



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 180 OF 2016**

**BETWEEN**

**ALBERT OMOLLO WESONGA.....1<sup>ST</sup> PETITIONER**

**WILLIAM SHIGALI MUKAISI.....2<sup>ND</sup> PETITIONER**

**AND**

**AGRICULTURE FISHERIES AND FOOD AUTHORITY .....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY AGRICULTURE.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**MUMIAS SUGAR COMPANY LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**WEST KENYA SUGAR COMPANY LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**BUTALI SUGAR COMPANY LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**NZOIA SUGAR COMPANY LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

**KIBOS SUGAR & ALLIED COMPANY LIMITED.....5<sup>TH</sup> INTERESTED PARTY**

**CHEMELIL SUGAR COMPANY LIMITED.....6<sup>TH</sup> INTERESTED PARTY**

**MUHORONI SUGAR COMPANY LIMITED.....7<sup>TH</sup> INTERESTED PARTY**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....8<sup>TH</sup> INTERESTED PARTY**

**TRANS MARA SUGAR COMPANY LIMITED.....9<sup>TH</sup> INTERESTED PARTY**

SUKARI INDUSTRIES COMPANY LIMITED.....10<sup>TH</sup> INTERESTED PARTY

SOIN SUGAR COMPANY LIMITED.....11<sup>TH</sup> INTERESTED PARTY

HOMALINE COMPANY LIMITED.....12<sup>TH</sup> INTERESTED PARTY

LUBAO JAGGERY FACTORY COMPANY LIMITED....13<sup>TH</sup> INTERESTED PARTY

## RULING

### **Introduction**

1. The ruling concerns the Petitioners' application dated 5<sup>th</sup> May 2016.
2. At the scheduled *inter partes* hearing also attended by the 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Interested Parties' counsel; the Petitioners' counsel indicated to the court that the Petitioners had abandoned prayers 2, 3 and 4 of the application. Instead, the Petitioners had decided to pursue only prayers 5 and 6 which read as follows :
  5. *THAT the Honorable Court be pleased to issue an order prohibiting the Respondents from disbursing, using, and or appropriating the said funds by way of loans or grants to any sugar industry stakeholder pending the hearing and determination of this Petition .*
  6. *THAT the Honorable Court be pleased to issue orders directing the Respondents to give a proper account of all monies collected in form of sugar development levy from February 2015 to date pending hearing and determination of this Petition.*
3. The Petitioners also sought costs of the application.

### **Background facts.**

4. The background facts are hardly in dispute.
5. The 1<sup>st</sup> Respondent has been charging a levy of 4% on all sugar sales by the Interested Parties. The levy is known as the Sugar Development Levy. Previously it levied by the Kenya Sugar Authority under the now repealed Sugar Act 2001. Section 42(2)(d) of the Crops Act 2013 then subsequently dictated that all levies previously imposed by the repealed law including the Sugar Act 2001 were to cease upon the expiry of six months following the enactment and commencement of the Crops Act 2013. The Crops Act 2013 commenced on 1<sup>st</sup> August 2014.
6. The amounts collected as Sugar Development Levy average kshs. 250,000,000/= per month. The 1<sup>st</sup> Respondent continued to collect the said levy until the 2<sup>nd</sup> Respondent revoked the Sugar (Imposition of Levy) Order 2002 which had authorized and legalized the levy.
7. The parties are in agreement that the levy is no longer being collected. In the meantime however, the 1<sup>st</sup> Respondent has continued to disburse the previously collected amounts to various stakeholders including farmers as well as some of the Interested Parties.

### **Petitioners' case**

8. Firstly, the Petitioners urged that the continued collection of the Sugar Development Levy had been unconstitutional and contrary to express provisions of the law. The Petitioners pointed to Section 42(2) (d) of the Crops Act 2013.
9. Secondly, the Petitioners also argued that none of the Respondents was mandated to manage the levy as

Section 9 of the Crops Act 2013 was clear that a Commodities Fund Board of Trustees was required to be constituted to manage the levy. The Petitioners argued that the absence of the Commodities Fund Board of Trustees and continued management and disbursement of the levy violated Articles 73, 201 and 232 of the Constitution.

10. Finally, the Petitioners argued that the Respondents have failed to account for the funds collected as Sugar Development Levy and that in so doing the Respondents have violated the Petitioners' rights to Article 35 of the Constitution which guarantees citizens the right to information.

11. The Petitioners consequently urged for a conservatory order to ensure that public monies did not go to waste or was not misappropriated. In the Petitioners' estimation, the Respondents had collected over kshs. 3 billion between the period February 2015 until June 2016.

### **Respondents' Response and Case**

12. The Respondents' case is contained in the Replying Affidavit sworn by Jude Chesire and filed on 25<sup>th</sup> July 2016.

13. The Respondents contended that the 1<sup>st</sup> Respondent's functions are relatively clear. The 1<sup>st</sup> Respondents core mandate is to administer the Crops Act 2013. It is also mandated to promote and regulate the production, marketing, storage, collection and warehousing of agricultural and aquatic products including sugar.

14. The Respondents contended that the collection of the Sugar Development Levy was within the 1<sup>st</sup> Respondents' mandate as authorized by Article 209(2) of the Constitution and promoted by Section 32(5) of the Crops Act, 2013. Additionally, the Respondents contended that the 2<sup>nd</sup> Respondent had on 1<sup>st</sup> August 2014 suspended the repeal of all subsidiary legislation which authorized the collection of the Sugar Development Levy.

15. The Respondents also contended that the funds collected were specifically utilized and ploughed back into the agricultural industry and more particularly to assist those involved in sugar production. It was therefore the Respondents' case that stalling the collection and or disbursement of the levy would not be in the public interest.

16. The Respondents finally denied that the Petitioners or any of the Interested Parties had requested for or had been denied any information.

### **Interested Parties' cases**

17. All the Interested Parties supported the Petitioners' Notice of Motion.

18. The Interested Parties' running theme was that the Respondents had, by collecting the Sugar Development Levy and disbursing the same, violated the provisions of the Crops Act 2013 which was clear that all levies imposed by the Sugar Act 2001 ceased to be effective upon the expiry of six months from the date of the commencement of the Crops Act 2013 and the Crops Act 2013, is not disputed commenced on 1<sup>st</sup> August 2014. Additionally, the Interested Parties stated that in the absence of a properly constituted Commodities Fund Board of Trustees, the 1<sup>st</sup> Respondent could not collect or manage the Sugar Development Levy.

### **Arguments in court**

19. Only the Petitioner and the 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Interested Parties urged their cases orally before the court. Despite knowledge of the date, the Respondents did not appear on the hearing date and neither did the other Interested Parties.

20. Mr. Khakula for the Petitioners stated that the collection and distribution of the Sugar Development Levy was illegal as the 2<sup>nd</sup> Respondent had failed to constitute a Commodities Fund Board of Trustees to manage the levy. According to counsel, only such Board of Trustees could under Section 9 of the Crops Act 2013 determine how the funds were to be utilized and its absence there was a risk that the funds could be misappropriated.

21. Mr. Khakula also submitted that the funds were being illegally and irregularly collected as the Crops Act 2013 prohibited the collection of any levy after the expiry of six months from the date of commencement of the Crops Act. Counsel referred the court to Section 42(2)(d) of the Crops Act. Counsel submitted that there was no legal framework for the collection or disbursement. Likewise, counsel also submitted that the Respondents could not account for the levy funds collected or disbursed.

22. Counsel referred the court to the two cases of **Gatirau Peter Munya vs. Dickson Mwenda Githinji & Others [2014]eKLR** and **Centre for Rights Education and Awareness & 7 Others vs. Attorney General & Others HCCP No 16 of 2011** and submitted that the Petitioners had satisfied the grounds for the issuance of a conservatory order.

23. Both Mr. Masinde and Mr. Musyoka, appearing for the 4<sup>th</sup> and 5<sup>th</sup> Interested Parties respectively supported the application. Both Counsel adopted the Petitioners' submissions and added that it was critical that the stakeholders interest was protected.

### **Discussion and Determination**

24. The sole question for determination is whether the court should grant the conservatory orders sought by the Petitioners.

25. Ordinarily conservatory orders granted under Article 23(3) of the Constitution are intended to keep the subject matter of any dispute *in situ* pending the determination of the constitutional petition. That position was made clear in the case of **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013]eKLR**. The apparent local classicus on conservatory orders is however the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & Another [2014]eKLR** where the Supreme Court of Kenya stated as follows:

***“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate orderly functioning within public agencies, as well as to uphold 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 applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (emphasis added)***

26. The approach to be followed by the court on an issue whether or not to allow an application for conservatory orders is basically now well settled. A brief reprisal would run thus: (1) Has the applicant a prima facie case with a likelihood of success; (ii) Is the applicant likely to suffer prejudice as a result of the violation or alleged violation of the Constitution; (iii) Would the Petition be rendered nugatory if the application is not granted (iv) What is the effect on the public in allowing or denying the application or, in other words, would the public interest be negatively affected. These principles may be easily retrieved from the following cases: **Centre for Rights Education and Awareness & 7 Others vs. Attorney General HCCP No. 16 of 2011**, **Muslims for Human Rights & Others vs. Attorney General HCCP No 7 of 2011**, **Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education Science and Technology & Others [2015]eKLR**.

27. The Petitioners' contention like the facts of the case is uncomplicated. The Petitioners contend with the support of the Interested Parties that the continued collection and distribution of the Sugar Development Levy is unconstitutional and illegal in view of the repeal of the Sugar Act and for lack of a

Commodities Fund Board of Trustees.

28. The Sugar Development Levy has its origins in the Sugar Act. The levy was intended to assist all the stakeholders in the sugar industry from the sugarcane farmers through the millers and distributors. It was a statutory levy under the Sugar Act and its subsidiary legislation. The Crops Act vide the 2<sup>nd</sup> Schedule (Paragraph 13) repealed the Sugar Act. Section 32(5) of the Crops Act however preserved all levies on tea and sugar post the enactment of the Crops Act and repeal of the Sugar Act.

29. Section 32(5) of the Crops Act states as follows:

***32(5). For the avoidance of doubt—***

***(a) the levies payable in the case of tea and sugar immediately before the commencement of this Act shall continue to be the payable rates until the cabinet secretary specifically imposes different rates;***

***(b) the rate of any other levy shall be specified in the notice under subsection(1) and shall not exceed four percent of the value of the crop on which the levy is payable***

30. The Crops Act preserved the payment of the Sugar Development Levy. It was a national government levy. The Constitutional validity of the levy cannot be doubted in view of Article 209.

31. At the hearing of the interlocutory application, the Petitioner counsel seems to have abandoned the pursuit to restrain the collection of the levy. I however would state that the Petitioners have not established a prima facie basis that the collection of Sugar Development Levy is unconstitutional and unlawful, in view of the rather express provisions of the statute which mandated the continued collection of the levy even as the same statute decreed that the collection of other levies be halted six months into the operation of the Crops Act .

32. I quickly come to the issue on whether the disbursement of the Sugar Development Levy ought to continue.

33. On this issue, the Petitioners argued that in the absence of the Commodities Fund Board of Trustees constituted by the 2<sup>nd</sup> Respondent under Section 9 of the Crops Act no funds should be disbursed. I have read Section 9. It is to the effect that the fund monies are to originate from monies paid as licence fees, commission, export, or import agency fees and any other fees that may accrue to the 1<sup>st</sup> Respondent in the course of exercising its functions under the Crops Act. It also consists of funds appropriated by Parliament and funds from other lawful source approved by the Trustees.

34. It would appear to me on a cursory reading of Section 9 that the Sugar Development Levy is not part of the fund contemplated under Section 9 but rather a separate levy mandated under Section 32(5) of the Crops Act.

35. The purpose of the Sugar Development Levy is generally not in dispute. The Petitioners concede that it is always been for the benefit not only of the immediate stakeholders but also the public at large. Section 12 of the Crops Act additionally mandates the 1<sup>st</sup> Respondent to offer incentives in the form of credit as well as technical support to crop growers. It is easy to conclude that funds collected by the 1<sup>st</sup> Respondent including the Sugar Development Levy may be disbursed otherwise than through the Commodities Fund.

36. I am not convinced that the Petitioner has made out a prima facie case to restrain the 1<sup>st</sup> Respondent from collecting the Sugar Development Levy. Section 32(5) of the Crops Act apparently allows it. It will however be important that a closer reflection and scrutiny of both Section 32(5) and 42(2) (d) of the Crops Act is made before any conclusive determination is made on this issue. For now I am satisfied that while Section 32(5) is more specific and allows for the collection of the sugar levy, Section 42(2) is of a

more generalized nature. Reading the two sections and the Act in whole it is easier to infer that there was no intention of getting rid of the sugar levy, otherwise section 32(5) would not have been so specific. It appears as an express exception and has, in my view, to be strictly construed.

37. I am also not convinced that it would be in the wider public interest to restrain the Respondents from disbursing any funds collected as the Sugar Development Levy. The growers, the production mills, the farmers generally expect some credit or subsidy. If the Sugar Development Levy is available for the purpose I see no reason why the 1<sup>st</sup> Respondent cannot be entrusted with the management of the levy collected. Besides, the Crops Act apparently allows the 1<sup>st</sup> Respondent to be engaged in the business of extending credit.

38. The fear that there may be no accountability in my view is misfounded for now. In the absence of any evidence to the contrary, the 1<sup>st</sup> Respondent is a corporate entity accountable as a state corporation under the Public Finance Management Act (Cap 412C). Appropriate and relatively adequate provisions are made under the Public Finance and Management Act to ensure both transparency and accountability.

39. Finally, the Petitioners also sought an order for the provision of proper accounts of revenue collected as Sugar Development Levy since February 2015. The Public Finance Management Act has an elaborate process on the expenditure of funds. It also has provisions for accounting. Ultimately, too the 1<sup>st</sup> Respondent will also be subjected to an audit process, through the office of the Auditor General. In short, I am not satisfied that the funds collected may not be adequately accounted for. The account sought at this stage of the proceedings is in my view pre-mature as an appropriate basis has not been laid.

### **Conclusion and disposal**

40. In conclusion, the Petitioners have, in my view, not shown that there is a prima facie case of the violation of the Constitution or law. Likewise the Petitioners have also not shown that the Petition may be rendered nugatory if the conservatory order is not granted. Public interest would instead dictate that the funds collected by the 1<sup>st</sup> Respondent as Sugar Levy be continuously disbursed. The application lacks in merit.

41. I am inclined therefore to dismiss the application dated 5<sup>th</sup> May 2016.

42. It is dismissed but with no order as to costs.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of September 2016**

**J.L.ONGUTO**

**JUDGE**