



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO. 7 OF 2019

(CONSOLIDATED WITH PETITION NO. 8 OF 2019)

IN THE MATTER OF: ARTICLES 22(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 28, 35(1)(B), 41(2), 43(1)(A), 48 AND 50(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: INFORMATION HELD BY JAMES FINLAY(KENYA) LIMITED ON THE WORKING CONDITIONS OF THE TEA WORKERS AT IT'S OPERATIONS IN KERICHO AND BOMET COUNTIES

AND

IN THE MATTER OF: INFORMATION HELD BY JAMES FINLAY(KENYA) LIMITED ON THE MEDICAL RECORDS OF THE TREATMENT OF THE 1ST, 2ND, 3RD, 4TH, 5TH, 6TH, AND 7TH PETITIONERS DURING THE TIME OF THEIR EMPLOYMENT AS TEA PICKERS AT ITS OPERATIONS IN KERICHO AND BOMET COUNTIES.

BETWEEN

ELLY OKONG'O INGAN' A.....1ST PETITIONER

LUCAS ONDUSO OMOKE..... 2ND PETITIONER

VITALIS OTIENO MUGA.....3RD PETITIONER

REBECCA OKENYURI NYAKONDO..... 4TH PETITIONER

JOICE MONGERE OCHOI..... 5TH PETITIONER

CHRISTOPHER OMWAMBA CHUMA.....6TH PETITIONER

GETUNA MASELA IDINGA.....7TH PETITIONER

AND

JAMES FINLAY (KENYA) LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The two Petitions herein were filed on 18th December, 2019 and consolidated under Petition 7 of 2019. The Petitioners have sought the court's intervention for it to order the respondent to supply them with information sought by their letters of 4th November, 2019 and 4th July, 2019 pursuant to Article 35(1)(b) of the constitution of Kenya and section 4(1)(b) of the Access to Information Act, to be released to them information in relation to the working conditions of the tea workers at its operations and the medical records of the treatment of the petitioners during the time of their employment as tea pickers at the respondent's operations in Kericho and Bomet counties.

2. The Respondent was represented by the firm of Behan & Okero Advocates. In response to the Petition, the respondent filed a Replying Affidavit sworn by **Peter K. Simeon Hutchinson**, the managing director of the Respondent on the 30th April, 2020 together with grounds of opposition and a preliminary Objection of even dates which Preliminary objections has been dealt with by this Court.

Petition 7 of 2019

3. The 1st and 4th petitioners are tea-workers currently in the employment of the respondent while the 2nd, 3rd, 5th, 6th and 7th Petitioner are former tea-workers at the Respondent farm while the respondent owns and operates tea estates and tea factories in the counties of Kericho and Bomet.

4. The petitioners aver that they, through their advocate wrote to the respondent by the letters of 4th July, 2019 and 4th November, 2019 requesting for the release to them of specific information concerning the work conditions that its tea workers have been subjected to over the year and for the collection and collation of the said information to be undertaken in presence of the petitioner's Agents duly appointed for this purpose.

5. That the request to the said information was to facilitate the protection of the petitioners' rights to information, dignity, fair labour practices and reasonable working conditions as provided for under the Constitution. Further that the information sought was to facilitate, the petitioners' access to justice under Article 46 and Fair trial under Article 50(1) of the Constitution in relation to their cases pending before the All-Scotland sheriff personal injury Court of the Sheriff Dom of Lothian and Borders at Edinburgh (**the Scotland Court**) which they are seeking to recover damages for injuries sustained during the course of employment as the respondent's tea workers.

6. It was stated that the respondent has refused to grant them this crucial information despite their several requests. Therefore, prayed for Orders that;

1) This court does declare that the failure by the respondent to provide the information under Article 35(1)(b) of the Constitution on the basis of the petitioners' request by the petitioners' advocates' letters is a violation of their right of access to information.

2) This court does declare that the failure by the respondent to provide the information under Article 35(1)(b) of the Constitution on the requests contained in the petitioners' advocates' letters is a violation of Article 10 of the Constitution specifically the values of the rule of law, human dignity, equity, social justice, human rights, transparency and accountability, and that it is further a violation of the rights of the petitioners to have their inherent dignity respected and protected under Article 28 of the Constitution, and their right to have, to pursue and to protect their right to fair labour practices and reasonable working conditions under Articles 41(1) and 41(2)(b) of the Constitution.

3) This court does in the exercise of its constitutional obligation under Article 48 to ensure access to justice compel the respondent by an order of mandamus to forthwith provide to the petitioners at the respondent's cost the information sought by the petitioners' advocates' letters including to facilitate its collection and collation at the respondent's premises in the presence of the petitioners' agents.

4) This court does hold the respondent responsible for the petitioners' costs in the sum of KShs.500,000.00.

7. The Petition is supported by the Affidavit of Antony **Elly, Okong'o Inganga**, the 1st Petitioner herein sworn on 18th October, 2019 and filed on 11th December, 2019 in which he reiterates the averments in the Petition.

Petition number 8 of 2019.

8. The parties in this petition are similar to the parties in Petition 7 of 2019. The petitioners aver that they, through their advocate on record, wrote to the Respondent's CEO on 4th July, 2019 and 4th November, 2019 requesting to access information and be released to them their respective medical records maintained by the respondent under regulation 15(1)(b) of the Food, Drugs and chemical Substance (Food hygiene regulations of Food, Drugs and Chemical Substance Act cap 254 Laws of Kenya, of their treatment at the respondent's medical facilities during all the years of their employment.

9. It was averred that this information was crucial in advancing their case in the All-Scotland sheriff personal injury Court of the Sheriff Dom of Lothian and Borders at Edinburgh (the Scotland Court) which they are seeking to recover damages for injuries sustained during the course of employment at the Respondent's employ.

10. They equally indicated to this Court, that the Respondent failed to grant them the sought information in violation of their constitutional rights and the respondent's statutory duties to release the information as requested. They therefore prayed for the following orders;

1) This court does declare that the failure by the respondent to provide the information under Article 35(1)(b) of the Constitution on the basis of the petitioners' request by the petitioners' advocates' letters is a violation of their right of access to information.

2) This court does declare that the failure by the respondent to provide the information under Article 35(1)(b) of the Constitution on the requests contained in the petitioners' advocates' letters is a violation of Article 10 of the Constitution specifically the values of the rule of law, human dignity, equity, social justice, human rights, transparency and accountability, and that it is further a violation of the rights of the petitioners to have their inherent dignity respected and protected under Article 28 of the Constitution, and to have, to pursue and to protect their rights to the highest attainable

standard of health and to healthcare under Article 43(1)(a) of the Constitution.

3) This court does in the exercise of its constitutional obligation under Article 48 to ensure access to justice compel the respondent by an order of mandamus to forthwith provide to the petitioners at the respondent's cost the information sought by the petitioners' advocates' letters including all necessary documents related thereto.

4) This court does hold the respondent responsible for the petitioners' costs in the sum of Kshs. 500,000.00/-

11. Similarly, this petition is supported by a sworn affidavit, by the 1st Petitioner herein, **Mr. Elly Okong'o Inganga** sworn on 11th December, 2019, reiterating all the contents of the Petition.

Respondent's case

12. The respondent opposed the petitions vide the replying Affidavits sworn by its managing director, one **Simon Hutchinson** on 30th April, 2020 who conceded having previously employed the Petitioners and all left its employment save for the 4th Petitioner who is still at its employ.

13. The respondent avers that there are Seven (7) suit that were instituted by each of the petitioners herein at the Courts in Scotland for allegedly suffering injuries in the course of employment as result of the respondent's breach of duty to provide safe working environment and on account of negligence on the part of the respondent and therefore sought to be awarded damages by the Scottish Court.

14. The respondent states that, in the bid to prove its claim, the petitioner through their advocates filed a motion seeking locus to inspect the respondent's tea estates being: Tiluet, Mariny, Kaporet and Kapsongoi Kitcumbe factory which factories fall within the sovereign states of Kenya. Nevertheless, the Scottish Court ordered the respondent vide its Order made on 22nd November, 2018 and Amended on 18th December, 2018 to allow the petitioners witnesses/Agents to inspect the said tea estate/ factories and carry out the activities as captioned in the orders marked as Exhibit 3 and 4 respectively.

15. That the import of the said Orders is to aid the Petitioners in the prosecution of their cases in the Scottish Court. Further that the execution of the said Order is against the sovereignty of Kenya and supremacy of the constitution as they failed to abide by the statutory provisions in place regulating execution of foreign Judicial Orders forcing the Respondent to seek court's direction in Nairobi ELRC Constitutional Petition No. 30 of 2019 marked as Exhibit 5 which application was allowed.

16. Aggrieved by the said judgment and Orders, the petitioners Lodged an appeal being Civil Appeal No. 297 of 2019. While the said Appeal was pending for determination, the petitioners' Advocates requested for information touching on the subject matter which information had been barred by the Court owing to the fact that the petitioner had breached sovereignty of Kenya and abused protocol by seeking to execute Orders of 18th December 2018 without following due procedure provided by law. Consequently, the Respondent decline to offer the petitioner the requested information.

17. The Respondent averred that the constitutional provision relied upon by the petitioner in the two petitions herein are similar to those raised in ELRC No. 30 of 2019 and the subject of Appeal No. 297 of 2019 which is pending for judgment before the Court of Appeal.

18. The Respondent finally urged this Court to dismiss the Petitioners suit for failing to observe the required procedure laid down for execution of foreign Orders and Judgments.

19. The petitions here were dispensed with by way of written submissions.

Submissions in support of the Petitions

20. The Petitioners' counsel submitted that, the petitioners sought to access information relating to their medical records in terms of their requests made in the letters of 4th July, 2019 and 4th November, 2019 in exercise of their constitutional right granted under Article 35(1)(b) of the Constitution of Kenya and enhanced in Section 4(1)(b) of the Access to information Act. That they approached the respondent to provide the said information as they are the ones mandated under Regulation 15(1)(b) of the Food, Drugs and Chemical Substance (Food Hygiene) Regulations of the Food Drugs and Chemical Substance Act to keep on its premises all the health records of the petitioners and of certificates of their annual medical examinations.

21. Counsel submitted that the information, the petitioners are seeking to access is in furtherance of their cases filed in the Scottish Court and that the information sought is necessary for the petitioners exercise of their constitutional right to the highest attainable standard of health including the right to health care services and reproductive health care as provided for under Article 43(1)(a) of the constitution of Kenya.

22. On the issue raised by the respondent that this suit is similar to ELRC No. 30 of 2019, the subject of Appeal No. 297 of 2019, It was submitted that the Court of Appeal rendered itself on the same and stated that the cases here are substantially different as such the issue of multiplicity of suits does not arise.

23. It is the applicants' submissions that, they also sought access to information with relations to working conditions that the respondent's tea workers are subjected to and the said information to be collected and collated in presence of their agents. It was argued that this information ought to be provided by the respondent as it is empowered under Section 2 within the meaning of Occupational Safety and Health Act to carry out risk assessment in relation to safety and health of persons employed by it and to adopt preventive and protective measures for all its employees.

24. In a further supplementary submissions filed on 10th June, 2021 the Petitioner submitted that the court of Appeal in Civil Appeal Number 297 of 2019 rendered itself that the issue in ELRC Cause number 30 of 2019 Nairobi sought to find out whether the inspection orders issued by the Scottish Court could be executed without them being sanctioned by the Courts in Kenya while the matter before this Court is different as it is seeking for the Court to direct the respondent to furnish them with some information. He thus argued that the two matters are substantially different.

25. They also submitted that they have a right under Article 50(1) of the constitution to even choose the forum in which they wished to litigate at including the English Court and reinforced their argument by citing the case of East Africa Development Bank –v- Dari Limited and 5 others [2020] eKLR.

Respondents' submissions

26. The respondent submitted that, the prayers sought by the Petitioners if granted would be contrary to the constitution, statutory enactment and would impede the due process of law. It argues that the access to information under Article 35 of the Constitution and section 4(1)(b) of the Access to Information Act is not absolute but subject to limitation under Article 24 of the Constitution as further enumerated under section 6 of the Access to information Act.

27. Accordingly, Counsel submitted that the information required by the petitioner as per their petition 7 herein would be; Contrary to the constitution, statutory provisions and the holding of Hon. Justice S. Radido in petition 30 of 2019 and therefore impediment to process of law; contrary to section 16 of the Work Injury and Benefits Act as such an impediment to the established legal process of law; Contrary to section 87 of the Employment Act as such an impediment to the established legal process.

28. It was then argued that, the information is not available to the petitioners due to the limitation imposed pursuant to Article 24 of the Constitution as read with Section 6(2)(j) of the Access to Information Act in that such information can only be released to a constitutional Commission as contemplated under section 3 of the Commission on Administrative Justice Act when conducting investigations and examinations in the performance of its duties as contemplated under the preamble of the Access to information Act. Further that when access to information is declined, a party can seek review from the said commission in accordance with section 14 of the Access to information Act.

29. Counsel argues that the petitioners herein have sought in their petitions herein to access information at the respondent's tea plantations/factories through their letter of 4th July, 2019 and 4th November, 2019 when they had initially sought the same information by *Locus Inspection Orders* obtained from a Scottish Court which they had failed to follow due procedure in executing the said Orders culminating to the filing of ELRC Petition No. 30 of 2019 which Justice Radido held that the orders sought to be enforced by the petitioner must follow due process of statute in Kenya and that the same cannot be enforced by the petitioner directly but that they must be adopted by the courts in Kenya before the same is enforced.

30. The Respondent's Counsel, submitted that the said Orders by Justice Radido are still in force and are yet to be overturned by the Court of Appeal in Appeal No. 279 of 2019.

31. Counsel submitted further that the information sought by the petitioners through their agents was a discovery process which is an integral part of conducting civil proceedings which request must be made by the Court ceased of the matter in case management conference as was held by Justice Gikonyo J in the case of **Mutiri and company Advocates –versus- LSG Lufthansa Services Europa Africa GMBH & Another [2015] eKLR**.

32. It was submitted that when the Court declined their prayer to access information without following protocol, the petitioner sought to access the same information by filling these petitions directly without their agents seeking the same reliefs. Counsel thus argues that the petitions herein are not only **res judicata** but an impediment to the due process of law which need to be observed based on the spirit of foreign judgments (Reciprocal enforcement) Act and the express provisions of the High Court (Practice and procedure) Rules.

33. Counsel submitted that the petitioner have tried to evade the doctrine of *Res Judicata* by introducing a different cause of action, a trend which the supreme Court discouraged and urged court to be vigilant as held in the case of **Kenya Commercial Bank Limited –Vs- Muiri Coffee Estate Limited and Another [2016] eKLR**.

34. It was submitted that the sole purpose of seeking the orders prayed for in this petition is to assist the petitioners indirectly fulfill the requirement of the *Locus Inspection Orders*, the subject of the matter in ELRC No. 30 of 2019 and in essence help them prosecute their claims before the Scottish Court as such the petitioners are using this Honourable Court as a surrogate to the Scottish Court instead of following due procedure of enforcing the said Orders as provided for under the Kenya Laws. Further that this Court are creatures of the Constitution that ought to conduct its business in accordance with the law and not at the whims of a foreign Court.

35. Counsel submitted that, a party who has obtained Orders from a foreign Court has to seek judicial assistance in enforcement of the same to ensure that the evidence being submitted to the foreign state is not inconsistent to public policy consideration in Kenya such as the need for legal certainty evidence of re-litigation in domestic court and reciprocity between sovereign states. Further that the involvement of the court ensures that the process is not tainted with illegalities as was held in **Penn- Texas Corporation –versus- Anstal and Others [1963] ALL ER 258** and ensure that the same does not amount to a fishing expeditions as was held in **Radio Corporation of America- versus- Rauland Corporation and Another [1956] ALL ER 549**.

36. He thus argues that the declaration sought by the petitioner would be contrary to law as elaborately discussed in ELRC Petition number 30 of 2019, prejudice the pending appeals before the Court of Appeal and violates the doctrine of *lis alibi pendens* therefore amounts to abuse of Court process.

37. The Respondent took issue with the institution of the claims in a foreign county when the issues of compensation of injuries sustained at

work place have been elaborately provided for under the Work Injury and Benefits Act with Appeal preferred to this Court. Counsel argues that the Petitioners allegedly sustained the injuries as indicated in their claims within the respondent's farm in Kericho and Bomet within Kenya thus allowing the petitioners to proceed with the said cases will be in an impediment to the legally established procedure of settling disputes of the said nature.

38. In conclusion, the respondent's Counsel, submitted that Kenya is a sovereign state with a progressive Constitution and well established judicial and quasi-judicial institutions to safeguard the rights and fundamental freedoms of its citizens and to shun these institution and institute a suit in a foreign court goes against the spirit of our laws and therefore allowing the petitioner to access information without the benefit of allowing such process be conducted by a judicial officer would go against the due process provided by law and in effect prejudice the respondent.

39. The respondent therefore urged this Court to dismiss both Petitions herein with costs.

40. On a rejoinder, Counsel for the petitioner urged this Court to ignore the submissions going into substance of the petitioner's cases at Scottish Court and deal with the issue of Access to information raised in the petitions. further that the *Locus Inspection Order* issued by the Scottish Court did not prevent the petitioners from requesting this information in person

41. On these petitions being *Res Judicata*, it was submitted by the petitioner Counsel that these Petitions as weighed against ELRC No. 30 Of 2019 are substantially different. Additionally, it was submitted that there is no stay order granted either in NAI Appeal no. 297 of 2019 or in Civil Application Number E006 of 2020(Appeal against the Respondents dismissed preliminary objection) to warrant the stay of these proceedings.

42. The Respondent equally filed supplementary submissions on the 23rd May, 2021 and submitted that the petitioners are relying of Article 35 on access to information to seek the very same information they sought in the locus inspection Order. He argues further that the Court of Appeal was of similar view as Justice Radido in Nairobi ELRC Cause number 30 of 2019 in holding that the locus inspection order can only be executed with judicial assistance.

43. The Respondent thus submitted that the petitioners are using mischief in seeking for the same information they sought in the locus inspection Orders which are res judicata if this court allows the Petitions herein.

44. The Respondent submitted that the petitioner still has a recourse of seeking the information by applying to the Court to affirm the Locus Inspection Orders but instead the Petitioners filed these proceeding in total abuse of the Court's process

45. The Respondent want the 2 petitions dismissed.

46. I have examined the averments of the parties herein. The main prayers by the petitioner herein is to be given information relating to their working condition as tea workers and also to access their medical records during their time of employment as tea pickers at the respondent's operation in Kericho and Bomet counties.

47. In Petition 7/2019, the petitioners sought this information specifically to facilitate the protection of their rights to information dignity, fair labour practices and reasonable working conditions as provided under the constitution.

48. They aver that they intend to use this information to facilitate them access justice under Article 46 and fair trial under Article 50(1) of the constitution in relation to their cases pending before All Scotland Sheriff Personal Injury Court of the Sheriff Dom of Lothian & Borders of Edinburgh (The Scotland Court) where they are seeking to recover damages for injuries sustained during the course of employment as the respondent's tea workers.

49. In Petition 8/2019, the petitioner aver that this information they require in the All Scotland Sheriff Personal Injury Court of the Sheriff Don of Lothian & Borders at Edinburgh (The Scotland Court) where they too have filed a case seeking to recover damages for injuries sustained during the course, of employment at the respondent's employment.

50. Of course the respondents are opposed to this petition and aver that in the cases filed before the Scotland Court, the petitioners sought locus to import the respondent's tea estates. The Scottish Court ordered the Respondent's vide order made on 22/11/2018 and amended on 18/12/2018 to allow the petitioner's witnesses/agents to import the said tea estate/factories and carry out the activities as captioned in the orders marked as exh.3 & 4 respectively.

51. The respondents contend that the importance of the said order is to aid the petitioner in prosecution of their cases in the Scottish Court which they submit is against the sovereignty of Kenya and supremacy of the constitution.

52. They aver that the petitioner failed to abide by the statutory provision in place regulating execution of foreign judicial orders forcing the respondents to seek court's direction in Nairobi ELRC PET NO. 30/2019 (Exh. 5) which application was allowed.

53. In the ruling in Nairobi Petition No.30/2019 the Hon. Judge made orders:-

“(i) That the expert witnesses, being agents of the petitioner herein could not obtain information ordered by the Scottish Court from the respondents unless and until the Scottish Court orders were adopted and recognized as orders of the Honourable Court”.

54. The other orders were;-

“(ii) That the petitioners were directed to observe High Court (Practice & Procedure) Rules Part VII before conducting inspection to obtain the information they require.

iii) Failure by the petitioners to observe High Court (Practice & Procedure) Rules Part VII while attempting to obtain the information required would be a breach of the sovereignty of Kenya and abuse of protocol as between the two sovereign states of the United Kingdom and Kenya.

iv) That executing the Scottish Court orders and obtaining information so required by the petitioners would be contrary to the Legal spirit, set out on the provision of Foreign Judgment (Reciprocal Enforcement) Act Chapter 43 Laws of Kenya”.

55. The petitioners were aggrieved by the Judgment and orders in ELRC Petition No. 30 of 2019 and lodged an appeal at the Court of Appeal. This appeal is still pending. The Petitioner in my view is seeking similar information in the current petition which information is already barred by the Hon. Judge in Petition 30 of 2019.

56. In my view the matters herein have already been determined in ELRC Petition 30 of 2019 by a court of competent and concurrent jurisdiction is therefore *res judicata*.

57. It would be an abuse of the court process and misuse of Judicial power for me to continue to adjudicate on these petitions.

58. I therefore decline to grant any orders on the petition on the grounds that they are *res-judicata*.

59. The only recourse is for the petitioner to await their appeal at the Court of Appeal before taking any other further direction.

60. I therefore find the petition not merited and are dismissed accordingly.

61. There will be no orders of costs.

Dated and delivered virtually this 23RD day of SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbeche holding brief Obura for Respondent – present

Okero for Petitioner – present

Court Assistant - Fred