



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW MISC. APPL. NO. 11 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

REPUBLIC..... APPLICANT

VERSUS

THE CABINET SECRETARY MINISTRY OF AGRICULTURE,

LIVESTOCK AND FISHERIES.....RESPONDENT

JOHNSTONE OCHIENG OTIENO.....EX-PARTE

JUDGMENT

The court has been moved by one **JOHNSTONE OCHIENG OTIENO**, a resident of Chiga, which is situated within the Miwani area of Kisumu County.

1. The Applicant described himself as a sugarcane farmer. In that capacity, he draws some benefits from the running and the operations of the state-owned sugar factories within the Western part of Kenya, namely;

i. Nzoia Sugar Company Limited;

ii. Chemelil Sugar Company Limited;

iii. Miwani Sugar Company Limited

(In Receivership);

iv. Muhoroni Sugar Company Limited

(In Receivership); and

v. South Nyanza Sugar Company Limited

2. In particular, the Applicant stated that the factories activities included the cultivation of sugarcane through contracts by farmers; and processing of sugarcane.

3. He pointed out that the factories were involved in the development of the sugarcane farms; the farming of sugarcane as a cash crop; the generation of revenue and income from the purchase of sugarcane and later the sale of processed products; the development of social amenities such as dispensaries and health centres; development of sports facilities such as stadia; the sponsorship of community projects such as schools and community social halls; and the direct and indirect provision of employment.

4. As a consequence of the activities undertaken by the factories, the Applicant intimated that the residents of the regions within which the said factories were located, had a direct interest in the factories, as the factories had both direct and indirect implications on their livelihoods.

5. It was within that context that the Applicant took a keen interest in an advertisement in the “Daily Nation” newspaper of 10th July 2020, through which the Respondent invited bids by way of International Expression of Interest [IEOI] for the proposed long term leases of the 5 Sugar Factories.

6. The Applicant pointed out that by a Special Issue of the Kenya Gazette dated 3rd August 2020, the Respondent revoked the appointment of the members of the Boards of Management of Nzoia Sugar Company Limited, the Chemelil Sugar Company Limited and the South Nyanza Sugar Company Limited.

7. 4 days later, on 7th August 2020, the Respondent appointed an Interim Management Committee to run and to oversee the operations of the 5 factories. The appointment was effected through Gazette Notice No. 5473, dated 7th August 2020.

8. It was the Applicant’s case that;

“..... the advertisement calling for bids for long term leasing of the said factories, the revocation of the appointment of the members of the Management Boards of some of the said factories/companies and subsequent appointment of an Interim Management Committee:-

(f) Was done unilaterally and without involving the factories/companies.

(g) Was carried out/done without public participation.

(h) Is unconstitutional as it shall lead to the breaching of the rights of those whose livelihood is to be adversely affected.

i. Was done without obtaining and Appreciating an Environmental Impact Assessment Report on the effects of the intended long term leasing of the factories/companies.

(j) Does not take into account the effect of the workforce and hence a breach of the rights of employees and hence unfair labour practices.”

9. The Applicant’s position was that, the very least that has to be demanded from the Respondent was that he accords to the public, a chance of being heard, so as to ensure that the process takes into account the interests of all the persons likely to be affected by the Respondent’s intended actions.

10. Although the Respondent, the Cabinet Secretary Ministry of Agriculture, Livestock and Fisheries was duly served, he did not file either a Replied Affidavit or any other answer to the Application.

11. After taking into account the Applicant’s affidavit, together with all the documents annexed thereto, and also bearing in mind the Respondent’s decision to refrain from challenging the said evidence, I find that the Applicant’s case is uncontroverted.

12. I find that the decision to remove the 5 sugar factories from the control of the state, and to private hands, who would lease them for a period of 25 years, would have a profound direct and indirect impact on the Applicant and the residents of the regions where the said factories are located.

13. Indeed, the Respondent indicated, in the advertisement carried by the “Daily Nation” dated 10th July 2020, that the sugar industry in Kenya plays a significant role in the country’s socio-economic development, including food security, employment creation, rural development and providing a source of livelihood for more than 8 Million Kenyans.

14. Of particular note is the acknowledgement that the sugar industry is a source of income for more than 400,000 small-holder farmers, who supplied over 90% of the milled cane.

15. In the circumstances, any change that would impact directly or indirectly upon such a critical mass of people requires the consultation with the people.

16. It is on record that the Consultative Meeting on the Implementation of the Sugar Task Force Report, which was held on 22nd July 2020, expressed the concern that the proposed Leasing Process had not been open and consultative with all the critical stakeholders.

17. The said Consultative Meeting was attended by H.E. Oparanya, the Governor of Kakamega County; H.E. Prof. Nyong’o, the Governor of Kisumu County; H.E. Chepkwony, the Governor of Kericho; and H.E. Prof. Ngome, the Deputy Governor of Bungoma County.

18. One of the issues raised by the said meeting was about the need to bring on board all multisectoral stakeholders, so as to make the process an inclusive one.

19. After the Consultative Meeting, H.E. Oparanya who is the Chairman of the Lake Region Economic Bloc, together with H.E. Prof. Nyong’o the Governor of Kisumu County wrote to Hon. Peter Munya who is the Respondent herein: the said letter is dated 22nd July 2020.

20. The gist of the message in that letter was that the Respondent was requested to suspend the process for the proposed leasing of the 5 Sugar factories, as the said process had not been open and consultative.

21. Notwithstanding the request for the suspension of the process, so that all stakeholders could be brought on board, the Respondent went ahead to gazette the appointment of Members of the Interim Management Committee on the Leasing of the 5 State-owned Sugar Mills.

22. I find that the Applicant was entitled, in the said circumstances, to seek the intervention of the court. I so hold because by dint of the provisions of **Article 10 (1)** of the **Constitution of the Republic of Kenya**, the National Values and Principles of Governance bind all State Organs, State Officers, Public Officers and all other persons whenever any of them, (inter alia) makes or implements public policy decisions.

23. Pursuant to **Article 10 (2)** of the **Constitution**;

“The national values and principles of governance include –

a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

b.

c. good governance, integrity, transparency and accountability; and

d. sustainable development.”

24. To the extent that the Respondent failed to demonstrate that there had been public participation in the process, I find that the constitutional rights of the Applicant had been violated.

25. In that respect, I wish to reiterate the following words which were pronounced by the Court in **COALITION FOR REFORM AND DEMOCRACY (CORD) & ANOTHER Vs THE REPUBLIC OF KENYA & ANOTHER (2015) eKLR**;

“Our Constitution, having been enacted by way of a referendum, is the direct expression of the people’s will and therefore all State Organs, in exercising their delegated powers must bow to the will of the people as expressed in the Constitution.”

26. It is the will of the people to be consulted when any State Organ, State Officer or Public Officer was either making or implementing public policy decisions.

27. In the case of **REPUBLIC Vs THE ATTORNEY GENERAL & ANOTHER Ex PARTE HON. FRANCIS CHACHU GANYA, JUDICIAL REVIEW MISC. APPLICATION NO. 374 OF 2012**, the Court said;

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended, and the public be afforded a forum in which they can adequately ventilate their views.”

28. In this case, the Respondent indicated that his actions had an objective which might appear to have good intentions. I say so because in the advertisement through which the Respondent sought International Expression of Interest for leasing and operating each of the 5 state-owned sugar factories, it was stated thus;

“The objective is to facilitate turn-around of these sugar companies to profitability through modernization and efficient management which will in turn enhance competitiveness in Kenya, EAC, COMESA, and the global sugar market.”

29. It matters not that the Respondent may have had noble intentions, when he set in motion the process of leasing out the 5 sugar factories.

30. Ngcobo J. held as follows in the case of **MATATIELE MUNICIPALITY AND OTHERS Vs PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS [2006] ZACC 12**;

“As has been observed, a ‘commitment to a right to public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect.”

31. By making decisions that are of public policy, without giving an opportunity for those likely to be impacted by such decisions, the person making the said decisions could be deemed to have ignored the very people who would be affected by the decisions.

32. When it is borne in mind that all sovereign power belongs to the people of Kenya, who have chosen to delegate their power to State Organs, it is a violation of the Constitution to ignore the view of the people, when making policy decisions that impact their livelihoods.

33. In this case the decision made by the Respondent, to lease out the 5 sugar factories for a period of 25 years each, shall doubtlessly impact the livelihoods of the sugarcane farmers and also of other people who live within the regions where the said factories are located.

34. It was imperative that the Respondent ought to have recognized the right of the people to participate in the process, and also to have provided a reasonable opportunity for the said public participation.

35. As the people were not accorded the opportunity for public participation, I find that the decision to invite bids by way of an International Expression of Interest for the long-term leasing of the 5 sugar factories was made without compliance with due process. The same is therefore quashed.

36. Finally, it is directed that the Respondent should ensure that a reasonable opportunity is made available for public participation, in the process of determining the appropriate policy decision and also in determining how best to implement such decision.

37. On the issue of costs, I appreciate that this is a Public Interest litigation, and I therefore order each party to meet his own costs.

DATED, SIGNED and DELIVERED at KISUMU This 27th day of January 2021

FRED A. OCHIENG

JUDGE