



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO.17 OF 2017

NZOIA SUGAR COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

WEST KENYA SUGAR CO. LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 29th August 2017 seeking for orders that:-

(1) Spent

(2) That a temporary injunction be issued restraining the defendant/respondent, its servants and/or agents from purchasing sugarcane seed, harvesting sugarcane or in any other way interfering with the plaintiff/applicant's contracted growers within Bungoma, Webuye & Kakamega Counties pending hearing and determination of this suit.

(3) That the County Commissioner, Bungoma and the Officer Commanding Police Division (OCP|D) to enforce the said order.

(4) Spent

(5) Costs be provided for.

2. The application is based on the grounds that:

(a) The plaintiff/applicant has fully financed the growing of sugarcane within Bungoma, Webuye and Kakamega counties for its growers.

(b) The plaintiff/applicant is to harvest the cane to recover the finances incurred.

(c) The defendant/respondent is acting fraudulently and unlawfully in approaching the farmers to sell the cane to them.

(d) Unless the orders sought are granted, the plaintiff/applicant shall suffer substantial loss.

3. The applicant did attach to their application eleven copies of contracts with contracted farmers and 10 copies of acknowledgement of debit receipts from the contracted farmers as an indication that the applicant has been financing the farmers with money which ought to be recovered by the applicant when the cane is harvested.

The applicant also filed one affidavit of a farmer who was financed by the applicant but sold his cane to the respondent.

4. The application was opposed by the respondent through their grounds of oppositions dated 31st August 2013 and the replying affidavit of the respondent's *Managing Director, Tejveer Singh Rai*. The respondent opposes the application on the grounds that the suit herein is *res judicata* in that the applicant had instituted a similar suit vide *Bungoma CMCC No.476 of 2012, Nzoia Sugar Company Limited –vs- West Kenya Sugar Company Limited* in which it sought orders restraining the respondents from purchasing sugar cane from farmers within its area/zone. That the matter was determined in the respondent's favour.

5. Further that the instant suit is *sub judice* in that there is a similar case ongoing at Kakamega High Court vide *West Kenya Sugar Company Limited -vs- Nzoia Sugar Company; Civil Case No.326 of 2012*. That in that case *Hon. Justice Chitembwe* issued an order of injunction restraining the applicants from impounding the respondent's tractors. That granting the orders sought herein by the applicant would directly conflict with the orders already issued by the High Court.

6. The respondent further says that they are not a party to the cane farming and supply contracts between the applicant and its contracted farmers. That should the applicant have grievance with the cane farmers, the best party to sue would be the farmers. That in any event, clause 10 of the said contracts provides that any question or dispute arising between the parties ought to be submitted to Kenya Sugar Tribunal.

7. The respondent also says that there are no exclusive zones for millers as suggested by the applicant. That there is no law that prevents independent farmers from selling their sugar cane to anyone including the respondent.

SUBMISSIONS:

8. In her submissions, the advocate for the applicant, Mrs *Arunga* submitted that the issues in the Bungoma case were not the same as the issues in the present case. That the applicant is not a party to the suit pending at Kakamega High Court. Further that the issues they have raised in the present case arose in 2017 while other suits that came up in previous years were dealt with by the courts and orders issued to serve specific purposes. That any orders issued now will not be in conflict with any earlier order as the orders will be specific to the issues that have arisen.

9. The advocate further submitted that they have filed affidavits of growers who were financed by the applicant but delivered their cane to the respondent. Therefore that they have established a *prima facie* case with a probability of success. Further that the contracted farmers need not have been made parties as they have contracts with the applicant.

10. The advocates for the respondent *Ogejo, Olendo & Company Advocates*, on the other hand submitted that the orders being sought seek to restrain the respondents area of operation. That in the above stated matter *Hon. Justice Chitembwe* granted orders of injunction upto the year 2013. That since then there has been no zoning. That if the orders sought are granted they will be in conflict with the orders issued by Hon. Justice Chitembwe. Further that the issue of zoning was settled by a three-Judge bench sitting at Kakamega in 2014 when the bench ruled that zoning was against the law.

11. Further that the pending Kakamega High Court case raises the same issues as in this case. That in the case the applicant purported to stop the respondent from harvesting cane in Nzoia area. The court issued some orders which upto date have not been discharged. That if the orders sought are issued they will be in conflict with the orders already in force.

12. The advocates submitted that the applicant is seeking for temporary orders. That the plaint also seeks for temporary orders. There is no prayer for permanent injunction. Therefore that if the orders sought are granted, the case will have come to an end.

13. Further that the respondent is not privy to the contracts between the applicant and the farmers. That the applicant has not shown that the respondent was aware of the contracts and breached them. In any case the farmers are not parties to this suit. That no orders can be made affecting their rights without them being given an opportunity to be heard.

14. Further that under the Movable Properties Act, a right has to be registered with the registrar. That the applicant has not registered the contracts with the farmers with the registrar. The rights are thereby not enforceable.

That the applicant has only exhibited 11 contracts. The other contracts not exhibited cannot be injuncted.

15. The advocates for the applicants responded that the Movable Properties Act relates to intellectual property and choses in action and is therefore not applicable in this case. That prayer 1 of the notice of motion is a substantive prayer that can be granted. Further that the 11 contracts are samples as it was not practical to annex all the agreements.

16. The questions for determination are:-

- (1) Whether the suit is *res judicata*
- (2) Whether the suit is *sub judice*
- (3) Whether there are exclusive zones for sugar millers
- (4) Whether an order for injunction should issue against the respondents.

Whether the suit is res judicata:

17. The principle of *res judicata* is replicated in *section 7* of the Civil Procedure Rules 2010. In *Maritime Services Ltd & Another vs Cabinet Secretary for Infrastructure & 3 others* (2015) eKLR the Court of Appeal stated that:-

“The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same

or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.”

18. The respondent herein alleged that the applicant herein had instituted a similar suit vide Bungoma CMC CC No.476 of 2012, Nzoia Sugar Company Limited vs West Kenya Sugar Company Limited in which the applicant sought to restrain the respondent from purchasing sugar cane from farmers within its area/zone. That the matter was determined in the respondent’s favour. However the respondent has not annexed proceedings in that case to prove the allegations. The respondent has thereby not proved that the suit is *res judicata*.

Whether the suit is sub judice:

19. The principle of *sub judice* is defined in *section 6* of the Civil Procedure Act as follows:-

“No court shall proceed with the trial of any suit or proceedings 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.”

20. The respondent herein contends that there is a similar suit between the parties in Kakamega High Court Civil Suit No.326 of 2012, West Kenya ~Sugar Company Limited vs Nzoia Sugar Company Limited, where the applicant had impounded the respondent’s vehicle claiming that the respondent was encroaching on their zone. That Hon Justice Chitembwe granted an order of injunction restraining the applicant from impounding the vehicles. They contend that granting the orders sought herein by the applicant would directly conflict with the orders already issued by the High Court.

21. However the order by Hon Justice Chitembwe dated 3rd December, 2012 was issued on temporary basis pending the hearing and determination of the application. Order 40 Rule 6 of the Civil Procedure Rules 2010 provide that:-

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

22. It is now nearly 5 years since when the interlocutory orders were made. There is no evidence that the court has extended the interlocutory orders. The orders have thereby lapsed. The issue in the said case was impounding of the respondent’s motor vehicles by the applicant herein. The issue in the present case is whether the respondent should be restrained from interfering with the appellant’s contracted farmers in Bungoma, Webuye and Kakamega Counties. The issues between the two cases are thereby not the same. The suit is thereby not *sub judice*.

Whether there are exclusive zones for sugar millers:

23. The Kakamega Civil Suit No.233 of 2012 was between Mumias Sugar Company Limited and others against the respondent herein. The dispute was over zoning of sugar areas. Hon Justice Chitembwe held that the respondent was at liberty to undertake its business activities in any sugar cane zone. In West Kenya Sugar Company Limited vs Agricultural Fisheries Food Authority & 11 others (2017) eKLR a three judge bench made up of *Judices R. Sitati, E.M. Maina and A.C. Mrima* held that there is no law providing for exclusive sugar zones for any miller. That indeed the Competition Act No.12 of 2010 and *section 3* of the Crops Act seem to frown upon the practice. These two authorities are persuasive that there are no exclusive sugar growing, transporting or dealing zones for any miller. Millers are at liberty to conduct their businesses in any sugar growing areas.

Whether an order for injunction should issue against the respondents:

24. The conditions for granting an order of injunction were set out in Giella vs Cassman Brown & Company Limited (1973) E.A. 358 at page 60 where it was stated that:-

“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 on the application on the balance of convenience.”

25. The applicant alleges that it has financed contracted farmers within Bungoma, Webuye and Kakamega counties to grow sugarcane. That it is part of the agreement with the farmers that the applicant will buy the cane when it is mature and recover its money. That the respondent has unlawfully approached some of its contracted farmers and has been purchasing seed planted by the applicant and buying the sugarcane financed by the applicant.

26. The applicant has annexed agreements of 11 farmers with whom they have financed to grow cane. The applicant says that there are many more farmers with whom they have entered into contract with but that the 11 are only samples. However out of the 11 farmers only one of them has sworn an affidavit that he was actually financed by the applicant and that after the cane had matured he sold it to the respondent. Does the act of one farmer out of so many prove that the respondent has been purchasing cane from its contracted farmers that calls for orders of injunction?

27. As stated above there is no law that prevents a miller from buying cane from any county. There are independent growers within a county

who have the choice to sell their cane to anybody of their choice. Courts have held that zoning is unfair business practice. The applicant is seeking for orders of injunction to restrain the respondent from buying cane from its contracted farmers, in Bungoma, Webuye and Kakamega counties. If such orders are to be granted, how is the respondent to know that a particular farmer is contracted to the applicant? How are the orders to be enforced since there are no such things as signboards/notice outside the farms to warn anybody that a particular farmer is contracted to the applicant? The court cannot issue a blanket order to restrain the respondent from harvesting or interfering with the applicant's contracted growers in the stated counties when the applicant has not give out a list of the contracted growers and details relating to their plot numbers, maps showing the location of the particular farmers etc so as to pin point out with clarity the farmers contracted to the applicant so that the respondent can keep off them.

28. The respondent submitted that the orders sought cannot issue without the farmers being given an opportunity of being heard. There is a privity of contract between the applicant and the farmers. The contracts between the two establishes a mechanism for resolving any arising disputes through the Kenya Sugar Tribunal. There was thereby no need of suing the farmers as parties in this case. In a proper case the orders sought can be issued against the respondents even without the farmers being parties to the suit since there is no dispute that the applicant has a contract with the farmers.

29. In the foregoing the applicant has not made out a prima facie case with a probability of success since there is no list of all the farmers that the respondent should be enjoined against together with their pertinent details. More so, there are no exclusive zones where a miller can be confined to buy cane from. The respondent cannot thereby be restrained from buying cane from the stated counties. Secondly the applicant can be compensated by way of damages for any loss suffered since the damages suffered can be computed. The conditions for granting an injunction have not been established.

For the above said reasons the application dated 29th August, 2017 is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 31st day of October, 2017.

J. NJAGI

JUDGE

In the presence of:

Mrs Arunga for petitioner

No appearance .. for respondent

George . court assistant