



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 206 OF 2010**

**WEST KENYA SUGAR COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA SUGAR BOARD.....1<sup>ST</sup> DEFENDANT**

**BUTALI SUGAR MILLS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**[1]** Before the Court for determination is the 2<sup>nd</sup> Defendant's Notice of Motion dated **16 January 2015**. The application was filed pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 2 Rule 15(d)** as well as **Order 17 Rule 2(1) and (3)** of the **Civil Procedure Rules, 2010** for orders that the suit be dismissed for want of prosecution; and in the alternative, that the Amended Plaintiff be struck out with costs for being an abuse of the process of the Court; and that the costs of the suit and of the application be borne by the Plaintiff. The application was based on the following grounds:

**[a]** That the suit was last in court on **17 September 2010** for a Ruling on an application for injunction; and that the Plaintiff has never taken a step in the suit since that date;

**[b]** That the delay by the pendency of the suit since the year **2010** is oppressive to the 2<sup>nd</sup> Defendant and egregiously prejudicial to it, since in the course of time necessary evidence is dissipating and witnesses are moving on, thereby prejudicing the fair trial of the dispute.

**[c]** That the Plaintiff is not interested in prosecuting the suit, and has abandoned the suit and proceeded to file other suits on the same subject matter, being **Nairobi Petition No. 59 of 2010: West Kenya Sugar Company Limited vs. Kenya Sugar Board, Attorney General and Butali Sugar Mills Limited** and **Kakamega High Court Constitutional Petition No. 26 of 2014: West Kenya Sugar Company Limited vs. Kenya Sugar Board, Attorney General and Butali Sugar Mills Limited**.

**[d]** That the Plaintiff has, since filing the suit and since the Ruling of **17 September 2010** acted contrary to the position taken in its pleadings herein, and has even adopted the ratio of the Court in this case that no sugar miller has an exclusive zone in any area; and that each miller ought to compete with others; and therefore that the Plaintiff has accordingly legally abandoned the cause of

action herein, as evidence by proceedings in **Kakamega High Court Civil Case No. 233 of 2012: John Marango & 5 Others vs. West Kenya Sugar Company Ltd;** and **Bungoma Resident Magistrates Court Civil Application No. 476 of 2012: Nzoia Sugar Company Limited vs. West Kenya Sugar Company Limited.**

[e] That the Plaintiff is seeking to enforce a void agreement, and alleged agreement that was admittedly entered into in breach of the rules of natural justice, and in violation of the right of the 2<sup>nd</sup> Defendant to be heard; and that the Plaintiff is seeking to enforce an alleged agreement with a public authority, the 1<sup>st</sup> Defendant to contract away from its statutory mandate.

[2] The grounds aforestated were expounded on in the Supporting Affidavit annexed thereto, sworn on **26 January 2015** by **Jayantilal Patel**, the Managing Director of the 2<sup>nd</sup> Defendant, to which he annexed copies of pleadings, affidavits as well as Rulings and Judgments of the suits aforementioned.

[3] The 1<sup>st</sup> Defendant had filed a similar application dated **10 February 2014**. The application was filed on **12 February 2015** pursuant to the provisions of **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** as well as **Order 17 Rule 2(1), (3)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that the Plaintiff's suit be dismissed with costs for want of prosecution; and that the costs of and occasioned by the application be borne by the Plaintiff in any event. It was premised on the ground that the pleadings stood closed in **July 2010** and that the matter was last in Court on **17 September 2010** when a Ruling was delivered on the Plaintiff's application dated **1 April 2010**; and that the Plaintiff has since, not taken any steps to set down the suit for hearing. The application was supported by the affidavit annexed thereto, sworn by **Andrew Osodo**, sworn on **10 February 2014**, in which a chronology of the events herein has been set out, ending with the Ruling of **17 September 2010**, by which the Plaintiff's application for temporary injunction was struck out with costs.

[4] In view of that historical perspective, it was averred by the 1<sup>st</sup> Defendant that this suit, having been dormant for over 3 years and 4 months by the time the deposition was made, ought to be dismissed for want of prosecution. It was further averred that, in any event, the object of the suit has been overtaken by events as the 2<sup>nd</sup> Defendant had been operational since **2011**; and that in the circumstances, the continued pendency of this suit is not only unwarranted, and is also prejudicial to the 1<sup>st</sup> Defendant. That application was however withdrawn on **17 February 2015**. Thus, this Ruling is in respect of the 2<sup>nd</sup> Defendant's application dated **26 January 2015**.

[5] The background to the application is that the 2<sup>nd</sup> Plaintiff, **Butali Sugar Mills Limited**, applied for a licence and was registered by the 1<sup>st</sup> Defendant, **Kenya Sugar Board**, to construct a sugar milling plant on **13 April 2005**. It was the assurance of the 1<sup>st</sup> Defendant that once construction was complete, the 2<sup>nd</sup> Defendant would be issued with a sugar milling licence. Thereupon, the Plaintiff, **West Kenya Sugar Co. Ltd.** filed **Nairobi High Court Miscellaneous Application No. 1127 of 2005** seeking leave to apply for, inter alia, an Order of Certiorari against the decision by the 1<sup>st</sup> Defendant to register the 2<sup>nd</sup> Defendant, and for that leave to operate as stay. The application for leave and stay was granted on condition that an Undertaking as to Damages be filed by the Plaintiff; which Undertaking was duly filed.

[6] Thereafter, on **26 July 2006**, when the Plaintiff's application came up for hearing, the Plaintiff's Advocates informed the Court that they had agreed with **Kenya Sugar Board**, (the 1<sup>st</sup> Defendant) to have the Judicial Review Application withdrawn. Apparently, the 2<sup>nd</sup> Defendant was not involved in those discussions or the agreement to have the matter withdrawn. Nevertheless, after the withdrawal of the suit, the 2<sup>nd</sup> Defendant demanded for damages on the basis of the Undertaking filed in **Judicial Review Application No. 1127 of 2005**, and was constrained to file **High Court Civil Case No. 168 of 2007** in that regard. During the pendency of that suit, the Plaintiff filed this suit seeking a permanent injunction to restrain the 1<sup>st</sup> Defendant from entertaining any application made to it by the 2<sup>nd</sup> Defendant, and from granting the 2<sup>nd</sup> Defendant or any other person or corporate body, a licence to operate and/or construct a sugar mill within a radius of 24 kilometers from mill to mill of the location of the Plaintiff's sugar mill.

This suit was essentially premised on the Agreement dated **21 July 2006**, by which the **Judicial Review Application No. 1127 of 2005** was withdrawn.

[7] Contemporaneously with the filing of the Plaint herein, the Plaintiff filed an application for temporary injunction dated **1 April 2010**, seeking to have the 1<sup>st</sup> Defendant restrained from granting a licence to the 2<sup>nd</sup> Defendant to construct and/or operate a sugar mill within a radius of 24 kilometers of its factory. That application was heard and determined on **17 September 2010** by **Koome, J.** (as she then was). A perusal of the court record confirms that no action was thereafter by the Plaintiff in this matter for a period of about 5 years as at the time the instant application was filed.

[8] **Order 17 Rule 2 of the Civil Procedure Rules**, stipulates thus:

**"(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit;**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule (1);**

**(4) The Court may dismiss the suit for non-compliance with any direction given under this order."**

[9] Undoubtedly, a period of more than one year has elapsed from **17 September 2010** when the last step was taken in this matter to **30 January 2015** when the instant application was filed. Thus, the case is more than ripe for dismissal for purposes of **Order 17 Rule 1(1) and (3)** of the **Civil Procedure Rules**. However, it is now trite that even where delay is proved, the Court can still excuse the same if the interest of justice so dictates, for which reason, the Court is obliged to give a careful all round consideration of the matter with a view of ascertaining what the justice of the case requires. In this regard, the expressions of the Court of Appeal in **Ivita vs. Kyumbu [1975] eKLR** are pertinent:

**" Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."**

[10] What is the rationale for the rule? As was explicated by **Edmonds, J.** in the case of **Victory Construction Co. vs. Duggal [1962] EA 697**:

**"The purpose of rule 6 of Order 16 [now Order 17] is to provide the court with an administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest..."**

Nevertheless, it was also observed that:

**"...However...the decision thereon is one which is entirely within the discretion of the court, and, even where a plaintiff has taken no step of any kind, a court may still decide not to dismiss the action if, in its opinion, the interests of justice so dictate."**

(see Sheikh vs. Gupta and Others Nairobi [1969] EA 140)

Thus, there being no dispute that there has been delay in the prosecution of this case, the issues for my determination are:

[a] What, if any, is the explanation for the delay?

[b] Whether the delay is excusable.

**The explanation for the Delay:**

[11] According to the Plaintiff, the 2<sup>nd</sup> Defendant did not file a Defence until **2 February 2017** when the same was filed simultaneously with the instant application. It was thus the contention of the Plaintiff that the one year provided for under **Order 17 Rule 2(1)** of the **Civil Procedure Rules** did not start running until the close of pleadings, and that the pleadings only closed after the filing of Defence by the 2<sup>nd</sup> Defendant. In effect, the Plaintiff blamed the 2<sup>nd</sup> Defendant for the delay in the prosecution of this case. It further pointed out that the 2<sup>nd</sup> Defendant ought to be blamed for the delay for the further reason that it filed **Kisumu High Court Miscellaneous Application No. 17 of 2010**, whose effect was to divert attention from the prosecution of this case. It was explained that that application gave rise to two Civil Appeals, being **Kisumu Civil Appeal No. 89 of 2011** and **Kisumu Civil Appeal No. 90 of 2011**, in respect of which the Court of Appeal delivered its Judgment on **19 September 2014**.

[12] With all due respect to **Mr. Nagpal**, the argument that the 2<sup>nd</sup> Defendant is to blame for having failed to file its Defence in time has no sound basis. This is because **Order 2 Rule 13** of the **Civil Procedure Rules** is explicit that:

**"The Pleadings in a suit shall be closed fourteen days after service of the reply to defence or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with."**

[13] The Plaintiff filed this suit on **1 April 2010**; and upon the joinder of the 2<sup>nd</sup> Defendant by an order of the Court dated **21 May 2010**, directions were given that the 2<sup>nd</sup> Defendant be served with the pleadings within 7 days of the order. The Court further ordered that:

**"...in view of the fact that this matter was certified urgent, upon service, the applicant should file their replying papers within 7 days..."**

Thus, it cannot be true that the Plaintiff had to wait indefinitely for the 2<sup>nd</sup> Defendant to file its Defence; more so in view of the fact that the matter had been filed under a Certificate of Urgency during the vacation and was duly certified urgent by the Court. It would be expected that the Plaintiff would take the lead in championing the expeditious disposal of the case; and if necessary, invoke the relevant provisions of **Order 10** of the **Civil Procedure Rules** in the event of default by the Defendants. It was the Plaintiff that was in need of a remedy and therefore had the primary responsibility to push for the expeditious disposal of this case.

[14] Similarly, the explanation that the Plaintiff's attention was diverted by the filing of **Kisumu High Court Judicial Review Application No 17 of 2010** is not one to be countenanced. The annexures filed in support of the application are explicit that the Plaintiff, having filed this suit, engaged in the institution of other suits in connection with the same subject matter. One of the suits is **High Court Petition No. 59 of 2010**, which was filed at the High Court of Kenya at Nairobi on **28 February 2011**. Some of the prayers were:

[a] That a declaration be issued to declare that the 2<sup>nd</sup> Respondent therein, **Kenya Sugar Board**, are absolutely prohibited under Articles 3, 10, 27, 40, 47 and 50 of the Constitution from

registering and licensing the 3<sup>rd</sup> Respondent therein (**Butali Sugar Mills Ltd**) or any other person to build and operate a sugar mill within the West Kenya Sugar Zone or designated command area of the Petitioner.

**[b]** That a declaration be issued to declare that under Articles 3, 47 and 50 of the Constitution, that **Butali Sugar Mills Ltd** has no right to apply for the registration and licensing to construct and operate a sugar mill factory within the West Kenya Sugar Zone.

**[15]** The pleadings were exhibited as annexures to the Supplementary Affidavit of **Jayantil Patel**, filed herein on **9 April 2015** and marked **Annexure JP-1. Annexure JP-2** to Supporting Affidavit confirms that there were other suits in which the Plaintiff participated after the Ruling of **17 September 2010**; and therefore, there is no excuse as to why this suit was not contemporaneously progressed, but instead left to lie dormant since **2010**.

**[16]** The need for alacrity in a case such as this cannot be overemphasized. In **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 16(2)**, the authors opine that:

**"A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation that 'equity aids the vigilant, not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches')."**

**[17]** And in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** it was held thus:

**"It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position."**

**[18]** Lord Denning made remarks of a similar effect in **Fitzpatrick vs. Batger & Co. Ltd [1967] 2 All ER 657** thus:

**"...it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition...The delay [of two years] is far beyond anything we can excuse...It is impossible to have a fair trial after so long a time..."**

In the light of the foregoing, I am not satisfied that a plausible explanation has been given by the Plaintiff to explain the delay of over 5 years in the prosecution of this case.

### **On whether the delay is excusable**

**[19]** Extensive submissions were made by the parties to demonstrate that the Agreement dated **21 July 2006** is an illegal contract and is therefore unenforceable, for the reason that the 1<sup>st</sup> Defendant had no powers to do what it contracted to do; and that in effect, it was contracting away its statutory mandate under **Sections 15 and 16 of the Sugar Act (now repealed)**. Useful authorities were cited to support this argument, including the case of **Kenya Pipeline Company Limited vs. Glencore Energy (UK) Limited, Civil Appeal No. 67 of 2014**, in which the Court of Appeal restated that:

**"There is a consistent line of decisions of this Court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The Court has refused to lend aid or succour and has refused to be an instrument of validation for such persons. We still refuse. See MISTRY AMAR SINGH VS. KULUBYA [1963] EA 408, HEPTULA VS. NOOR MOHAMED [1984] KLR and FESTUS OGADA VS. HANS MOLLIN (supra). In the last case the court stated and we are content to merely restate it as good law, that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself**

**implicated in the illegality."**

[20] The Agreement was further impugned on the ground that it was signed in contravention of the law. In this regard, the Defendants argued that the First Schedule to the Sugar Act made provision for the conduct of business and affairs of the 1<sup>st</sup> Defendant, including decision making and execution of covenants. It was contended that the Agreement was not discussed or agreed at a meeting convened by the Chairman of the 1<sup>st</sup> Defendant, as required by **Rule 2 of the First Schedule**; and therefore that the 1<sup>st</sup> Defendant was not a party to that Agreement. An affidavit to that effect was sworn by **Benjamin Shamala Imbogo** produced as **Annexure JP-6** to the Affidavit of **Jayantilal Patel**. It was also the contention of the 2<sup>nd</sup> Defendant that the Agreement in question was made and used to withdraw **Judicial Review Application No. 1127 of 2005** in contravention of the rules of natural justice, in so far as it was not involved, and yet it was a party to that Application.

[21] Although the Plaintiff put a gallant fight and resisted the foregoing arguments, contending that, as per the finding of the Court of Appeal, the question of illegality of the Agreement dated **21 July 2006** is yet to be finally determined, the arguments are not idle arguments. In the Ruling delivered herein on **17 September 2010**, the Court found as a fact herein that:

**"...Although the issue of illegality of this agreement can be said to be a matter of trial, on the face of it, it has been disowned by the 1<sup>st</sup> Defendant who has had no difficulty in terming it a contravention of the Act and an illegal contract. On the face of it, this agreement cannot form the basis for granting an order of injunction."**

[22] More importantly, it was conceded that a lot has since changed; and that the 2<sup>nd</sup> Defendant was granted a licence following the decision of the Court of Appeal in Kisumu dated **19 September 2011** in respect of **Civil Appeal No. 89 and 90 of 2011**. In its Judgment, the Court of Appeal ordered that:

**"...in place of the order of mandamus compelling KSB to issue an operating licence we grant an order of mandamus compelling KSB to hear and determine the application for a licence by Butali Sugar Mills Ltd dated 10<sup>th</sup> April 2010 within a reasonable time and according to the law giving the appellant a right to be heard in opposition."**

[23] Another supervening occurrence has been the repeal of the **Sugar Act**, and the replacement therewith by the **Crops Act, No. 16 of 2013**. One of the effects thereof, as was noted by the three Judge bench that decided **Kakamega Petition No. 26 of 2014**, was that, by dint of **Section 42(2)(b)** thereof, all the licenses that had been issued by the 1<sup>st</sup> Defendant under the **Sugar Act** stood revoked, such that both the Plaintiff and the 2<sup>nd</sup> Defendant were placed on equal footing. **Section 42(2)(b)** of the **Crops Act** provides thus:

**"Permits, licenses and all statutory instruments issued or issuable under the repealed Acts shall, unless the Authority otherwise directs, be deemed to have been repealed."**

In the premises, the Plaintiff's cause of action herein appears to have been overtaken by events; and therefore there would be no valid cause to excuse the manifest delay in the prosecution of this suit.

[24] The foregoing being my view of the matter, I would find merit in the 2<sup>nd</sup> Defendant's application dated **16 January 2015** and would dismiss this suit with costs for want of prosecution. In the premises, I find it superfluous to consider the alternative arguments advanced by the Defendants in support of the prayer for striking out of this suit for being an abuse of the process of the Court, under **Order 2 Rule 15(d)** of the **Civil Procedure Rules**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2017**

**OLGA SEWE**

**JUDGE**