



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 212 OF 2012**

**NZOIA SUGAR COMPANY.....PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT**  
**AND**

**FRANCIS OYATSI.....1<sup>ST</sup> INTERESTED PARTY**

**CENTRAL ORGANISATION OF TRADE UNIONS (K).....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Applicant in this case, *Nzoia Sugar Company Limited*, which is also the Petitioner moved this Court by way of a Notice of Motion dated 24th October, 2012, arguing that in its judgment of 12th October 2012 the Court made a final determination of the Petition at the Interlocutory stage (at the hearing of the Application for conservatory orders) and that thus, the Petitioner was denied an opportunity to be heard on its main complaints.
2. From the record, by a Chamber Summons Application dated the 18th May, 2012 The facts leading up to the present Application dates back to a Chamber Summons application dated the 18th May 2012, accompanying a Petition dated the same day the Petitioner moved this Court seeking to challenge an award of the Industrial Court in a dispute between the parties terming it as being invalid on the basis of failure by the then judges of that Court to take an oath of office as required under **Article 74** of the Constitution.
3. On 12th October, 2012, I delivered a judgment which contained the final orders of the Court in the matter. The Applicant was aggrieved by my decision and by the Chamber Summons aforesaid, it moved this Court under a certificate of urgency alleging that there was an error on the face of record to the extent that I pronounced the final orders of the court as opposed to a ruling on the application for interlocutory orders.
4. The Application which is the subject of the present Ruling is dated the 24th October, 2012 and seeks the following Orders:

(1) ***That for reasons to be recorded the Application be certified urgent and be heard ex parte in the first instance in respect of prayers 2 and 3***

- (2) *That this Honourable court be pleased to stay the orders of this Honourable court issued on 12th October, 2012 pending the inter partes hearing of this application*
- (3) *That pending the inter partes hearing of this application, this Honourable court be pleased to reinstate the ex-parte conservatory orders issued on 1th May 2012 and extended on various dates the latest extension being on 1st August, 2012 to the ruling date of 12th October, 2012*
- (4) *That this Honourable court be pleased to review its Orders of this Honourable court issued on 12th October 2012 and set them aside*
- (5) *That this Honourable court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of the case.*
- (6) *That the costs of this application be provided for.*

5. On the **26th October, 2012** after hearing the Application *ex parte*, I granted conservatory orders in terms of prayers (b) and (c) of the Application, to wit, that the orders of court issued on the 12th October, 2012 be stayed pending the inter partes hearing of the Application and that the *ex-parte* conservatory order of the 11th May, 2012 as extended from time to time, be reinstated.

6. The Application is opposed by the affidavit of **Francis Oyatsi**, the 1st Interested Party, dated the 5th November, 2012 in which he denies the Applicant's allegation that he was not given a chance to be heard contrary to the rules of natural justice pointing out that the Petitioner filed elaborate submissions dated the 5th July, 2012 in this respect. Further, that the Applicant had not alleged that the issues framed by the court for determination were in any way wrongly decided.

7. **Mr Oyatsi, Advocate for the Interested Party in Submissions** opposes the Applicant's plea that the Chamber Summons be heard afresh before another judge, arguing that the same lacked merit and that the move would defeat the provisions of **Article 22 and 159** of the **Constitution**. He asked the court to dismiss the Application and prayed that the Petitioner be condemned to pay costs.

### **Determination**

8. I think in order to put the Application in perspective, it is important to revisit the material relevant to the present Application. The Application stems from a Chamber Summons dated of 18th May, 2012 in which the present Applicant sought the following reliefs:

1. *THAT for reasons to be recorded the Application herein be certified urgent and be heard ex parte in the first instance in respect of Prayers 2 hereof.*
2. *THAT Conservatory Order do issue by way of a stay of execution of the award delivered on 16th November, 2011 and all consequential orders including a warrant of attachment dated 11/05/2012 in **Industrial Court Cause No. 361 of 2009; Francis Oyatsi vs. Nzoia Sugar Company Limited** pending the hearing and determination of this Application inter partes on such date and time as may be Ordered.*
3. *THAT Conservatory Order do issue by way of a stay of execution of the Award delivered on the 16th November, 2011 and all Consequential Orders including a warrant of attachment dated 11/05/2012 in **Industrial Court Cause No. 361 of 2009; Francis Oyatsi Vs. Nzoia Sugar Company Limited** u pending the hearing and determination of this Petition.*
4. *THAT this Honourable Court be pleased to give such further or other Orders and/or Directions as to the hearing hereof and the Petition filed herein as it may deem just in light of the circumstances hereof.*
5. *THAT the Petitioner/Applicant be at liberty to apply for such other or further orders and/or Directions as this Honpourable Court may deem fit and just to grant.*

6. *THAT the costs of this Application be provided for.*

9. The Application accompanied a Petition dated the same date in which the Petitioner (the Applicant herein) sought *inter alia* the following Orders:

**(a) A permanent order of stay of execution of the award delivered on 16th November 2011 and all consequential orders, warrants in Industrial Court Cause No. 361 of 2009; Francis Oyatsi vs Nzoia Sugar Company Limited.**

**(b) A declaration that all proceedings including the Award and consequential decree, orders, rulings by the Industrial court undertaken without the judge taking oath of office upon the coming into effect of the Constitution of Kenya, 2010 in Cause No. 361 of 2009 are unconstitutional and inconsequential therefore void, illegal, invalid and/or inapplicable.**

**(c) A declaration that Section 32(2) of the Industrial Court Act 2011 is inconsistent with Article 74 of the Constitution and therefore void to the circumstances hereof as against the Petitioner to the extent of the said inconsistency.**

10. After hearing the Chamber Summons *ex Parte* on the 18th May, 2012, I certified the matter as urgent and granted prayer no. 2 of the Application pending the hearing *inter partes*. When the Application came up for hearing on the 22nd June 2012, before Hon. Ngugi, the parties agreed and the court ruled that Mr Oyatsi, the 1st Interested Party in that case do file submissions by the 25th June, 2012 and that the Applicant responds by the 29th June, 2012.

11. When the matter came up for further mention before me on the 6th July, 2012, following consent by Parties, I directed that submissions be filed by 16th July, 2012 and that the highlighting of submissions be done on the 1st August, 2012.

12. Counsel for the Parties appeared before me on the said date and according to the court record both advocates addressed me extensively on substantive issues going to the root of the Petition including the validity or otherwise of the impugned Industrial court order. During the submissions, Mr Wekesa, counsel appearing for the Petitioner indicated as follows; *"I have my written submissions based on the Petition and Chamber Summons on record. I rely on the affidavits on record sworn by Saul Wasilwa.* Mr Wekesa then went on to make substantive arguments in support of both the Application and the Petition. Mr Oyatsi in opposition to the Petitioner's Application and during his oral submissions, also gave his client's side of the story terming both the Application and the Petition an abuse of the court process.

13. On the 12th October, 2012, I delivered the final orders of the Court in the following terms:

**(i) The Petition dated 18th September 2012 is dismissed.**

**(ii) The Cross-Petition dated 8th June 2012 is dismissed.**

**(iii) The Petitioner for reasons that it is the one that instituted the present proceedings, shall pay the costs of the dismissed Petition**

14. The Applicant takes issue with the fact that I proceeded to substantively determine the matter in entirety while according to counsel for the Applicant, I ought to have confined my finding to the conservatory orders sought in the Chamber Summons Application.

Is there merit in the Application?

### **The right to be heard**

15. The Applicant has argued that my decision to finally dispose the matter denied him the right to be heard contrary to the rules of natural justice and further that my said decision constituted an apparent

error on the face of the record.

16. The right to be heard is, no doubt a key component of the delivery of justice. It must however be remembered that the right is one of substance and not mere theoretical import. The right to be heard necessarily connotes the opportunity to be heard in substance. The question in this case is therefore **whether the Applicant was given an opportunity to be heard at all**. This is not rocket science and would easily be discerned from the proceedings, depositions and submissions presented to court by both parties; it can also be deciphered from my final decision in the matter aside from the Chamber Summons Application, there was the Petition itself which was accompanied by an affidavit sworn by one **Saul Simiyu Wasilwa**; the Managing Director of the Petitioner. Oral submissions were admitted by court as particularly depicted by the court proceedings of the 1st August, 2012.

17. I am of the view that the right to a fair hearing does not exist in a vacuum. It is a right to be granted an opportunity to ventilate one's grievances. These grievances are based on the pleadings, submissions and depositions presented before Court. In this case, the party's grievances were set out in the Petition which I have outlined at paragraph 9 above supported by depositions and submissions. It is from these that I distilled and framed the following two issues for my determination, namely;

**“(i) Firstly, whether judges of the former Industrial Court as constituted under the now repealed Labour Institutions Act are State Officers within the meaning of Article 260 of the Constitution to whom the provisions of the Constitution, in particular Article 74, apply.**

**“(ii) Secondly, the effect of the said judges not taking an oath under the Constitution with regard to the validity of any award issued by the then Industrial Court since the promulgation of the Constitution, 2010.”**

I took all matters on the record in answering the above questions.

18. It is the duty of a Court of law upon hearing Parties to render its decision. In this case i did so through 12th October, 2012. In short therefore, the party's grievance was before the court, the court heard it and made a determination on the german issues as presented to it. There is thus nothing else left to be heard and determined by this court and the Applicant has not demonstrated that this court left out what was required in its determination or shown that there was new and compelling evidence or such other grounds as to attract this court's discretion in review of its decision under the law. In any event, it is clear that the issues in contention were all decisively addressed and the remedy left is an appeal.

19. For this reason, I reject the Applicant's contention that it was not granted an opportunity to be heard.

### **Error apparent on the Face of Record**

20. The Applicant has contended that my proceeding to pronounce the final orders as opposed to a ruling on the conservatory orders constituted an error apparent on the face of the record. In ***Nyamogo and Nyamogo Advocates v Kogo* [2001] EA 173 at 173** the Court of Appeal pronounced itself as follows regarding the ground of 'error apparent on the face of the record':

***“An error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where they may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or***

**wrong view is certainly no ground for a review although it may be for an appeal. [Emphasis added]**

In the present case, I find that the issue at hand does not amount to an error apparent on the face of record as to attract this court's intervention by way of review and I have said why.

21. If the Petitioner is dissatisfied with the substance of my said decision, then the law is very clear on the proper recourse to ventilate such dissatisfaction. A party may however not circumvent the normal process of appeal by crafting a short cut by other means as the Applicant seems to employ in the guise of the present Application. While citing the case of **Maharaj v Attorney General of Trinidad and Tobago**(No. 2) [1979] AC 385, the Court of Appeal sitting at Nyeri in the case of **Methodist Church in Kenya Trustees Registered & Another v Rev. Jeremiah Muku and Another CA, Civil Appeal No. 233 of 2008(unreported)** delivered itself thus;

**“As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review.”** [Emphasis added]

I completely agree with both decisions above.

21. That said, it must also be remembered that this Court, just like other State organs is bound by various principles enunciated under **Article 10** of our Constitution. Some of these values and principles include human dignity, social justice, human rights and good governance and moreover, **Article 159(2)** provides for the principles of exercise of judicial authority. The provision reads in part as follows:

**(2) In exercising judicial authority, the courts and tribunals shall**

**be guided by the following principles—**

**(a) justice shall be done to all, irrespective of status;**

**(b) justice shall not be delayed;**

**(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause**

**(3);**

**(d) justice shall be administered without undue regard to procedural technicalities; and**

**(e) the purpose and principles of this Constitution shall be protected and promoted.**

In applying the above principles,

It is notable that this is a relatively old dispute which was commenced in 2009 when the case of **Francis Oyatsi vs Nzoia Sugar Company Ltd, Industrial Court Cause No. 36(N) of 2009** was filed and justice demands that there should be a speedy end to litigation. Further a successful party in litigation ought to be given a chance to enjoy the fruits of their judgment without the losing party employing legal tactics to frustrate that enjoyment.

23. Needless to say, it is the duty of the court to stop in their tracks abuses to its processes and it is also a good old principle of law that litigation must come to an end. This court cannot allow a second bite at the cherry by the Applicant as it were. To do so would defeat the cherished principle of efficient and expeditious disposal of disputes and compromises on the dispensation of justice on the overall, not to mention extravagance on utilisation of judicial time and resources if I were to heed the Applicant's

prayers as sought in its present Application. This would in effect be an affront on the Constitutional principles I earlier mentioned and the Constitution in general.

24. What I am saying in short is that the Court was justified and had every right to proceed the way it did. Firstly, the matter was determined on its merits and I have not been told or shown that I wrongly framed the issues for determination.

25. Secondly, in this particular case, my assesment of the conservatory orders would necessarily have invited me to address my mind, even remotely to the germane issues raised in the Petition in order that I may decisively determine whether or not to grant the drastic conservatory orders sought in the Application and whose effect was to stay orders of an equal and competent court and the due execution of warrants of attachment in pursuance of the said Order. In other words, the orders sought from the Chamber Summons application could not be considered in isolation of the real issues in controversy, being the jurisdiction and validity of the Industrial court Orders.

26. Thirdly, I neither detect any prejudice or substantial injustice that was occasioned to either parties by my proceeding the way I did nor has any such allegation been impressed on me, aside from the allegation on the right to be heard which I have disposed of, above. Lastly, the Applicant perhaps proceeds on the hope that upon revisiting the matter, I (or another judge of equal and competent jurisdiction) would by some stroke of luck second-guess my earlier decision and vary the final orders which I arrived at and consciously delivered after my full assessment of all the pleadings, depositions and submissions(both oral and written) and the evidence presented. That assumption is merely speculative.

### **Conclusion**

(a) For the above reasons, I find and hold that the Applicant was duly heard and the court addressed itself on the germain issues. I also find that there is no error apparent on the face of record as to warrant this Court's intervention in the manner suggested by the Applicant. The Application therefore lacks any legs on which to stand on from whichever angle I look at it and must collapse.

(b) I have no choice but to dismiss the Chamber Summons Application dated the 24th October, 2012.

(c) For the avoidance of doubt, the conservatory orders I granted on the **26th October, 2012** are hereby discharged.

(d) I award the 1st Interested Party herein the costs of the Application as against the Petitioner/Applicant

(e) Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Irene – Court clerk*

*Mrs. Midal holding brief for Mr. Oduor for 2nd Respondent*

*Mr. Miyare holding brief for Mr. Oyatsi for 1st Interested Party*

*Mr. Opndo for Attorney-General*

**Order**

*Ruling duly read.*

