



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

PETITION NO. 25 OF 2016

BETWEEN

HENRY NYABUTO ONDIEKO.....PETITIONER

AND

CHARLES APUDO OWELLE.....1ST RESPONDENT

CABINET SECRETARY (MIN OF AGRICULTURE).....2ND RESPONDENT

CHAIRMAN OF THE BOARD CHEMELIL

SUGAR COMPANY LIMITED.....3RD RESPONDENT

RULING

1. The petitioner in this case has moved the court to declare that the continued stay of the 1st respondent as the Chief Executive Officer of Chemelil Sugar Company (“ the Company’’) is in contravention of the *State Corporations Act (Chapter 466 of the Laws of Kenya)*.

2. It is not in dispute that the 1st respondent was is now serving a second three year term as the Chief Executive of the Company. He was initially appointed on or about 12th March 2013 for a period of 3 years commencing 11th May 2012. After the term expired, his contract was renewed for another 3 years with effect from 11th May 2015

3. Together with the petition, the petitioner has filed a Notice of Motion dated 26th September 2016 seeking the following orders;

(b) That the Honourable Court be leased to issue interlocutory interim orders against the 1st respondent from discharging his duties as Chief Executive officer of Chemilil Sugar Company Limited till the main application is heard interparties and determined.

(b)That the contract of Kshs. 265,000,000 which is due to start be put on hold due to the 1st respondent’s legal status and inability to contract.

4. In his petition the applicant states that the 1st respondent has not been properly employed as he has been in an acting capacity and that he lacks legal authority to bind the company. He also states that the Company is scheduled to close for maintenance at a cost of Kshs. 265 million and that his status should be regularised before the Company expends more money.

5. The application is opposed through the affidavit of Sammy Kipcho Choge, the Chairman of the Board of Directors of the Company and also the 1st respondent. The tenor of their depositions is that the 1st respondent is properly qualified and duly appointed by the Board of Directors to carry out the duties of the Chief Executive Officer of the Company.

6. In an application for an interlocutory injunction, the principles for consideration are now well settled. In **Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358** the court laid down the conditions for the grant of an interlocutory injunctions as follows:-

The conditions for the grant of an interlocutory injunction are now well settled in East Africa. 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 doubt, it will decide an application on the balance of convenience.

7. These conditions have been extended in areas of public law such as those existing in this petition. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & Others SCOK Application No. 5 of 2014 [2014]eKLR**, held the Supreme Court held that the element of public interest was to be considered. It observed that:

[86] Conservatory orders bear a decided public law commutation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the courts, 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 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 a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant cases.

8. Bearing these principles in mind, I find that there is sufficient evidence that the 1st respondent was appointed by the Board of Directors with concurrence of the relevant ministry. Board of Directors is charged with oversight of the affairs of the Company and is represented by the Chief Executive who acts on day to day matters. If the orders sought are granted, the operations of the Company would be affected negatively. Further to interfere with the Company investment programme by halting maintenance works, as prayed in the application, would, at this stage, cause irreparable harm to the Company and the public. Such an order would not only cripple the Company but affect third parties dealing with the Company hence contrary to the public interest.

9. In the circumstances, the application is dismissed.

DATED and DELIVERED at KISUMU this 11th day of October 2016.

D.S. MAJANJA

JUDGE

Petitioner in person.

Mr Oyuko instructed by Amos O. Oyuko and Company Advocates for the 1st and 3rd Respondent.