conservatory orders sought by the applicant merely on allegations that Sections 34(4), 34(5), 34(6) and 34(7) of the Tea Act are Unconstitutional are not sufficient to proof Unconstitutionality.

14. The respondent took issue with part A of this applications, where the petitioners allegations that the terms of payment of key employees will be changed, some will be redundant, subjected to Job losses are mere speculations that have not been established and no evidence attached to the application to proof them.

15. It was stated that, if operationalization of Sections 34(4), 34(5), 34(6) and 34(7) of the Tea Act would render some employees redundant, then redundancy is a process recognized by Section 40 of the Employment Act and that the same is lawful.
16. The respondent contends that the petitioners are presumptuous and merely apprehensive of averments in part A of the application and that there is no evidence at all that any employee had been dismissed without following due process due to operationalization of the Tea Act to warrant issuance of conservatory orders sought herein.
17. He averred that Sections 34(4), 34(5), 34(6) and 34(7) of the Tea Act does not in any way provide that employment terms should be changed without involvement of the employees or due regard to procedure and that the application is based on unsubstantiated fears. Further that the petitioners have not demonstrated any strong cogent reasons for this Honourable court to grant conservatory orders.
18. It is contended that, it is in the public interest that the Tea Act, 2020 is implemented and more so Sections 34(4), 34(5), 34(6) and 34(7) thereof because the objects of this sections is to make sure that the tea farmers get maximum profits. Over the years the tea farmer shouldered the cost burden of production and sale of tea while benefits are taken by middle men and brokers.
19. That, the provisions of Section 34 arose from outcry by tea farmers regarding the unconscionable nature of agreements signed by their factories and KTDA MS, management agent. the agreements are restrictive and lopsided in favour of the management agent at the expense of the tea factory by extension the tea farmer.
20. He stated that, the management agreements entered with KTDA MS, management agent, are standard form contracts prepared by the Management Agent. The tea factories have no independent legal counsel to advise and to ensure that their interests are protected. There is also no room for the tea factories to evaluate the performance of the management agent or to renegotiate the agreements, since they are self-renewing.
21. Further that, the provisions of Section 34(6) of the Tea Act, 2020, were formulated to shield small scale tea factories from a group company secretary that doubles up as the director for elections for all smallholder tea factories and the legal advisor to all subsidiary companies under KTDA Holdings Ltd. There is a clear conflict of interest and in addressing it, the Tea Industry Task Force Report of 2016 recommended that each Tea Factory should retain its own company secretary.
22. It is stated that, Section 34(6) of the Tea Act, 2020, does not introduce another prequalification for company secretaries but simply requires management agents' and tea factory which are limited companies to have separate governance structure by appointing independent company secretaries contrary to the petitioner allegations.
23. The respondent contends that; public interest overrides the interest of the Petitioners who have brought this petition on behalf of a few employees whose employment has not even been demonstrated to have been threatened or infringed.
24. Further that, contrary to the applicants' assertions that the respondent did not carry out sufficient public participation, the respondent states that there was sufficient public participation before enactment of the Act which was carried out as follows:
- a) The Tea Act No. 23 of 2020 came to parliament as private members bill and was tabled before the senate and committed for consideration and public participation to the senate standing committee for Agriculture Livestock and Fisheries. The senate standing committee for Agriculture Livestock and Fisheries invited members of the public for a public hearing on 28 February, 2019 held at KICC grounds to submit views on the bill. The senate also invited public to written memoranda which were considered on 12th June, 2019 when the bill was passed with amendments;
 - b) The bill was then referred to the National Assembly where it underwent the first reading on 26th June, 2019. It was then committed to the Departmental Committee on Agriculture and Livestock for consideration and submit a report to the house.
 - c) The department committee on Agriculture published a notice inviting members of the public to submit memoranda on the Tea Bill to the clerk of the National Assembly on or before 3rd September, 2019 and annexed a copy of the notice as annexure HPM-1.
 - d) Responding to this call, members of the public, tea value chain players and the ministry of Agriculture Livestock and Fisheries and Cooperatives submitted their views. The Ministry reviewed the Tea Bill and submitted a memorandum of a proposed amendments to the clerk of National Assembly and attached the memorandum marked as HPM-2:
 - e) The report by the Departmental Committee on Agriculture Livestock and Fisheries indicates the committee received memoranda from Kenya Tea Development Agency on its own behalf and on behalf of tea factory companies dated 18th, 22nd and 30th September, 2020; from Ministry of Agriculture Livestock and Fisheries and Cooperatives on 16th September, 2020; from the governor of the County Government of Kericho and Kenya Growers Association submitted their comments.
 - f) The committee also conducted a public hearing at Kericho, Konoin Constituency where it received views from farmers and farmers' association as evidence in the report marked as annexure HPM-3,
 - g) In addition to the amendments proposed by persons in (e) and (f) above the following members also proposed amendments: Hon. Eve Obara; Hon. Ronald Tonui, M.P; Hon Ezekiel Machogu, M.P; Hon. Cecily Mbarire, MGH, MP; Hon Gichimu Githinji, M.P; Hon. Brighton Yegon, M.P; Hon Ben Moranyi, M.P and Hon. Millie Odhiambo, M.P.
 - h) The departmental committee reviewed all the proposed amendments from all stakeholders and made amendments to the bill in an

addendum and its report submitted on 26th November, 2020 where Members of Parliament proposed further amendments'. The amendments were incorporated and then adopted and passed by the committee and the whole house on 3rd December, 2020.

i) The bill was referred back to The Senate which accepted the amendments by the National Assembly and without further changes passed the Tea Bill on 21st December, 2020 and finally the Presidents assented to it on 23rd December, 2020.

25. The respondent therefore stated that, it is clear that the whole process of the law making, complied with the Constitution and it is improper for one to deliberately mislead the Court that there was no public participation. Further that the petitioner allegation that no public participation was carried out is without merit and the same ought to be disregarded. The respondent contends that, in any case under Article 118 of the constitution, all views of the petitioners herein and or applicants need not be factored in.

26. The Respondent thus stated that the petitioners/ Applicants have failed to demonstrate how section 34(4)(5)(6) and (7) of the Tea Act contravenes Article 24(1), 27(3), 27(4), 41(1), 41(2), 43(1), 47(1), 50(1),54(1), 53(2) of the constitution of Kenya and thus urged this court to dismiss the Petitioners' Application together with the entire petition with costs to the respondent.

27. On 9th February, 2021 the Court directed parties to file submission to dispose of the application, which the petitioner filed on 15th March 2021 and the Respondent on 21st April, 2021.

Petitioners Submissions

28. The petitioner through their Advocates submitted that, this Honourable Court has jurisdiction to hear and determine this case as provided for under Article 23(3) of the Constitution of Kenya. He buttress that argument by citing the case of **simeon Kioko Kitheka & 18 other versus- County Government of Machakos & 2 others [2018] eklr** where the court held that; -

“Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court... It is accordingly clear that the mere fact that the legislative assembly enacts an Act that is not the end of the matter. I am satisfied that I can grant the orders sought in the petition, where appropriate, or appropriate orders in accordance with Article 23(3). It is therefore my view and I hold that this Court cannot where there is an allegation of violation of the Constitution down its tools without investigating the same.”

29. The petitioners further submitted that the Employment and Labour relations Court being a Court with same status as the High Court have equally been clothed with the requisite jurisdiction to hear constitutional matter arising out of an employer-employee relationship. In this they relied on the case of **Okiya Omtata Okioti –versus Cabinet secretary, for information communication and technology & 2 others 2019] eklr** where the court proceeded to render itself that;

“Under Article 162(2)(a) of the Constitution, parliament is empowered to establish a court with the same status as the High Court to hear and determine disputes relating to employment and labour relations. Consequently, this Court was established under the Employment and Labour Relations Court Act. Section 12 (1) (a) of the Act, grants this Court exclusive original and appellate jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and an employee. Under Articles 22(2)(c) and 258(2)(c) court proceedings may be instituted by a person acting in the public interest where a person's right or fundamental freedom in the Bill of Rights has been violated or denied or where the Constitution has been contravened or threatened with contravention.”

30. It was submitted that, the petitioners are challenging the constitutionality of section 34(4), (5),(6) and(7) of the Tea Act as the same seeks to terminate some of the petitioners employment, make changes to their employment contracts and interfere with their remuneration among others. Further that, the petitioners have presented evidence that they are retained by the managing agent and some of them have been seconded to the tea factories which in effect means their salaries will be paid by the small scale tea factories which in essence will change their terms of remuneration.

31. On the issue of violation of the petitioners constitutional right, it was submitted that, the petitioner have clearly illustrated in their Petition how the impugned provisions of the Tea Act has violated and or intend to violate their rights, which all fall under the purview of Article 22 of the Constitution.

32. On the issue of whether the petitioner have established a case to warrant issuance of the interim conservatory orders sought, it was submitted that, the court is required to look for the conditions precedent for the grant of the interim conservatory Order and desist from making determinative conclusion of both fact and law as was held in the case of **David Ndi & others –versus Attorney General & other [2021] eklr**.

33. The conditions precedent from the grant of conservatory order were illustrated in the case of **Gatirau Peter Munya –versus- Dickson Mwenda Kithinji & 2 others [2014] eklr** where the court proceeded to state;

“Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest,

the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

34. It was further submitted that, the applicants at an interim stage, in seeking conservatory orders need to satisfy the court that ,it has a prima facie case with a likelihood of success, that if the conservatory order is not granted the petition alleging violations will be rendered nugatory and that the matter is of public interest. To buttress this, they cited the case of **Wilson Kaberia Nkunja –versus- The Magistrates and Judges vetting Board and others [2016] eKLR**.

35. The petitioner argues that it has a prima facie case in that, they have arguable constitutional issue that needs the attention of this Court. The said issues have been listed as follows;

- i. Does the abolishment of employees’ offices, through statute, without granting the said employees an opportunity to be heard, breach and or violate the right to fair labour practices as provided under Article 41(1) of the Constitution?
- ii. Does the statutory termination the Petitioners’ employment due to their association with the Managing Agent, amount to discrimination contrary to Article 27(4) of the Constitution of Kenya?
- iii. Does the statutory change of the Petitioners employment without granting them an opportunity to be heard amount to breach of fair hearing as provided for under Article 50(1) of the Constitution of Kenya and breach of fair administrative action contrary to Article 47 of the Constitution of Kenya?
- iv. Whether the limitation of the petitioners rights as stipulated under Article 27(1)(3), 41(1-2), 43(1),, 47(1), 50(1), 54(1)€ and 54(2) by virtue of the provision of sections 34(4-7) of the Tea Act 2020, stands the test of limitation as provided under Article 24 of the constitution of Kenya.

36. On whether the said issues raised by the petitioners have a likelihood of success. It was submitted that the petitioners have presented evidence, that by virtue of the impugned sections of the Tea Act, their employment relationships will ultimately be changed without the respondent granting them an opportunity to be heard as required in law.

37. On the second limb of whether there was real danger that the petitioner will suffer as a result of the violation of the constitution, it was submitted that from the Tea Act, it was clear that anyone who breached the provision of the statute would indeed face regulatory action. In that regard, the retention of Company Secretaries as retained by the Small-Scale Tea Factories in line with the management agreement entered into between the Small-Scale Tea Factories and the KTDA Management Services became illegal. The said company secretaries are to immediately resign and relinquish their position without any of their input, fair hearing as stipulated in the Employment Act and the Constitution, the Petitioners would thus have been denied an opportunity to work.

38. It is submitted that, the relinquishing of their position would mean that the Petitioners have effectively had their employment terminated and their salaries stopped. This is indeed an imminent danger to the Petitioners. Further that, if they failed to comply with the said provisions by remaining in employ of the Tea Factories as seconded staff and receiving therefrom salaries, they would be in breach of the provisions of the Tea Act, 2020, hence liable to the general penalty under Section 71 of the Tea Act, 2020.

39. On the third limb, the petitioners urged this court to allow the conservatory order in that failing to allow the same will render their Petition nugatory as their basic issue such as fair hearing will not be addressed and cited the case of **The center for Human rights and democracy 7 other –versus the judges and vetting board & others Eldoret petition No. 11 of 2012**.

40. On whether the matter at hand is one of public interest, the Petitioners submitted that any issue where there is breach of law especially the Constitution is of public interest and relied on the case of **law society of Kenya –versus- Attorney general & another [2020] eKLR** where the court held that;

“There can be no greater public interest than upholding the Constitution and the law. There are several laws which enable the 2nd Respondent to fully, firmly and independently discharge its constitutional and statutory duties. In other words, even without the impugned directives still the 2nd Respondent is sufficiently endowed with legal authority and power to fully discharge its constitutional and statutory mandate.”

41. The petitioner concluded and submitted that they have satisfied this Honourable Court on all the facets required for issuance of conservatory orders and urged the Court to allow the application as prayed with costs.

Respondent’s Submissions

42. The Respondent submitted from the onset that there is a presumption that legislations are constitutional as such the Tea Act 2020 is constitutional and lawful. they relied in the case of **susan Wambui Kaguru & others –verus Attorney General and Another [2012] eKLR** which Justice Majanja expressed himself as follows;

“I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with our delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious and weighty arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so.”

43. On whether the petitioners have established a prima facie case, the Respondent submitted that, the grounds relied upon by the petitioners in demonstrating how the impugned sections of the Tea Act 2020 violated their constitutional right have not been substantiated. Furthermore, it was argued that even if the said sections of the Tea Act were substantiated the same does not ipso facto prove that the said sections of the Tea Act are unconstitutional but only that, the employer in this instance KTDA did not adhere to the employment Act and the Fair Administrative Action Act.

44. The respondent submitted that, the Tea Act, does not expressly require the KTDA, the management Agent to dismiss the employee without regard to Articles 47 and 50 of the Constitution, further that if employment contract of any employee is affected by the operationalization of the Tea Act then there are legislations which govern the process of resolving such issue when they arise as none has arisen at this juncture and the petitioner application and petition is premature.

45. According to the respondent, there is no nexus between the orders sought and the allegations set out therein as such the petitioners have failed to establish any prima facie case. They cited the case of **Francis Nduthu Karanja –versus- Attorney General [2008] eklr.**

46. The respondent submitted that there is no imminent loss to be suffered by the petitioners if the Orders sought are not granted. It is alleged that the application is based on apprehensions, assumptions and speculations that the operationalization of the Tea Act will result in massive loss of employment, changes in terms of employment without according employees hearing when the Act has not in any way suggested and or expressed the said loss of employment without following the set out procedures.

47. It is therefore submitted that the petitioners have not established how section 34 of the Tea Act will result into massive loss of employment of the 800 employees in KTDA or at all as alleged. In addition the respondent argues that there is no evidence on record of any notices or communication of any intention to dismiss the said employees and that the petitioner must lay some evidential basis for their fears or imminent danger as was held in the case of **Okiya Omtata Okoiti –versus Attorney General & 5 others [2020] eklr** where the court while relying on the Court of Appeal case of Alfred N. mutua –versus Ethics and anti-corruption commission & 4 others [2016] eklr held that;

“We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the Constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.”

48. Therefore, the respondent, submitted that, it is upon the petitioners to demonstrate the probability of the said danger as opposed to possibility of the said danger occurring, as a mere speculation and expression of personal fear will not suffice. The petitioners are thus to transcend speculation and the fear of the unknown into the arena of evidence.

49. On the issue of whether there was public participation, the respondent submitted that its’ deponent in the replying affidavit of 15th March, 20021 clearly gave a detailed procedure followed before the Tea Act was assented as such public participation was duly carried out. Further that the petitioners have failed to illustrate how there was no public participation and the ramification of such on them as individuals.

50. The respondent denies any existence of issues raised by the petitioner that attracts public interest. It is argued that the Tea Act was enacted for the greater purpose of ensuring tea farmers get maximum profits from their produce and urged the court to balance the interest of these farmer vis a vis the interest of an alleged 800 employees of KTDA who claim that their right are threatened when they have failed to demonstrate the said violations. Therefore, the respondent submitted that the larger public interest tilts towards protection of the farmers who had voiced out concerns over unconscionable nature of agreement between them and KTDA. The respondent buttressed its arguments by citing the case of **Francis Nduthi Karanja –versus- Attorney General & another [2008] eklr** which Court held that;

“Moreover even at this threshold stage the court appreciates the need to apply the test of proportionality. Thus it cannot be right or proportionate for the Court to grant a drastic conservatory order to stop the operation of an Act of Parliament on some still unproven special needs of one party Applicant because this would be contrary to need to uphold the common good or the public interest being advanced by the PPA.”

51. In conclusion the respondent, submitted that the alleged loss of employment by the petitioners even by operation of law does not ipso facto make the loss of the employment illegal since there are mechanisms employed by the law to shield such employees from the effects of such changes which the petitioners’ employer, KTDA, has not commenced any of the process that declared employees redundant, laid off employees and that if such process was to commence the burden of following due process lie with the employer and not the respondent. It thus urged this court to dismiss the petitioners’ application with costs.

52. I have examined the averments of the parties herein. The appellant sought orders at this interim stage to declare the Tea Act 2020 unconstitutional. They also seek orders that this court suspends implementation of certain sections of the said Act.

53. The applicant avers that the new Act has the ability to cause terminations without a hearing and also causing salary reduction or changing terms of employment.

54. My presumption is that parliament cannot pass an unconstitutional Act as exemplified by my brother **J Majanja in Susan Wambui Kaguru case (Supra)**. The only way this court can actually determine the unconstitutionality of the Tea Act is after the hearing of this petition in full and after hearing arguments from both parties.

55. It would be unlikely to allow such an argument at this interim stage.

56. As for suspension of certain section of the Tea Act, the argument above also applies and I believe any illegality in the Act if established

can be remedied in one way or another.

57. I therefore find the application not merited and I decline to grant it and order the main petition to proceed. Costs in the petition.

Dated and delivered virtually this 27TH day of APRIL, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochieng for the petitioners – present

Cheruiyot for the respondents – present

Court Assistant - Fred