



**Busia Sugar Industry Limited & 2 others v Kenya National Highways Authority & 2 others  
(Constitutional Petition E009 of 2022) [2023] KEHC 277 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 277 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CONSTITUTIONAL PETITION E009 OF 2022**

**JN KAMAU, J**

**JANUARY 24, 2023**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS AS ENshrINED UNDER ARTICLES 20, 21, 22, 23, 24, 40 AND 259 (1) OF THE  
CONSTITUTION OF KENYA AND IN THE MATTER OF DOCTRINE OF LEGITIMATE  
EXPECTATION AND IN THE MATTER OF FLAGRANT DISREGARD OF COURT ORDERS**

**BETWEEN**

**BUSIA SUGAR INDUSTRY LIMITED ..... 1<sup>ST</sup> PETITIONER**

**MOSES ODUORY OBARA ..... 2<sup>ND</sup> PETITIONER**

**ALI AHMED TAIB ..... 3<sup>RD</sup> PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**GOKHAN & MASTER SPACE JV LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. In its notice of motion dated August 22, 2022 and filed on August 25, 2022, the 1<sup>st</sup> respondent herein sought orders that pending the hearing and determination of the present application, the court do stay execution of and set aside the order that was issued by the lower court at Busia Law Courts on April 22, 2022 and August 19, 2022 directing that Motor Vehicle Registration Number KCF 439R (hereinafter referred to as “the subject Motor Vehicle”) which had been held as evidence in the Traffic Courts in Nyando Law Courts, Naivasha Law Courts, Eldoret Law Courts, Kikuyu Law Courts, Mumias Law Courts and this court whose Ruling for its release was scheduled for January 24, 2023. It also sought



- an injunction barring the Petitioner from filing any additional matters in respect to the subject Motor Vehicle in gross abuse of the court process (sic).
2. Eng Michael Ngala, the 1<sup>st</sup> respondent's Assistant Director, Axle Load Control, swore an affidavit in support of the said application on August 22, 2022. The 1<sup>st</sup> respondent averred that on June 27, 2022, this court declined to grant the petitioners' request to have the subject Motor Vehicle released pending delivery of the aforesaid ruling.
  3. It stated that on July 28, 2022, the petitioners served it with a notice to show cause why legal action should not be taken against its Director General, Eng Kungú Ndungú citing disobedience of the order of April 22, 2022 that was issued at the Chief Magistrate's Court at Busia. It pointed out that the petitioners being fully aware of the present proceedings, failed and/or refused to include it as a party in the proceedings in the lower court.
  4. It contended that on August 11, 2022, it objected to the said notice which was set aside and it was directed to file a response to the Petitioners' application in the lower court. It stated that it filed its replying affidavit on August 19, 2022 and that despite informing the lower court that the petitioners had sought similar matters in this court, the lower court ordered that it release the subject Motor Vehicle within five (5) days of its order.
  5. It averred that if the said orders were not stayed, they had the possibility of embarrassing this court when it delivered its Ruling on January 24, 2023 and also threatening the sub stratum of the matter that was before this court. It therefore sought that this court grants an order staying the said orders.
  6. In opposition to the said application, on September 30, 2022, the 2<sup>nd</sup> petitioner swore a replying affidavit. The same was filed on even date.
  7. He averred that he was the 1<sup>st</sup> petitioner's driver. He contended that the court could not gag any orders issued by any other court without following procedural law. He was emphatic that this court was not seized of jurisdiction to stay the orders that were issued in Busia CMC Misc TR No 45 of 2022 and that the said orders could only be stayed by way of review, judicial review and/ or appeal. He added that there were no orders of April 22, 2022 and the same were non-existent. He wondered aloud where the 1<sup>st</sup> respondent got the same from.
  8. It was his averment that the 1<sup>st</sup> Respondent was exhibiting impunity by muddling up otherwise explicit court orders to the detriment of the Petitioners. He termed the present application an abuse of the court process and urged this court to dismiss the same with costs to them.
  9. The 1<sup>st</sup> respondent's Written Submissions were dated September 14, 2022 and filed on September 16, 2022. The Petitioners' Written Submissions were dated and filed on September 30, 2022. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in the proceedings herein. This ruling is based on the said written submissions which parties relied upon in their entirety.

## Legal Analysis

10. The 1<sup>st</sup> Respondent relied on the case of Kenya Bankers Association vs Kenya Revenue Authority [2019] eKLR where the court in dealing with the issue of res sub judice, stated that the word "matter" did not mean legal proceedings but rather the subject matter for determination in a legal proceeding. It submitted that the rationale of the res sub judice rule was to prevent a situation of conflicting orders emanating from two (2) or more different courts as was also held in the case of *David Ndi & others vs Attorney General & others* [2021] eKLR.



11. It also relied on the case of Otieno Clifford Richard vs Republic [2006] eKLR where it was held that leave must first be obtained before a private person could conduct a private prosecution. It urged this court to strike out Busia Miscellaneous Traffic Application No 46 of 2022 Busia Sugar Industries Ltd vs Republic for not having been instituted properly.
12. On their part, the Petitioners argued that Busia Miscellaneous Traffic Application No 46 of 2022 Busia Sugar Industries Ltd vs Republic was not part of the traffic cases. They averred that this court had unfettered discretionary powers to make such orders that meet the ends of justice in this matter.
13. Their further submissions that “The subject of this Petition and further all the traffic cases the subject of this court as from 25<sup>th</sup> April 2022 and annexed herein are copies:- (a) Notice of Motion dated 22<sup>nd</sup> April 2022 commencing Busia CMC Misc TR C No 45 of 2022 marked as “M O O 1” and (b) Copies of charge sheets commencing the subject of this petition marked “M O O 2 a, b, c, d, e, f and g. ... by holding on to the truck without express statutory provisions prohibiting on alleged traffic offender from maintaining the possession of a truck pending the leaving and final determination of the court proceedings” were not clear to this court.”
14. Having carefully considered the present application, this court noted found that the only prayer that was before it for determination was the one in which the 1<sup>st</sup> Respondent had sought that the Petitioners being barred from filing any additional matters in respect of the subject Motor Vehicle.
15. If the court was to grant the said order, it would amount issuing a gagging order in rem as there was a myriad of applications that could be made in respect of the subject Motor Vehicle. The prayer was couched in an amorphous manner that if granted, it had the potential to cause great injustice to the Petitioners herein.
16. Having said so, in view of the res sub judice rule, the Petitioners could not seek any of the following prayers they had sought in the present Constitutional Petition herein in any other court while the Petition herein was pending hearing and determination.
  - a. A Declaration that the Petitioners’ fundamental rights and freedoms had been contravened and infringed upon by the Respondents.
  - b. A Declaration that;
    - i. Mumias Pmc Tr Case No E037 Of 2022
    - ii. Mumias Pmc Tr Case No E038 Of 2022
    - iii. Eldoret Cmc Tr Case No E434 Of 2022
    - iv. Eldoret Cmc Tr Case No E435 Of 2022
    - v. Nyando Pmc Tr Case No E066 Of 2022
    - vi. Nyando Pmc Tr Case No E067 Of 2022
    - vii. Kikuyu Pmc Tr Case No E126 Of 2022are unconstitutional, a violation of human rights and such the proceedings therein be quashed.
  - c. An Order for compensation of the Petitioners by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the sum of Kenya Shillings Ten Million (Kshs 10,000,000/=) in loss of profits, general damages and punitive damages.



17. Going further, as the Petitioners' Notice of Motion application dated and filed on 10<sup>th</sup> May 2022 was awaiting delivery of a Ruling by this court, they could not seek any of the following prayer in any other court:-
2. Pending the hearing of this application inter partes, a Release Order do issue that Motor Vehicle Registration Number KCF 439 R Mercedes Benz Lorry pulling trailer Reg No ZF 5310 be released unconditionally to the Petitioners.
  3. Pending the hearing and determination of this petition the honourable court be pleased to issue a conservatory order staying the hearing of the following matters:-
    - i. Mumias Pmc Tr Case No E037 Of 2022
    - ii. Mumias Pmc Tr Case No E038 Of 2022
    - iii. Eldoret Cmc Tr Case No E434 Of 2022
    - iv. Eldoret Cmc Tr Case No E435 Of 2022
    - v. Nyando Pmc Tr Case No E066 Of 2022
    - vi. Nyando Pmc Tr Case No E067 Of 2022
    - vii. Kikuyu Pmc Tr Case No E126 Of 2022
18. Notably, when the matter came before the court on May 26, 2022, 1<sup>st</sup> respondent was not opposed to the aforesaid cases being stayed pending the hearing and determination of the Petition herein. However, it objected to the said subject Motor Vehicle being released pending the hearing and determination of the Petition herein.
19. When the matter came up in court on July 27, 2022, this court sought to know if the petitioners could deposit the amount they were being charged for the excess weight in an escrow account to facilitate the release of the subject Motor Vehicle. This was a proposal that was agreeable to the 1<sup>st</sup> respondent herein. However, the Petitioners rejected the proposal and demanded that the subject Motor Vehicle be released unconditionally.
20. As ordering the release of the subject Motor Vehicle unconditionally would have amounted to making a decision without first having given the 1<sup>st</sup> respondent an opportunity to argue the prayer formally, the prayer having been a substantive issue in the petitioners' Notice of Motion application dated and filed on 10<sup>th</sup> May 2022, this court declined to order the release of the subject Motor Vehicle. Indeed, the petitioners cannot have their cake and eat it too.
21. It therefore followed that the order that was issued on August 19, 2022 by Hon P.A. Olengo SPM directing that the said subject Motor Vehicle be released contravened the res sub judice rule. This court had made a specific order relating subject Motor Vehicle as did the lower court.
22. notably, section 6 of the [Civil Procedure Act](#) cap 21 (Laws of Kenya) stipulates that:-
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



23. This court did not wish to analyse into the question of whether or not the Petitioners had undertaken a private prosecution as it was not clear whether the Prosecution was aware of their application at the lower court but failed to attend court resulting in the orders that were issued on August 19, 2022.
24. Suffice it to state that this court had made a specific order relating subject Motor Vehicle as did the lower court. This court was superior to the lower court and having issued an order earlier, the lower court was bound by its decisions of July 27, 2022. It is important to point out that his court did not see the order of April 22, 2022 that the 1<sup>st</sup> Respondent had alluded to in its present application. What the court noted from the order of Hon P. A Olengo SPM Busia was that the application dated April 22, 2022 was to be heard on September 2, 2022.
25. Notably, the petitioners filed the present Petition in this court thus subjecting themselves to its jurisdiction of this court. In any event, the Petitioners wished to have Nyando PMC TR Case No E066 of 2022 and Nyando PMC TR Case No E067 of 2022 at Nyando Law Courts stayed. The Petitioners could not therefore approbate and reprobate on the issue of jurisdiction of this court. This court was thus well seized of the dispute relating to the subject Motor Vehicle and could therefore make orders relating to it.
26. There is therefore no doubt in the mind of this court that the petitioners' application at the lower court was forum shopping having failed to secure the release of the subject Motor Vehicle from this court on July 27, 2022. The application that was filed in the lower court was an abuse of the court process.
27. Whereas none of the orders the 1<sup>st</sup> respondent had sought in its application could be granted in view of the manner in which the same had been couched, this court could not sit back and helplessly watch the petitioners abuse the court process. They could not purport to go to a court in another jurisdiction obtain orders in respect of the same vehicle that was the subject of the proceedings in this court then argue that this court did not have jurisdiction to make orders relating to the same. This court had inherent powers to make such orders as may be necessary for the ends of justice.
28. Indeed, section 3A of the *Civil Procedure Act* provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
29. Although this court had inadvertently reserved the ruling of the present application for April 26, 2023, this court deemed it prudent to render its decision while delivering its decision in respect of the petitioners' notice of motion application dated and filed on May 10, 2022 as the same were intertwined and related to the same issue. It was necessary to put the interlocutory issues between the parties to rest as this matter had taken a bit of time to be resolved in view of its very contested nature.

## **Disposition**

30. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> respondent's notice of motion application dated August 22, 2022 and filed on August 25, 2022 was not merited and the same be and is hereby dismissed.
31. However, pursuant to powers bestowed on this court by the law, it is hereby directed that the order of August 19, 2022 issued in Chief Magistrate's Court at Busia in Misc Traffic Case No 45 of 2022 be and is hereby stayed pending the hearing and determination of the petition herein.
32. Costs of this application will be in the cause.



33. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY 2023**

**J. KAMAU**

**JUDGE**

