



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

(CORAM: CHERERE-J)

PETITION NO. 05 OF 2019

BETWEEN

KENYA UNION OF SUGAR PLANTATION

AND ALLIED WORKERS.....PETITIONER

AND

THE LAKE REGION ECONOMIC BLOC.....RESPONDENT

AND

KENYA SUGARCANE GROWERS ASSOCIATION....INTENDED INTERESTED PARTY

WEST KENYA SUGAR COMPANY LIMITED.....INTENDED INTERESTED PARTY

SUKARI INDUSTRIES LIMITED.....INTENDED INTERESTED PARTY

RULING

Introduction

1. By a Petition filed on 08th April, 2019, the Petitioner Declaratory orders that the respondent's authorization of construction of new weighbridges contravenes Article 26, 28, 40 as read with Article 260 and 43(e) of the Constitution and shall prejudice public interest and contravenes the objectives of the Crops Act, 2013. The Petitioner also sought an order of prohibition orders against the Respondent from authorizing the construction of new weighbridges and costs.
2. Simultaneously with the Petition, the Petitioner filed a notice of motion dated 04th March, 2019 seeking conservatory orders against the Respondent.
3. The Respondent entered appearance on 11th April, 2019 and on 26th April, 2019, the advocates for the Petitioner and the Respondent filed a consent dated 12th April, 2019 allowing the Petition with no order as to costs.
4. On 02nd May, 2019, **KENYA SUGARCANE GROWERS ASSOCIATION** brought a notice of motion seeking to be enjoined to this petition as a 2nd Respondent and for an order to set aside of the consent endorsed as the court judgment on 26th April, 2019. The notice of motion is based on the ground that the Association represents over 200,000 sugarcane growers and that the construction and non-construction of weighbridges which are used as the sugarcane selling points directly affects them thus the need for them to be accorded a hearing before a decision affecting them is made.
5. The Petitioner upon being served with the notice of motion dated 02nd May, 2019 filed a notice of Preliminary Objection on 09th May, 2019 asserting that the court is *functus officio* and lacks jurisdiction to hear and determine the notice of motion.
6. On 21st May, 2019, **WEST KENYA SUGAR COMPANY LIMITED** and **SUKARI INDUSTRIES LIMITED** filed notices of motion dated 17th May, 2019 similarly seeking to set aside the consent adopted as the court judgment on 26th April, 2019. The two companies contend that the Respondent is not a lawful party to the Petition and the petition seeks to criminalize and delegitimize their weighbridges

under a judicial action.

7. When the matter came up on 23rd May, 2019 for directions, I directed the parties to file written submissions on the Preliminary Objection which they dutifully filed.

8. I have considered the Preliminary Objection in the light of the Petition, the application dated 02nd May, 2019, the grounds of opposition and the written submissions and authorities cited by the respective parties.

9. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a “demurrer”. The *locus classicus* on Preliminary Objection is the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**, where Law J.A. stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. Sir Charles Newbold, President stated in the same judgment as follows: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. In **The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

12. The applicant’s application is in the form of review of this court’s judgment. Order 45 of the Civil Procedure Rules states as follows:

1. (1) Any person considering himself aggrieved-

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

13. It is apparent that the foregoing rule refers to any person and not necessarily parties to the suit. The Applicant is therefore properly before the court. Consequently, where a party contends that it has been condemned unheard, the court can never be *functus officio* nor can it down its tools on the ground that the party is not a party to the impugned proceedings. In any case, this court has unrestricted power to review its ruling and judgment where injustices have been alleged. (See **TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448**).

14. Further to the foregoing, the provisions of Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Ends of justice cannot be seen or be said to be done when an interested party is denied a right to a fair hearing guaranteed by Article 50(1) of the Constitution.

15. The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision. In **ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456**, Nyarangi, JA asserted at **page 459**:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”

16. At **page 460** the learned judge added:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

17. In **MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206**, at page 210, the Court of Appeal stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

18. From the foregoing analysis, I find that the question of whether or not the Applicant’s presence in this Petition is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter is a matter of fact and not a point of law that can be challenged by way of a Preliminary Objection.

DISPOSITION

19. The upshot of the foregoing is that the Applicant has *locus* to challenge the consent judgment in issue and the court has jurisdiction to entertain the application challenging the said consent judgment. Consequently, the preliminary objection lacks merit and is dismissed with costs to the Applicants.

20. For avoidance of doubt, this ruling applies *mutatis mutandis* to notices of motion dated 17th May, 2019 filed on 21st May, 2019 on behalf of **WEST KENYA SUGAR COMPANY LIMITED** and **SUKARI INDUSTRIES LIMITED**.

DELIVERED AND SIGNED AT KISUMU THIS 30th DAY OF May 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant	- Felix
For the Petitioner	- Mr Gichoba/Kibungei
For the Respondent	- Mr Ogwera/Ms Maua
For Kenya Sugarcane Growers Association	- N/A
For West Kenya Sugar Company Limited	- Mr Olendo
For Sukari Industries Limited	- Mr Kibe Mungai