



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**PETITION NO. 1 OF 2013**

**STEVEN GEORGE AND 64 OTHERS.....PETITIONERS**

**-VERSUS-**

**KAISUGU LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR LABOUR.....3<sup>RD</sup> RESPONDENT**

**-AND-**

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.....INTRESTED PARTY**

**(Before Hon. Justice Byram Ongaya on Friday 4<sup>th</sup> October, 2013)**

**JUDGMENT**

The Petitioners filed a petition entitled as the statement of claim on 08.02.2013 through Chigiti & Chigiti Advocates. The 1<sup>st</sup> to 64<sup>th</sup> petitioners are all former employees of the 1st respondent. The 65<sup>th</sup> petitioner is the Kenya Human Rights Commission.

The 1<sup>st</sup> Respondent **Kaisugu Limited** appointed Kiplenge & Kurgat Advocates on 12.03.2013 to act for it in the case. The 2<sup>nd</sup> respondent **the Attorney General** and the 3<sup>rd</sup> respondent **the Minister for Labour** filed their grounds of Opposition and submissions on 15.04.2013 through Kaumba Samwel Odiwuor, Litigation Counsel and on behalf the Attorney General acting for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The 1<sup>st</sup> respondent filed the statement of response on 15.04.2013 together with a list of 8 witnesses and prayed that the petitioners' case be dismissed with costs.

The petitioners filed the amended statement of claim on 29.04. 2013 and prayed for:

- a. **A declaration that the respondent's conduct , acts and or omissions are unlawful, illegal and or unfair and the same violates Article 27, 28, 29, 40, 41 and 43 of the Constitution and the same violates the sections of the Employment Act cited in the statement of claim.**
- b. **A declaration that failure by the 1<sup>st</sup> Respondent to issue casual workers with written contracts amounts to a violation of Article 41 and 47 of the Constitution.**
- c. **Compensation of petitioners 1 through to 64 on the said violations under Article 23 of the Constitution.**
- d. **An order that the 1<sup>st</sup> respondent do compute and pay the petitioners 1 through to 64 their**

**dues and leave days' dues for the years worked.**

- e. **An order directing the 1<sup>st</sup> respondent to issue all its casual workers with written contracts making them permanent after the statutory three months of service.**
- f. **A declaration that the petitioners are entitled to access to information under Article 35.**
- g. **Costs.**
- h. **Or that such other orders as this honourable court shall deem just and fit to grant.**

The 1<sup>st</sup> respondent filed on 11.06.2013 the further list of documents and a response to amended statement of claim.

Directions for hearing of the case were taken on 12.06.2013. Upon hearing the respective advocates for the parties, the court ordered:

**“By consent, hearing on 23.07.2013 at 9.00 am. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents at liberty to file a memorandum of response and to serve by close of 21.06.2013. Case is allocated 3 hours for hearing.”**

On 23.07.2013, parties attended court ready for the hearing. The interested party was enjoined. The advocate for the petitioners was ready for the hearing with 5 witnesses and the 1<sup>st</sup> respondent's advocate was ready with 8 witnesses. The petitioners' witnesses gave evidence and when the turn for the 1<sup>st</sup> respondent came to give evidence, the witnesses were absent and no reason was advanced for that turn of events. The case was closed and by consent of the parties, directions were made for filing of submissions. Despite the consent order on the submissions, the 1<sup>st</sup> respondent failed to file and serve the submissions.

The claimant's witnesses included Daniel Ochieng' Ooko being petitioner No.47 (**PW1**), Grace Atieno Otieno, petitioner No.64 (**PW2**), Pius Oyier Opilla, petitioner No.24 (**PW3**), Hellen Chepkoskei, petitioner No.41 (**PW4**), and Isaac Ogolla Were, petitioner No.45 (**PW5**). The evidence was given by these witnesses on their own respective behalf and on behalf of all the other witnesses. The evidence was as follows:

- a. Each of the petitioners, except petitioner No. 65, was at all material time employed by the 1<sup>st</sup> respondent without any letter of appointment and for a tenure that was not stated by the respondent at the time of engagement. The contracts of employment were therefore oral for each of the claimants.
- b. The petitioners served the 1<sup>st</sup> respondent in the capacity either to pluck tea or as tea factory workers and for a long term of service without a break and in all their cases for unbroken service of more than three months so that their terms of service converted to permanent service under the provisions of the Employment Act, 2007.
- c. The respondent terminated the employment of the petitioners in February 2012 without any notice and without invoking due process as prescribed in law.
- d. For the petitioners who worked in the factory they were asked to check the list of names at the noticeboard and if the employee's name was missing, the 1<sup>st</sup> respondent's management informed the employee to consider the employment terminated indefinitely. The notice as posted did not state the reason for termination of the affected employee. The witnesses stated that they were verbally informed by their respective supervisors that the reason for termination was that work had reduced.
- e. For the petitioners employed to pick tea, they were approached and given folded papers bearing the writings “**Yes**” and “**No**”. The affected petitioner was asked to pick any of the papers randomly. It was the evidence that one who picked the piece of paper written “**No**” were informed by the supervisor that the employment had been terminated on account of reduced work due to reduced rains. Such petitioner was to “**go home**” until when the rains would increase. They were never recalled even when the long rains came to fall.
- f. The petitioners' evidence was that prior to the termination, they were housed in the respondent's staff residential houses. After the termination, the respondent evicted them without any notice and

in an inhuman and degrading manner under which some of their households were lost and their children's education suddenly disrupted. PW4's account of the eviction was as follows:

**“I resided in Kaisugu’s residential estate. I was in house No.120. I was staying with a co-worker, a lady. I did not know my misconduct. I was not given any notice but I was evicted. Five people came. They were two house officers and security officers. They locked the door. They locked in my households. In the evening, they threw out my property. I took some. Others got lost. I was seriously pained and injured.”**

- g. The witnesses also testified that after the termination, they were not paid any terminal dues including the 10 or 11 days they had worked in the month of February 2012. Further, while in the employment, the 1<sup>st</sup> respondent failed to remit their respective National Social Security Fund (NSSF) dues as prescribed in the relevant statute. They were not paid any severance or service pay.
- h. The evidence shows that the 1<sup>st</sup> respondent did not accord the petitioners their due annual leave as prescribed in the Employment Act, 2007.
- i. The petitioners sought and obtained the assistance of the 65<sup>th</sup> petitioner, the Kenya Human Rights Commission, to assist them undertake the litigation to enforce their fundamental rights and freedoms by filing the petition.
- j. The Yes-No selection criteria used in the redundancy procedure was unfair because last in first out principle was not adhered to, the ballot papers were privately prepared by the 1<sup>st</sup> respondent, and the petitioners were not accorded natural justice as envisaged and provided for in Articles 27, 41, and 47 of the Constitution. Those petitioners whose names were conveyed on the notice boards were not heard at all and had no notice of the termination.
- k. The 1<sup>st</sup> respondent had no intention of recalling the petitioners' whose employment was terminated because the respondent had already evicted them from the staff residential houses.

The court has considered the pleadings and documents filed for the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent's case is as follows:

- a. The petitioners' case is defective in form and substance. The 1<sup>st</sup> respondent has not elaborated the grounds in support of the averment.
- b. The respondent has denied violation of the Petitioners' rights and freedoms as claimed.
- c. The respondent is a member of the Kenya Tea Processors Association (KTGA) and is bound by the collective agreement between KTGA and the Kenya Plantation and Agricultural Workers Union (KPAWU). The collective agreement applies to both permanent and temporary staff. The petitioners were bound by the collective agreement. The respondent has remitted the union dues to the KPAWU and to the Central Organisation of Trade Unions (COTU) as per the Labour Relations Act, 2007.
- d. In January 2012 and for about two months thereafter, there was serious drought characterized with decrease in tea production by about 89.7%. Hence, the 1<sup>st</sup> respondent was forced to lay off some of its workers to be reinstated once production improved in the month of May 2012. The petitioners failed to turn up for the re-engagement.
- e. The 1<sup>st</sup> respondent in paragraph 20 of the response to claim stated thus, **“20. The 1<sup>st</sup> Respondent in deciding who was to be laid off used a very ingenuous, transparent and democratic probability method of picking marked ballots papers marked either YES or NO whereby those who picked NO were to be laid off and would be employed back once the production improved.”**
- f. That upon resumption of the rains after April 2012, the respondent put up notices for the employees who had been laid off to resume work in May 2012. The respondent met the union officials on 2<sup>nd</sup> July, 2012 but some employees including the petitioners and being over 100 did not resume. Thus, the respondent employed other persons to ensure continuous production.
- g. The respondent remitted the NSSF dues as required by statute.
- h. The spouses of some of the petitioners are employees of the 1<sup>st</sup> respondent and they reside in the

respondent's staff residential estate so that the allegations of forceful evictions were not true.

The 1<sup>st</sup> respondent did not avail its witnesses as per the directions for the hearing and as already explained earlier in this judgment.

The court has considered the issue of form and substance in the manner the petitioners approached the court and as raised by the 1<sup>st</sup> respondent and finds that the respondent is deemed to have abandoned that line of pleading especially in absence of submissions to urge that ground. The court has considered the pleadings and documents filed in this case and find that no party has been prejudiced in view of the manner the petitioners invoked and moved the court's jurisdiction.

The issues and questions for determination in the case are as follows:

1. **Whether the petitioner's employment converted to permanent service under the Employment Act, 2007.**
2. **What are the circumstances and reasons for the termination of the petitioners' employment?**
3. **Whether the petitioners were unfairly terminated from employment.**
4. **Whether the petitioners are entitled to the remedies as prayed for.**

There is no dispute that the petitioners were engaged on temporary basis and as per short term contracts that the 1<sup>st</sup> respondent renewed with the consequence that the petitioners served for tenures of more than a month and without a break with respect to work spanning for more than 3 months. The respondent paid the petitioners' wages on monthly basis. To answer the first issue, the court finds that the petitioners' employment converted as per section 37 of the Employment Act, 2007, to permanent terms subject to the minimum terms and conditions of service prescribed under the Act.

What are the circumstances and reasons for the termination of the petitioners' employment? There is no doubt that the reason for termination of the petitioners' employment was lack of work due to a dry season that occasioned the substantial decline in tea production. The court finds that the circumstance clearly fits a redundancy situation. Section 2 of the Employment Act, 2007 defines redundancy thus: **"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.**

Accordingly, the court finds that the petitioners lost their employment on account of redundancy.

The third issue for determination is whether the petitioners were unfairly terminated from employment. Section 40 of the Act provides for the procedure the employer should invoke in event of redundancy. The section provides as follows,

**"40.(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -**

- (a) **where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy:**
- (b) **where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer ;**
- (c) **the employer has, in the selection of employees to be declared redundant had**

**due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**

**(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

**(e) the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash;**

**(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**

**(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

**(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part IX in which case that Part shall be applicable.**

**3. The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.”**

The court finds that the 1<sup>st</sup> respondent did not comply with the provisions of the section in terminating the petitioners' contracts on account of redundancy. In particular, the 1<sup>st</sup> respondent:

- a. did not serve the petitioners with the prescribed redundancy notice;
- b. invoked the ballot system of YES-NO instead of applying the objective criteria entailing consideration of seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy; and
- c. did not pay the petitioners the dues as prescribed in the section.

The court finds that the termination was unfair because the 1<sup>st</sup> respondent did not comply with provisions of the section.

The final issue for determination is whether the petitioners are entitled to the remedies as prayed for. The court makes the following findings:

- a. The petitioners prayed for a declaration that the respondent's conduct , acts and or omissions are unlawful, illegal and or unfair and the same violates Article 27, 28, 29, 40, 41 and 43 of the Constitution and the same violates the sections of the Employment Act cited in the statement of claim.

Article 27 entitled the petitioners to equal protection of the law; equality to full and enjoyment of all rights and fundamental freedoms; and freedom from discrimination. The court holds that the petitioners were entitled to equal and full protection of section 41 of the Employment Act, 2007. The 1<sup>st</sup> respondent failed to accord the claimants such protection and the claimants are entitled as claimed.

Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected. The petitioners testified how they were unfairly evicted from their residence and their employment terminated without notice. Consequential to the termination, they suffered lack of livelihoods and their family life was rudely disturbed. The court finds they are entitled as prayed.

Article 29 provides for freedom and security of the person. The claimants have showed that they suffered psychologically and they were subjected to degrading treatment. The court finds they are entitled as prayed.

In the process of eviction, the petitioners demonstrated that they lost their private property and the court finds that the respondent violated Article 40 on protection of property. The court has already found that the 1<sup>st</sup> respondent failed to comply with section 40 on redundancy. Accordingly, the court finds that the respondent breached the petitioners' right to fair labour practices as protected in Article 41.

Article 43 entitled the petitioners as employees to highest attainable standard of health, accessible and adequate housing, and freedom from hunger and adequate food of acceptable quality, clean and safe water in adequate quantities, social security, and to education. It was submitted that if the 1<sup>st</sup> respondent intended to reengage the petitioners, then the petitioners should not have been evicted as the respondent had acted. The interested party submitted that the petitioners' right to work had been violated and denied in view of the ensuing termination. It was further submitted that the right to work is critical to realization of the rights protected in Article 43 and more particularly the realization of the rights to life, food, housing, education, health and water. The court agrees and finds that in this case, the 1<sup>st</sup> respondent without justification and due process breached the petitioners' enjoyment of the Article 43 rights and freedoms.

Accordingly, the court finds that the petitioners are entitled as prayed for.

- b. The petitioners have prayed for a declaration that failure by the 1<sup>st</sup> Respondent to issue casual workers with written contracts amounts to a violation of Article 41 and 47 of the Constitution. The court has considered the prayer and holds that section 8 of the Employment Act, 2007 provides that the Act provides that it applies to both oral and written contracts of employment. Thus, in strict application of that section, it is not unfair labour practice for parties in the employment contract to proceed and remain in employment relationship on the basis of an oral contract. The court finds that the petitioners are not entitled as prayed for.
- c. The petitioners have prayed for compensation of petitioners 1 through to 64 on the said violations under Article 23 of the Constitution. Further, they have prayed for an order that the 1<sup>st</sup> respondent do compute and pay the petitioners 1 through to 64 their dues and leave days' due for the years worked. The court has considered the prayers and finds that under Article 23 (3) (e), the petitioners are entitled to compensatory relief for the breach of their rights by the 1<sup>st</sup> respondent. The court holds that in this case the statutory policy guideline to the compensatory relief is provided for in section 49(1) (c) of the Employment Act, 2007. The claimants are also entitled to payment upon redundancy as provided for in section 40 of the Act. The court finds that the 1<sup>st</sup> to 64<sup>th</sup> petitioners are entitled to payment by the 1<sup>st</sup> respondent as follows:
  - i. twelve months gross salary at rate of last monthly pay for unfair termination and in view of the violations of the fundamental freedoms and rights;
  - ii. one month pay in lieu of the redundancy notice;
  - iii. pay for annual leave days due but not taken as at termination; and
  - iv. severance pay at 15 days per completed year of service.
- d. The petitioners have prayed for an order directing the 1<sup>st</sup> respondent to issue all its casual workers with written contracts making them permanent after the statutory three months of service. The court has considered the prayer and finds that parties are entitled to written or oral contracts. In the circumstances, the court finds that the prayer shall fail.
- e. The petitioners have prayed for a declaration that they are entitled to access to information under

Article 35. In view of the breaches established against the 1<sup>st</sup> respondent, the court finds that the petitioners are entitled to the prayer and in particular for proper realization of the entitlements found due to the petitioners in this judgment.

As the petitioners have substantially succeeded in their claims against the 1<sup>st</sup> respondent, the court finds that the 1<sup>st</sup> respondent is liable to pay the costs of the suit.

In conclusion, judgment is entered for the petitioners against the 1<sup>st</sup> respondent for:

- a. **a declaration that the 1<sup>st</sup> respondent's conduct , acts and omissions are unlawful, illegal and unfair and the same violated Articles 27, 28, 29, 40, 41 and 43 of the Constitution and the same violated section 40 of the Employment Act, 2007;**
- b. **the 1<sup>st</sup> to 64<sup>th</sup> petitioners be paid by the 1<sup>st</sup> respondent as follows:**
  - i **twelve months gross salary at rate of last monthly pay for unfair termination and in view of the violations of the fundamental freedoms and rights;**
  - ii **one month pay in lieu of the redundancy notice;**
  - iii **payment for days worked prior to the termination and not paid;**
  - iv **pay for annual leave days due but not taken as at termination; and**
  - v **severance pay at 15 days per completed year of service;**
- c. **the petitioners to compute the amount in (b) and serve the computation upon the 1<sup>st</sup> respondent within 14 days from the date of the judgment for hearing of any objections on a convenient date;**
- d. **a declaration that the petitioners are entitled to access to information from the 1<sup>st</sup> respondent under Article 35 of the Constitution and as necessary for full realization of this judgment;**
- e. **the 1<sup>st</sup> respondent to pay the amount in (b) by 1.12.2013 in default to pay interest at court rates till full payment; and**
- f. **the respondent to pay the petitioners' costs of the suit.**

**Signed, dated and delivered in court at Nakuru this Friday, 4<sup>th</sup> October, 2013.**

**BYRAM ONGAYA**

**JUDGE**