



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI

HC.PETITION NO. 1 OF 2016

**IN THE MATTER OF AN ALLEGED INFRINGEMENT OF THE RIGHTS TO EQUAL
BENEFIT AND EQUAL PROTECTION OF THE LAW AND THE RIGHT AGAINST
DISCRIMINATION UNDER ACT 27 OF THE CONSTITUTION OF KENYA 2016**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

RULING:

1. South Nyanza Sugar company (the Petitioner) is a Sugar Miller and therefore an interested party in the Sugar Industry and its dealings with the Sugar –cane growers, was regulated by the provisions of the Sugar Act (Act No. 10 of 2001) which came into operation on 1st April 2002.
2. That Act had established a Sugar Arbitration Tribunal under Section 3 for purposes of arbitrating disputes arising between any parties under the Act. It also required that the growers and millers, growers and out growers have Sugar Industry agreements negotiated between them which conformed to the guidelines set out in the Second Schedule of the Act.
3. According to the Petition, such agreements specified the standard provisions governing rights and obligations of the growers, millers and outgrowers institution in the Sugar industry , pursuant to which it entered into such agreements with various sugarcane outgrowers for milling the zone.
4. The Petitioner as a miller was also required under Section 16(5) of the repealed Act to offer extension and other services to outgrowers and to mandate every miller to conduct business in accordance with the Act. The Petitioner , at a cost which was recoverable from the cane proceeds due to the growers ,was owed lot of money , whose recovery could only be pursued in cases of default, through the now defunct Sugar Arbitration Tribunal.
5. The Sugar Act was repealed and a new Crops Act (No. 16 of 2013) was enacted without preserving the Sugar Arbitration Tribunal. Apparently over the years, between 2007- 2014, various disputes arises between the petitioner and several outgrowers, and there were referred to the Sugar Arbitration Tribunal.
6. By the time the Act was repealed some of the disputes had not been concluded and were at various stages before the Tribunal.

7. It is the Petitioner's case that at 1st August 2014, it had several unconcluded disputes which cannot now be heard and determined by virtue of the dissolved Tribunal by dint of Section 42 (1) of the Crops Act. However the Crops Act does not provide for any administrative measures to ensure the smooth and orderly transition of the legal regime with respect to resolution of disputes which were pending before the Tribunal.

8. This is why the petitioner states that its right of access to justice under Article 48 of the Constitution of Kenya have been violated, and it cannot benefit to equal protection of the law.

9. Furthermore it is pointed out that section 40 of the Crops Act does not have any retrospective effect and the arbitration process envisaged by the provisions does not apply to the disputes which had been filed and were in existence before the commencement date.

10. The petitioner avers that the Cabinet Secretary for the time being in charge of Agriculture, Livestock and Fisheries has not made rules envisaged by the provisions of Section 40 and 41 of the Crops Act to address the Petitioner's dilemma. The applicant contends that its right to redress can only be realized by having the said pending disputes transferred to various subordinate courts with territorial jurisdiction, for hearing and determination.

11. The Petitioner therefore prays for declaration that in the absence of a functional arbitration body envisaged by the provisions of the Crops Act, any new disputes arising between the Petitioner and any of the growers over the Sugar Industry Agreements can be filed and determined before the High Court and/or any subordinate court with territorial or monetary jurisdiction.

12. Further that the disputes which were pending before the Sugar Arbitration Tribunal be transferred to the subordinate courts for hearing and determination.

13. In the supporting affidavit sworn by the Petitioner's legal officer Gabriel Ouma Otiende, he reiterates the averments made in the petition and has annexed a schedule of some of the disputes pending before the tribunal which total to 624 cases.

14. The Respondent (The Attorney General) never filed any reply nor did any representative attend court even once despite being served with a hearing notice dated 8th July 2016.

15. A few issues arise for consideration - what was the rationale for setting up the tribunal to hear the disputes under reference? Obviously as at the time the Tribunal was set up, subordinate courts were in existence, and the legislators were fully aware that courts were in existence but deemed it fit to have them handled by the Tribunal.

16. Has the Crops Act failed to address the issue under concern? The now defunct Tribunal had powers akin to those of a court and under Rule 4 (3) of the Sugar (Arbitration Tribunal) Rules 2008, the Tribunal had power to admit any pleadings, documents, references, petitions or applications. Part II of the Rules set out how disputes were to be initiated and how proceedings were to be conducted – the rules even gave room for the Tribunal to invite comments from any person on the issues involved in any hearing.

17. Further, the Tribunal was at liberty to decide the dispute on the strength of pleadings and submissions of the parties only in line with direction as may be so taken, and the Tribunal may even order conclusion of two or more matters for purposes of expediency in proceedings and finding where it is deemed appropriate.

18. Certainly the magistrates court and the High Courts have original jurisdiction to hear civil matters as enshrined in Act 165 of the Constitution of Kenya. I also recognize that Tribunals are only alternative forum settle disputes and cannot replace the authority of the courts to settle disputes between Litigants, yet in its wisdom the legislature considered that tribunal could play a supplementary role to the courts in disputes resolution of a specific kind. The Constitution at Article 159 also recognizes Tribunal. My

perception is that the Tribunal was established to help in fast tracking disputes within the Sugar Industries , which would therefore clog the regular courts.

19. Section 41 of the Crops Act requires the Cabinet Secretary to make rules providing the procedure for arbitration of disputes between farmers and other crop dealer.

The Third Schedule of the Act has the transitional provisions to the effect that on the date the Act came into force. Under Section 2 (3).

“ If on the appointed day, any suit appeal arbitration or other proceedings of whatever nature and wheresoever instituted in relation of the former institutions which is by virtue of this paragraph transferred to the authority, shall not abate, be discontinued or be in any way prejudicially affected by reason of such transfer of the business of the former institutions and any suit appeal,arbitration or other proceedings shall be continued and enforced by or against the Authority.”

20. I think this provisions takes care of petitioner concerns where there may be disputes involving it and the Kenya Sugar Board, which the Scheme refers to as “**former institutions**”.

21. As for the disputes between it and growers and out-growers the solution does not lie in transferring the dispute to the courts, but in the relevant Cabinet Secretary making rules providing for the procedure of pre-existing disputes between the farmers and other crops dealers as envisaged by Section 41 of the Act as to ensure a smooth transition. This will ensure that the pending cases referred to do not remain in limbo , and it will also save the courts which are already bursting at the seams with a heavy back log of cases , from being saddled with an additional six hundred plus cases.

22. The petitioner in my view ought to take a step and write to the Cabinet Secretary drawing attention to the provisions of Section 41 of the Act, and the yawning gap left by the Crops Act in not addressing especially the fate of pending cases which had been filed before the now defunct Tribunal. If that does not achieve the desired results, there is provision to move the courts for orders of mandamus by way of judicial Review- a bridge that would be crossed at the appropriate time.

23. As matters stand I hold and find that this application is premature and is dismissed.

DELIVERED and DATED at MIGORI this 25th day of November 2016.

H. A. OMONDI

JUDGE