



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
PETITION CASE NO. 2 OF 2016
(FORMER KISUMU NO. 16 OF 2016)

MOHAMMED OMAR BAJABER.....1ST PETITIONER

BUSIA SUGAR INDUSTRY LTD.....2ND PETITIONER

VERSUS

AGRICULTURE, FISHERIES & FOOD AUTHORITY.....1ST RESPONDENT

WEST KENYA SUGAR CO. LTD.....2ND RESPONDENT

RULING

1. When the 1st Petitioner, Mohammed Omar Bajaber and the 2nd Petitioner, Busia Sugar Industry Limited filed their Petition at Kisumu High Court on 9th May, 2016, they at the same time filed, under certificate of urgency, a Notice of Motion application under Articles 22, 23(b), (c) & 159(2) (d) of the Constitution of Kenya, 2010; Rule 13 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules; sections 1A, 1B & 3 A of the Civil Procedure Act; Order 40 of the Civil Procedure Rules and other enabling provisions of the law.
2. Through the said application the petitioners seek orders as follows:

“1) That this Honourable Court be pleased to certify this matter as extremely urgent and dispense with service in the first instance.
2. That pending the *inter-partes* hearing of this application this Honourable Court be pleased to issue a conservatory order in the nature of an injunction restraining and staying the Respondents, their agents, officers or any persons acting upon their instruction from conducting any meeting whatsoever pursuant to the 2nd Respondent’s letter dated 28th April 2016 either on 13th May 2016 or at such other date unless otherwise directed by this court.
3. That pending the *inter-partes* hearing of this application this Honorable Court be pleased to issue a conservatory order in the nature of an injunction restraining the 2nd Respondent, its agents, officers or any person acting on its behalf from constructing, milling sugar, crushing cane, loading or offloading of cane, cane extracts, or other sugar production materials or machinery onto machinery, motor vehicles or other apparatus or otherwise engaging in any construction, milling or cane crushing activities.

4. That pending the *inter-partes* hearing of the Petition herein, this Honorable Court be pleased to issue a conservatory order in the nature of an injunction restraining the 2nd Respondent, its agents, officers or any persons acting on its behalf from constructing, milling sugar, crushing cane, loading or offloading of cane, cane extracts, or other sugar production materials or machinery onto machinery, motor vehicles or other apparatus or otherwise engaging in any construction, milling or cane crushing activities.

5. That the costs of this Application be provided for.”

3. The application is supported by the grounds on its face, a supporting affidavit sworn by the 1st Petitioner on 9th May, 2016 and annexures to that affidavit. The matter was placed before E. N. Maina, J on 9th May, 2016 whereupon she certified the application urgent and directed that the same be served for *inter-partes* hearing before the Judge in this Court (High Court of Kenya at Busia) on 12th May, 2016.

4. The record shows that at about 3.55 p.m. on the same date (9th May, 2016) the file was again placed before E. N. Maina, J who was asked by counsel for the petitioners to place the matter before any other judge within Kisumu. The learned Judge acceded to the request and the matter was placed before H. K. Chemitei, J on 10th May, 2016 whereupon he issued temporary orders in terms of prayers No. 2 and 3 of the application. He at the same time directed that the application be served for *inter-partes* hearing on 24th May, 2016.

5. On 16th May, 2016, some persons who identified themselves as interested parties filed a Notice of Motion application seeking to be enjoined in the matter. That application has been addressed through a separate ruling-see Ruling No. 1.

6. On 17th May, 2016, the 2nd Respondent, West Kenya Sugar Company Limited filed a Notice of Motion application seeking to vacate the orders issued on 10th May, 2016.

7. When the three applications were placed before H. K. Chemitei, J on 24th May, 2016, he directed that they be heard before this Court on 2nd June, 2016. He also extended the interim orders issued on 10th May, 2016.

8. On 2nd June, 2016 there was no judge at this station as I was yet to report upon my transfer from another station. The matter was thus placed before Ali Aroni, J of the High Court of Kenya at Bungoma wherein a consent was recorded as follows:

“1. That the status quo as of 10th May 2016 shall be maintained until the 8th June 2016 when the file shall be placed for hearing before the High Court in Busia.

2. That for avoidance of doubt the 2nd Respondent’s cane buying centre at Olepito is not subject of orders issued on 10th May 2016.”

9. When the parties appeared before me on 8th June, 2016, I indicated to them that we should focus on the Petition and urged them to reach an agreement on the orders in place. No agreement was forthcoming thus necessitating the hearing of the petitioners’ Notice of Motion dated 10th May, 2016.

10. To date, the 1st Respondent, Agriculture, Fisheries & Food Authority is yet to participate in these proceedings.

11. The arguments in respect to the petitioners’ Notice of Motion proceeded upside down as initially the arguments were intended to be limited to the extension of the interim orders that were in

- place. At the conclusion of the arguments it became apparent that the Notice of Motion had been argued in full and I informed the parties that I would give a ruling in respect of the application itself.
12. Mr. Kibe Muigai for the 2nd Respondent submitted that the orders that the petitioners were seeking to extend were not proper orders as E. N. Maina, J did not vacate her orders directing that the application be served for *inter-partes* hearing before this Court. He submitted that the orders issued by H. K. Chemitei, J amounted to overturning the orders of E.N. Maina, J.
 13. It was also the 2nd Respondent's case that the orders the petitioners seek to extend were obtained by a counsel without a practising certificate for the year 2016. It was submitted that the Law Society of Kenya through a letter dated 7th June, 2016 had confirmed that Mr. Ipapu who led Mr. Madowo in the proceedings that led to the recording of consent at Bungoma High Court had no practising license for the year 2016. It was the 2nd Respondent's position therefore that the consent maintaining the status quo was null and void and there is nothing to extend.
 14. The 2nd Respondent further contended that the conservatory orders amounted to stopping the operations of its factory and yet the factory cannot by virtue of Section 18 of the Crops Act, 2013 operate without a license under that Act. The 2nd Respondent contended that it was an abuse of the court process for the petitioners to seek orders that are already guaranteed by statute. It was the 2nd Respondent's case that what is proceeding is construction of the factory and when the time comes for licensing, it will make its application and the same will be subjected to the legal process.
 15. The 2nd Respondent also contended that construction of a factory is only subject to approval by the National Environment Management Authority (NEMA). It was the 2nd Respondent's case that the issue of its licensing had been subjected to litigation and it is only on 3rd June, 2016 that the National Environmental Tribunal allowed it to proceed with construction after dismissing the objection filed against its licensing by NEMA.
 16. Finally, the 2nd Respondent contended that the orders sought are orders of permanent injunction and they are defective as they cannot be said to be conservatory orders.
 17. On his part, Mr. Madowo for the petitioners insisted that the orders should be granted. He stated that the Petition is directed at an illegal construction of a factory by the 2nd Respondent and the aim of these proceedings is to ensure that the construction comes to a halt. It is the petitioners' case that once they establish an arguable case, then conservatory orders should issue.
 18. The petitioners placed reliance on the decision of M.K. Ibrahim, J (as he then was) in the case of **Muslims for Human Rights (MUHURI) & 2 Others V Attorney General & 2 Others (2011) eKLR** where the learned Judge cited with approval the statement in **Nairobi Petition No. 16 of 2011 Centre for Rights Education and Awareness & 7 Others** by Musinga, J (as he then was) that **"a party seeking a Conservatory Order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the Court [grants] the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution"**
 19. Mr. Madowo argued that the petitioners have established that the 2nd Respondent's construction is in violation of the laws of the land and orders should issue accordingly.
 20. On the question of the practising certificate of Mr. Ipapu, Mr. Madowo submitted that he is the counsel on record and he has all along appeared for the petitioners and the question of Mr. Ipapu's license does not therefore arise in this matter.

21. Before I proceed to deal with the main issues, I find it necessary to dispose of two minor issues that arose at the hearing.

22. The first issue is whether there is a proper order on record worth extending. On this issue, I will simply state that whatever happened in Kisumu and Bungoma is now water under the bridge. What this Court is addressing is not the extension of any orders but the question whether conservatory orders should issue pending the hearing and determination of the Petition. The circumstances under which interim orders were issued are no longer relevant at this stage.

23. The second question is whether the status of Mr. Ipapu as an advocate should affect this matter. First and foremost, I have already stated that the orders issued prior to the hearing of the substantive prayers in the Notice of Motion are no longer relevant. Secondly, Mr. Madowo has correctly pointed out that he is the one who filed the papers in this matter. He was also present when the orders were issued at Bungoma. I think it would then be absurd to hold as null and void proceedings in which one of two advocates appearing for the same party was duly licenced. The presence of Mr. Madowo in Court and the fact that he drafted the pleadings is sufficient to cushion the petitioners' case from any impeachment on the ground that one of their advocates did not have a practising certificate.

24. I will now proceed to deal with the substance of the application. The main question herein is whether the petitioners have met the grounds for grant of conservatory orders.

25. The principles guiding the grant of conservatory orders were well enunciated by the Supreme Court in its ruling of 2nd April, 2014 in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others[2014] eKLR** when it stated at paragraph 86 that:

“[86] “Conservatory orders” bear a more decided *public-law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case, or “high probability of success” In the supplicant’s case for orders of stay, Conservatory orders consequently, should be granted on the *inherent merit* of a case, bearing in mind the *public interest*, the *Constitutional values*, and the *proportionate magnitudes*, and *priority levels attributable to the relevant causes*.”

It is those principles that shall guide this Court in deciding whether to grant conservatory orders or not.

26. Applying those principles to this case, it is important to ask whether failing to grant stay will render these proceedings nugatory. What is before this Court is an allegation by the petitioners that the 2nd Respondent is constructing its sugar factory at Olepito without the necessary permits from the licensing authorities. The 1st Respondent is one of those authorities but it is yet to make its stand known in these proceedings.

27. At the moment I cannot for sure say that the activities of the 2nd Respondent are illegal. The 2nd Respondent has asserted that its actions are lawful. It has disclosed to the Court that an order that had barred its activities was discharged by the National Environmental Tribunal. There is evidence that the construction of the 2nd Respondent’s factory is at an advanced stage.

28. The other side of the coin is the petitioners’ contention that the 2nd Respondent has not been licensed to construct its factory. The question that arises is whether apart from being a good citizen and a guardian of the law the petitioners will suffer any loss if the 2nd Respondent carries on with the construction. No evidence has been tendered to show that the petitioners will suffer any loss if the activities of the 2nd Respondent are not halted. Indeed the party who is likely to suffer irreparable loss is the 2nd Respondent because anything done illegally may subsequently lead to the pulling down of its factory. However, if it wishes to continue with the construction

despite the risk that its work may amount to nothing then I do not see why it should not do so.

29. There is another reason why conservatory orders should not issue. The 2nd Respondent is engaged in an economic activity and it would go against the interests of the people of the County of Busia to stop an activity that is likely to uplift their standards of living.

30. From the material placed before the Court, I would find that the scales tilt in favour of rejecting the petitioners' application for conservatory orders. However, the entire application will not fail as failure to grant Prayer No. 2 of the application may render these proceedings nugatory.

31. The Notice of Motion application dated 9th May, 2016 is therefore resolved as follows:

- a. Prayer No. 2 is allowed so that the respondents, their agents, officers or any person acting upon their instructions are restrained, pending the hearing and determination of this Petition or further directions by the Court, from conducting any meeting whatsoever pursuant to the 1st Respondent's letter dated 28th April, 2016.
- b. Prayers No. 3 and 4 of the application are dismissed meaning that the 2nd Respondent is at liberty to carry on with its activities.
- c. Considering the outcome of the application, the parties who participated in this application will meet their own costs of the application.

Dated, signed and delivered at Busia this 16th day of June, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT