REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO. 1 OF 2021

NZOIA OUTGROWERS CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

NZOIA SUGAR CO. LTD.....DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant's application dated 30th March, 2021 expressed to be brought under the provisions of Sections 3, 3A and 63(e) of the Civil Procedure Act and Order 40, Rules 1, 2 and 3 of the Civil Procedure Rules seeks;

1. That this honourable court be pleased to temporarily restrain the respondent by itself, its servants or agents from withholding 1% Capital Levy deducted from farmers' cane proceeds pending the hearing and determination of this application.

2. That this court orders the respondent to release immediately half of the withheld Capital Levy since March 2020 to date to the applicant pending hearing and determination of this application.

3. The respondent be ordered to render an account of all payments of cane proceeds to farmers since March 2020 to date and the 1% Capital Levy thereof be deposited in court pending hearing and determination of suit.

4. Costs herein be provided for.

The application is supported by the grounds in the face of the motion and the applicant's General Manager's affidavit.

The applicant depones that it is a Company Limited by Guarantee comprising of 11 Board Members drawing its members from all Sugar Cane Farmers contracted to Nzoia Sugar Company.

The applicant depones that the respondent has been ordinarily remitting Capital Levy which is 1% of the farmers cane produce which it claims were suddenly stopped without notice to it causing its operations such as salaries, wages, servicing of loans and credits, legal fees and general duties to collapse.

That the said Capital Levy fees which hitherto was being released fortnightly has never been remitted since March 2020 resulting in workers going on strike and abandoning duties. That the levy has never been disputed or opposed by the farmers.

The application is opposed. The respondent depones that the parties herein entered into an agreement on 11th October, 1999 recognizing one another as partners which agreement was terminated on 22nd December, 2010 and has not been renewed to date.

That since the termination of the agreement, there is no legal frame work for deduction of the 1% levy from farmers without their consent.

That the respondent has received several complaints from farmers complaining about any deductions of their money and remitting to the applicant. The last of such deductions was made on 10/4/2020 and as such there is no money to be remitted to the applicant.

The applicant subsequently filed its submissions reiterating the facts leading up to the dispute. The applicant urges this court to grant the reliefs sought as it risks closing shop due to lack of funds which it alleges are withheld by the respondent.

The respondent equally filed their submissions which the court has given the due consideration.

The single issue that falls for determination by the court at this interlocutory stage is whether the applicant is entitled to the orders sought.

The principles for granting an injunction are well established in the often cited case of ***Giella Vs Cassman Brown (1973)E.A 358*** where it was held;

> ***The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.***

The role of this court at this stage were articulated by Nyakundi J. in in ***Royal Mabati Factory Limited V Imarisha Mabati Limited [2018] eKLR*** where the learned Judge rendered herself thus:

> ***My role at this stage is to ensure that I do not embark on a journey resulting that of in depth analysis meant to be of a trial of the suit. This is indeed so given the fact that at this stage I have been presented with a rival affidavit evidence. I consider resolution of any disputes in the affidavit evidence and any difficult queries of the law to be a preserve of the main action.***
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> ***It is also a principle of law that in exercising discretion for grant of interlocutory injunction the court should take the approach that appears to carry what I can call a lower risk of injustice to either of the parties in the suit. I am therefore guided by the above principles in determining whether or not the applicant's Notice of Motion on interlocutory injunction should be granted pending the hearing and determination of the main suit.***

Firstly, on whether there exists a prima facie case with a probability of success; the dispute relates to monies allegedly withheld by the respondent which sum the applicant claims was deducted on its behalf by the respondent. The applicant contends that the respondent has failed or refused to remit the monies despite deducting the money from its members who supply cane to the respondent.

The respondent denies owing the applicant any money. The respondent contends that it stopped deducting the money from farmers on 10/4/2020 and therefore there is no money to be remitted to the applicant. It argues that the foundation of the deductions are found in an agreement which was subsequently terminated after several farmers complained and sought to stop the respondent from deducting any of their monies in favour of the respondent.

Considering the rival affidavits on record and the applying the case law cited above, this court is inclined to answer the first issue in the negative. That is, the applicant has not demonstrated a *prima facie* case with high chance of success. The answer to this question will be best answered when the parties' evidence will be put to test through cross examination on hearing of the main suit, when documents of the relationship or agreement will be tendered.

Turning to whether the applicant shall suffer irreparable loss not capable of being compensated for by way of damages. It is no doubt the genesis of the suit is money allegedly withheld by the respondent.

In the case of **Marple Brooks Projects Company Limited & another Vs I & M Bank Limited (2019) eKLR** while addressing the issue, the court held;

> ***"The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by Ringera J.A in the case of Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd 2002 2 KLR 207 was that "No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."***

The applicant's claim as can be seen from the plaint is monetary; which sum is ascertainable without much difficulty. The applicant does not aver that the respondent is at the verge of collapse or that it may not be able to pay the decretal sum if its suit is successful as against the respondent. As such the applicant has not demonstrated an injury it is likely to suffer which cannot be adequately compensated monetarily.

Since the two grounds enumerated above have not been demonstrated sufficiently, the third ground, that is, the balance of convenience falls by the wayside with the resultant order being that the application is dismissed with costs to the respondent.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF JUNE, 2021

S.N RIECHI

JUDGE