



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 32 OF 2017

IN THE MATTER OF ARTICLES 2, 20, 22(1), 23 & 165 OF THE CONSTITUTION OF KENYA

AND

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

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLE 27, 35 & 40 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

- 1. CHARLES M. OROBA**
- 2. EVANS MAUTI ONGWENYI**
- 3. CALLEN NYABOKE LUCAS**
- 4. HELEN NYABOKE MARIGA**
- 5. ALFRED OBIRI NYANGWESO**
- 6. GRACE OGONDA**
- 7. TABITHA MANYANGE**
- 8. ANTHONY KEBERWO**
- 9. JOHN ONGESA**
- 10. JASON CHIBA**
- 11. CHARLES GERA**
- 12. JEREMIAH NYANGAU**
- 13. JOHN NYAKUNDI OGUTA**
- 14. NOAH KERAMA**
- 15. SABINA NDIEGE**
- 16. DAMARIS NYABUTO**

17. LUCAS KIYONDI

18. THOMAS KIGE

19. SAMUEL MAKORI

20. GICHURU TANDI

21. JOSEPH OKIOMA

22. SAMSON MOCHAMA

23. DAVID ORARO ONDIEKI

24. LIVINGSTONE MANGABO.....PETITIONERS

v

KENYA TEA DEVELOPMENT AGENCY LTD.....RESPONDENT

JUDGMENT

1. In an award delivered on 27 January 2005 in Cause No. 18 of 2004, *Kenya Plantation and Agricultural Workers Union v Kenya Tea Development Agency*, the Industrial Court awarded unionisable employees of the Respondent wage increases for 2001 to 2002.
2. During the pendency of the Cause and delivery of the Award, the Petitioners were sent on early retirement (about 2 months before the Award by the Industrial Court).
3. After the Award, the parties moved the Court seeking an interpretation on whether the employees who had been sent on early retirement should be paid salary arrears accruing therefrom (the parties were contesting the legality of the Award and determination/confirmation of the beneficiaries).
4. On the question of beneficiaries, the Industrial Court citing long chain of authorities noted that employees who left employment before the registration of a *collective bargaining agreement* could not benefit from the same (see Cause No. 41 of 2001, *Kenya Chemical & Allied Workers Union v East African Industries*).
5. In the meantime, after the Award, some of the employees who had been retrenched moved the High Court in Nairobi High Court Civil Case No. 387 of 2009, *Abel Onsare Onwonga & 30 Ors v Kenya Tea Development Agency Ltd* seeking to adopt/enforce the Award of the Industrial Court.
6. A consent was reached by the parties that the salary arrears accruing from the Award be paid in terms of an agreed schedule.
7. The current Petitioners were not part of the consent and on 10 April 2017, they moved this Court alleging that the Award was in *rem* and therefore the failure to pay them the salary arrears accrued from the Award violated their right to property, right to equality and freedom from discrimination, and right of access to information.
8. The Petitioners made reference to other Constitutional and statutory provisions.
9. On 28 July 2017, the Petitioners filed an *Amended Petition*, but the amendments did not go to the substance of the alleged violations.
10. The Respondent filed a *Replying Affidavit* sworn by its Employee Relations Manager in opposition to the Petition raising procedural as well as substantive questions of law.
11. These were; the competency of the Petition (authority and authenticity of signatures and whether issues raised were constitutional); delay in instituting the proceedings, limitation, applicability of the collective bargaining agreements to the Petitioners/employees who had left employment before the Award and *res judicata*.
12. The 1st Petitioner filed a *Supplementary Affidavit* on 29 November 2017 after which they filed written submissions on 29 June 2018.
13. The Respondent filed its submissions on 8 May 2018 and *Supplementary* submissions on 17 September 2018.
14. For unknown reasons, the parties did not attend Court on 10 December 2018 to highlight the submissions.
15. The Court has keenly considered the pleadings and submissions and come to the conclusion that the Petition is not only unmerited, an abuse of the court process, but incompetent for the following reasons.

16. One, the gravamen of the Petitioners cause of action is anchored on an *Award* and decree of the Industrial Court.
17. In the Court's view, such an action to enforce a decree is governed by statutory law and does not raise, the type of constitutional questions purported to be raised.
18. The submission by the Petitioners that the Award/decreed was in *rem* and constituted a crystallised constitutional property right, is to the Court a red herring.
19. Two, the Award of the Industrial Court was delivered on 27 January 2005 and in terms of section 4(4) of the Limitation of Actions Act, the Petitioners had 12 years within which to bring any enforcement proceedings. The instant proceedings were instituted after 13 years.
20. Three, the Petitioners invoked and moved the Industrial Court through an *Interpretation application* to be included as beneficiaries of the Award, and in a ruling delivered on 21 September 2005, the Court clarified that they could not benefit as they had exited employment before the Award and consequent *collective bargaining agreement* from which the accrued salary arrears sought had been registered/issued.
21. If the Petitioners were not satisfied by the decision of the Industrial Court on Interpretation in September 2005, they should not have waited until 2017 to move the Court (or High Court).
22. Four, the Petitioners litigated on their entitlement to benefit from the Award and the collective bargaining agreement and, the Industrial Court determined that question on 21 September 2005 on the merits.
23. The issue is therefore *res judicata*, despite being clothed as a constitutional question.
24. Five, the *collective bargaining agreement* in place by the time the Petitioners exited employment was the one for 1999 - 2000 and it would be illogical for the Petitioners to seek to benefit from a *collective bargaining agreement* which had not been registered by the time of their exit from employment.
25. This Court notes that the Industrial Court in its ruling of 21 September 2005 indicated that the *collective bargaining agreement* for 2003-2004 had been overtaken by events
26. Six, the 32 ex-employees who were paid after a consent order in 2011 had left employment after the Court Award and registration of the *collective bargaining agreement* embodying the *Award* and were therefore not in the similar contractual relationship like the Petitioners.
27. In this respect, the Court is unable to discern any discrimination or violation of the right to equality before the law.

Conclusion and Orders

28. The Court finds no merit in the Petition and orders that it be dismissed with costs to the Respondent.

Delivered, dated and signed in Nairobi on this 15th day of February 2019.

Radido Stephen

Judge

Appearances

For Petitioners O.M. Otieno & Co. Advocates

For Respondent Milimo, Muthomi & Co. Advocates

Court Assistant Lindsey