



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1997 OF 2014

KENYA PLANTATION AND AGRICULTURAL WORKERS UNIONCLAIMANT

VERSUS

KENYA TEA GROWERS ASSOCIATION RESPONDENT

RULING

1. The ruling is with regard to two applications one filed by the Claimant on 10th February 2015 and the second filed by the Respondent on 14th April 2015. Both will be addressed herein.

2. On **10th February 2015**, the claimant, Kenya Plantation and Agricultural Workers union filed their application by Notice of Motion under the provisions of Section 12 (1) and (4) of the industrial Court Act and Rules 16 and 27 of the industrial Court (Procedure) Rules seeking for orders;

1. *Spent*

2. *That an order do issue that industrial Cause No 14 of 2014 between Kenya Plantation and Agricultural Workers [versus Kenya Tea Growers Association] filed at the Industrial Court Kericho be and is hereby consolidated with cause No 1997 of 2014 herein at Nairobi.*

3. *That Industrial Cause no 14 of 2014 filed at Kericho be and is hereby transferred to Industrial Court Nairobi under the above Cause*

3. The application is supported by the annexed affidavit of Thomas Kipkemboi and on the grounds that the petitioner in Industrial Cause no 14 of 2014 has filed a similar suit in industrial Court kericho which suit raises similar issues as filed herein and thus seek the consolidation of the suits.

4. In his affidavit, Mr Kipkemboi avers that when Cause No 14 of 2014 was mentioned before Court on 4th February 2014, the Court directed parties to consolidate the suits herein as under Rules 23 on the Industrial Court (Procedure) Rules.

5. On 28th April 2015, the Respondent filed their response through the Replying Affidavit sworn by Apollo Kiarri, the Chief Executive Officer of the Respondent and avers that the application seeking for the consolidation of this suit with Cause No 14 of 2014 is in disregard of the fact that Cause No 14 of 2014 was filed on 31st October 2014, served upon the Claimant herein on 5th November 2014 and they filed a defence on 13th November 2014. Despite filing a defence in Cause No 14 of 2014 in Kericho, the Cause herein was filed on the same date of 10th November 2014. The proceedings herein relate to the same dispute as in Cause No.14 of 2014 Kericho in respect of stalled CBA negotiations for 2014-2015. The Claimant herein did not disclose that there are proceedings already filed in kericho which amount to material non-disclosure and thus not entitled to reliefs sought herein. The Respondent has filed an

application seeking for the suit herein to be struck out on account of existence of similar proceedings before the Court in Kericho. The Claimant herein is in abuse of the Court process which is detrimental on the Respondent because the critical CBA dispute is likely to caution irreparable substantial financial loss if not resolved expeditiously by filing multiple suits as herein. There are several incidents of unrest whereby some employees have taken to destroying leaf sheets due to the frustration occasioned by the delay in resolving the CBA dispute.

5. Mr Kiarri also avers that there is no proper suit for consolidation and the prayer for a transfer will achieve no purpose other than that the Respondent will be at great costs. The application should therefore be dismissed.

6. A Further Affidavit was filed by the Claimant union and sworn by Meshack Khisa on 18th May 2015 and avers that he did not have personal knowledge of Cause 14 of 2014 in Kericho when he filed Cause No 1997 of 2014 herein. The Claimant acted swiftly upon noting the contents of both suits and moved the Court seeking consolidation of the suits and to seek sanction orders against him and Mr Thomas Kipkemboi will not achieve any useful purpose in resolving the dispute or the substantive issues herein.

7. On **14th April 2015**, the respondent, Kenya Tea Growers Association, filed their application through Notice of Motion under the provisions of section 3(1) to (3) and section 12(3) of the Employment Act seeking for orders that;

- 1. The memorandum of claim filed in Court on 10th November 2014 be dismissed with costs;*
- 2. The Court does issue an appropriate sanction to the officials of Kenya Plantation and Agricultural Union – Meshack Khisa and Thomas Kipkemboi for abusing Court process by filing proceedings Nairobi ELR 1997 of 2014 despite the fact that there were pending proceedings in Kericho ELR 14 of 2014 KTGA vs KPAWU;*
- 3. That such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the dignity of this honourable court;*
- 4. Costs be provided for.*

8. The application is supported by the annexed affidavit of Esther Kinyenje-Opiyo and on the grounds that the Respondent herein filed a claim against the Union in Kericho on 31st October 2014 being Cause No.14 of 2014. The Claimant herein, being the Respondent in the suit was served on 5th November 2014 and they proceeded to file a defence on 13th November 2014 and despite knowledge of the matter at Kericho, the Union filed this suit on 10th November 2014 in blatant abuse of Court process. The suit herein relate to the same dispute as those in Kericho in respect of stalled CBA negotiations for 2014-2015 and thus an exact replica of the proceedings in Kericho claim. The union failed to disclose to the Court that there already existed another suit before filing this one.

9. Other ground are that there is no reason for the union to file fresh proceedings relating to the same dispute in Nairobi and thus ought to be dismissed. The officials of the union Meshack Khisa and Thomas Kipkemboi had full knowledge of the already existing Kericho claim and the Court should protect itself from abuse. It is important the CBA dispute is resolved expeditiously so as to maintain industrial peace especially on matters relating to wage increases. A party cannot institute suit over the same matter and parties as to do this would be an abuse of Court process.

10. In the affidavit of Mrs Opiyo, she avers that as counsel for the respondent, prior to filing the claim there were conciliation proceedings by the Respondent at their offices in Kericho where the County Labour Officer was present. This conciliation related to the CBA for the period 2014-2015. Upon disagreement, the Respondent filed Cause 14 of 2014 in Kericho and served the union. The union went ahead and filed this claim in Nairobi in a replica suit as already filed in Kericho. There is no reason to file a new suit while a similar one exists and the officials of the union Meshack Khisa and Thomas

Kipkemboi should be sanctioned for abusing the Court process as by their actions the CBA dispute has stalled and likely to cause industrial unrest. This suit should therefore be struck out and the union officials sanctioned.

11. Both parties made their submissions in support of their applications as well as in response to each application.

12. The Claimant union submitted that the objectives of the Court are to have justice expedited and by coming to Court the union as the Claimant herein, was keen to have the issues herein addressed. The union as a Claimant has officials but cannot be personally held liable over the corporate as to do so would be to go outside the issues raised herein. On the cases the Respondent is relying on, the Claimant noted that in **Council of Governors versus Senate & Another [2014] eKLR**, the Supreme Court addressed the issue as to whether the Senate can summon Governors which is not the case here. The Claimant is keen to have the two suits now pending between the parties touching on the CBA dispute consolidated for hearing and disposal. The case of **Republic versus Chairman District Alcoholic Drinks Regulation Committee & 4 Others Ex parte Detlef Heier & Another [2013] eKLR** is distinguishable from this case as it related to the challenge of jurisdiction of the Court to hear *ex parte* Notice of Motion.

13. That in the interests of justice the suit herein should be consolidated with Cause No 14 of 2014 in Kericho and the Court to transfer the other suit for expeditious disposal as the suits touch on similar economic issues.

14. The Respondent on their part submitted that despite knowledge of suit in Kericho Cause No 14 of 2014, the Claimant went ahead and filed this suit. In law the first in time takes precedence as held in *Ali Ishmael Baraki & Another versus Chairman, Garissa County Service Board & 4 Others [2014] eKLR*. When a party files a dispute in two courts this amounts to abuse of court. The Respondent consists of various companies around Kericho and it would be very expensive to be heard in Nairobi as conciliation proceedings happened in Kericho. To file multiple suits is to delay the hearing of the CBA subject of suit in Kericho and this is already causing tension to the employees. The officials of the union should be sanctioned by this Court for filing the current suit.

15. The Respondent has not proved any similarity in the suits now before Kericho and herein to warrant a transfer and consolidation. What the Claimant has failed to appreciate is the huge costs the Respondent is being put into which costs are unnecessary as the Respondent has to defend both suits. In **Council of Governors versus Senate & Another**, the Supreme Court castigated counsel for filing suit in the wrong forum as this was a waste of Court time. The Court should not encourage multiplicity of suits and thus the claim herein should be struck out and officials of the union sanctioned.

Determination of the issues

Emerging issues from both applications can be outlined as;

Whether a Consolidation of Cause No 14 of 2014 herein is necessary;

Whether Transfer of Cause No 14 of 2014 is necessary;

Whether the suit herein be struck out;

Whether the union officials should be sanctioned.

16. Both parties agree that there are two suits now filed between themselves. The suits relate to an economic dispute over negotiations of the CBA covering the period 2014-2015. It is also common cause that on 31st October 2014, the respondent, KTGA filed Cause No 14 of 2014 in Kericho. A defence was filed on 13th November 2014 by the claimant, Union. Counsel for the Respondent submitted that Cause No 14 of 2014 was served upon the Union on 5th November 2014.

17. On their part, the Union as Claimant herein, filed this suit on 10th November 2014. On 10th February 2015 the Claimant Union filed Notice of Motion seeking a consolidation of suits noting Cause No 14 of 2014 filed in Kericho. On 14th April 2015, the Respondent KTGA filed their Notice of Motion seeking the suit herein be struck out and the Union officials be sanctioned for filing a replica suit herein.

18. What is apparent is that, suit herein is filed by;

Kenya Plantation & Agricultural Workers Union versus Williamson Tea (K) Ltd, Kapchorua Limited, Tea Research institute of Kenya, Sotik highlands, Tea Estate, Sotik Tea Estate, gakoe Tea Limited, Mogusii Farmers Company Limited, Itbo Estate, Kerumbe Farm & Kamiti Tea Estate, James Finlay (K) limited, jointly and severally of KTGA

19. The issues noted in dispute are;

1. *Rates of pay*
2. *Hours of work*
3. *Annual leave*
4. *Annual leave transport allowance*
5. *Medical treatment and sick leave*
6. *Retirement age*
7. *Gratuity*
8. *Day of worship; and*
9. *Baggage allowance.*

20. The orders sought by the Claimant herein are;

- a) A declaration that the Respondent implement as submitted by the Claimant above; and
- b) That the Respondent meet the costs of this suit.

21. In Cause No 14 of 2014 filed at Kericho is by;

Kenya Tea Growers Association versus the Kenya Plantation & Agricultural Workers Union.

22. The issues in dispute are not structured as under the provisions of Rule 4 of the industrial Court Procedure Rules but in the body of the claim are outlined as;

- i. *Rates of pay and productivity*
- ii. *Gratuity*
- iii. *Hours of work*
- iv. *Annual leave*
- v. *annual leave travelling allowance*

vi. *Medical treatment and sick leave*

vii. *Summary dismissal*

viii. *Retirement age*

ix. *Day of worship*

x. *Baggage allowance*

23. The orders sought are;

The Claimant prays for this honourable Court to intervene and assist the parties reach an amicable resolution of the dispute without imposing any terms onto the parties.

24. The similarities in the suits is apparent save that the issues in dispute even without the Respondent compliance with Rule 4 have a slight but fundamental difference. What is in dispute under Cause 14 of 2014 includes the issues of;

Rates of pay and productivity; and

Summary dismissal.

25. Should the suits then be consolidated? Apart from the powers given to this Court under section 12 of the Industrial Court Act, the law gives this Court special mandate unlike any other known Court in Kenya. Section 3 of the Act outlines the various principal objectives the Court must meet in the administration of justice being;

Principal Objective.

3. (1) The principal objective of this Act is to enable the Court facilitates the effective, just, expeditious resolution of disputes governed by this Act.

(2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).

(3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.

26. In whatever matter the Court arbitrates, the starting point is to reflect on the principal objectives to be met. The Court must act in a way that is effective, just, and expedite resolution of disputes noting the nature of claims filed by employees, employers, trade unions, employer associations, etc. effect must be given to these principals at all stages and times, the power under section 12 notwithstanding. The parties before the Court equally have a duty to assist the Court in achieving the set objectives by ensuring participation in proceedings as appropriate and comply with given directions.

27. In this regard, the Court on its own motion under Rule 23 of the Industrial Court (Procedure) Rules can direct the consolidation of suits where it appears that such suits address the same question of fact or law and hear such suits/claims together. Rule 23 states;

23. Consolidation of cases.

The Court may consolidate suits if it appears that in any number of suits

(a) some common question of fact or law arises; or

(b) it is practical and appropriate to proceed with the issues raised in the suits simultaneously.

28. Parties coming before the Court equally have a duty to participate in proceedings and where it is apparent that there is knowledge that such proceedings relate to other suits already before court, raise the issue and seek the consolidation for the Court to address similar suits having common facts or law and where it appears by resolving one dispute, the whole will have been resolved. Administratively therefore, the Court on its own motion can move files from one Court to the other and direct parties to move to such Court where such a matter should be heard. It does not relate only to the physical location of the Court or court, the issue at hand is the subject of claim that in the courts assessment, it would be effective, just and expeditious to transfer, consolidate or move to one Court or Judge for hearing and disposal. To so transfer, consolidate is an administrative action that is not contrary to the rules or applicable law and the principal objectives of the court.

29. In this case, the Respondent filed Cause No 14 of 2014 on 31st October 2014 and 10 days later, the Claimant filed the suit herein. Whether cause No 14 of 2014 was served and hence within the knowledge of the Claimant within the intervening 10 days I find to be a matter of evidence. Such evidence of service on the Claimant with summons in Cause No 14 of 2014 would have of no much consequence had it not been challenged and from it, the Respondent has applied to have the Claimant officials sanctioned for moving the Court while they were aware of the suit in Cause No 14 of 2014. The Claimant has also been accused of material non-disclosure in that they failed to inform the Court that Cause No 14 of 2014 had been filed before moving the Court as herein. Service of summons in Cause No 14 of 2014 therefore takes a higher weight as with it responsibility shifts from the Respondent to the claimant. Though controverted, the Respondent only made submissions in this regard but evidence of service was not gone into.

30. In totality, a merger of all the outlined issues by the Claimant and the Respondent will ensure the effective arbitration. The Respondent list of issues raise two (2) more issues that I find fundamental to be part of the entire consolidated list of issues in dispute that require resolution. The quality of the upcoming CBA will only find viability within this comprehensive list consolidated.

31. Noting the nature of cases now before Court and the common elements now outlined, and based on the powers of the Court and in meeting the set objectives of the court, the issues outlined in both suits would only be well articulated and resolved conclusively by a consolidation of the two suits as herein. Agreed that this is an economic dispute, movement of parties would be in the minimal and hence reduced costs. Application for consolidation of suits is herein and not outside here. The order shall be made herein. The matter can proceed before the Court before any officer allocated to take the main course in its full length to determination. Such officers are in plenty and ready to meet their mandate.

33. To strike the suit herein will not achieve much purpose as against a consolidation of suit. The quality content shall be lost in striking out the suit. The question of a sanction against union official is addressed above when the first issue is resolved I will not add more.

34. Before conclusion, mention was given with regard to Rule 4 of the Industrial Court (Procedure) Rules. Even with direction on the consolidation of suits it is important to lay it out here. The requirements set out under Rule 4(e) of the Industrial Court (Procedure) Rules are that;

4. A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out—

...

(e) Any principle or policy, convention, law or industrial relations issue or management practice to be relied upon

35. Parties are required to set out and indicate in the pleadings or submissions, *any principle or policy, convention, law or industrial relations issue or management practice* relied on. This gives the other party and the Court the basis of the claim well in advance also relevant at the stage of writing a judgement

instead of putting this at the submissions stage. The nature of proceedings before this Court to allow the other party have the evidence to be relied upon well in advance which is a procedure slightly different from the Civil Procedure Act and the Rules thereto. See **Fredrick Kariuki versus Bank of India, Cause No.2424 of 2012.**

36. That settled, whether the issues are addressed before any Court presiding over employment and labour relations, the purpose and the objectives of the parties and Court will respectively have been achieved. At the end of day, the worker/employee/labourer in the field will have his or her day. Whatever mechanisms are employed or put in place by the parties, the ultimate objective is to ensure industrial peace. This I find can be achieved by a consolidation of the suits herein for the purpose of an expeditious disposal of the issues at hand that will foster negotiations and eventual settlement of the matter. The continued stay of such a dispute in court, whether Nairobi or Kericho will only heighten tensions amongst workers, the employer too as they have to keep watch day and night in the event the employees are agitated and the duty now is for the Court to ensure an expeditious disposal of the matter without further ado.

37. The delays here are not warranted. Looking at the CBA period of cover, a hearing date should be allocated on priority basis.

38. In applications such as these, there is no winner or loser. Both parties have an equal interest in the resolution of the matters in dispute – to have a CBA in force covering the period 2014-2015.

There shall be Consolidation of suits herein effected with the transfer of Cause No 14 of 2014 from Kericho, Employment and Labour Relations Court Registry to Nairobi for this purpose. Hearing shall be before any Judicial Officer of this court. Each party shall bear their own costs.

Delivered in open Court, dated and signed at Nairobi on this 28th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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