REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JR CIVIL APPLICATION NO. 6 OF 2013

IN THE MATTER OF AN APPLICATION FOR ORDR OF CERTIORARI AND PROHIBITION BY JOSEPH ABUYA

AND

IN THE MATTER OF CHIEF MAGISTRATE'S COURT AT KISII CIVIL CASE NO. 469 OF 2010 IN JOSEPH ABUYA V. SOUTH NYANZA SUGAR COMPANY

AND

IN THE MATTER OF CHIEF MAGISTRATE'S COURT AT KISII CIVIL CASE NO. 1502 OF 2004 IN JOSEPH O. OBALA V. SOUTH NYANZA SUGAR COMPANY

BETWEEN

JOSEPH ABUYA …….……..…….. 1ST APPLICANT

JOSEPH O. OBALA ……..…… 2ND APPLICANT

VERSUS

THE CHIEF MAGISTRATE, KISII LAW COURTS ……..……..…… RESPONDENT

AND

SOUTH NYANZA SUGAR CO. LTD …….....……..… INTERESTED PARTY

RULING

1. The applicants seek leave of court to file judicial review proceedings for:

a. **Orders of certiorari to remove into the High Court and quash the orders given on 7th May 2013 stating that suits do stand dismissed in the Chief Magistrate's court in Kisii in Civil Suit No. 469 of 2010 Joseph Abuya v. South Nyanza Co. Ltd to apply in C.C No. 480 of 2010, C.C No. 949 of 2004, C.C No. 69 of 2004, C.C No. 495 of 2010, C.C No. 779 of 2004, C.C No. 1473 of 2004, C.C No. 946 of 2004, C.C No. 1479 of 2004, C.C 663 of 2005, C.C NO. 717 of 2005, C.C NO. 807 of 2005, C.C No. 284 of 2006, C.C No. 286 of 2006, C.C No. 287 of 2006, C. C No. 685 of 2006, C. C No. 516 of 2009, C. C No. 517 of 2009, C. C No. 520 of 2009, C. C No. 522 of 2009, C. C No. 529 of 2009, C.C No. 530 of 2009, C.C No. 549 of 2009, C.C No. 386 of 2010, C.C No. 396 of 2010, C.C No. 461 of 2010, C.C No. 467 of 2010, C.C No. 470 of 2010,**

and orders applied in C.C No. 508 of 2004, C.C No. 53 of 2004, C.C 289 of 2006, C.C No. 1501 of 2004, C.C No. 652 of 2005, C.C No. 791 of 2005, C.C No. 55 of 2004, C.C No. 655 of 2004, C.C No. 978 of 2004, C.C No. 1502 of 2004, C.C No. 1499 of 2004, C.C No. 1482 of 2004, C.C No. 650 of 2005, C.C No. 1480 of 2004, C.C No. 494 of 2004, C.C No. 959 of 2004, C.C No. 677 of 2005, C.C No. 801 of 2005, C.C No. 1500 of 2004, C.C No. 665 of 2005, C.C 499 of 2004;

b. **An order for prohibition to prohibit the Chief Magistrate's Court Kisii from enforcing and/or executing the order issued on 7th May 2013 in so far as it purports to direct that the suits to stand dismissed; and that**
c. **Leave thus granted by this honourable court do operate as a stay of these proceedings, rulings and orders in the Chief Magistrate's at Kisii in Civil Case No. 469 of 2010 and the orders as applied in the related cases.**

2. The test for the grant or refusal of leave to file judicial review proceedings is whether the applicant has an arguable case and not whether there is a prima facie case even though a prima facie case does not mean a case that must succeed. See ***Meixner & Anor v. Attorney General*** [2005] 2 KLR 189; ***R. v. Attorney General*** [2006] 1 KLR 219; and ***Oil Com. Kenya Ltd v. Permanent Secretary of Roads and Public Works & Anor*** [2008] KLR 104 [Although the holding in the last case that an application for leave to file judicial review proceedings is supposed to proceed *ex parte* and the High Court had no discretion to conduct the application *inter partes* is no longer good law in view of the proviso to rule 1(4) of Order 53 Civil Procedure Rules, 2010].

3. The present application for leave is supported by the grounds set out on the application and the averments contained in the affidavit of Ezekiel Oduk, counsel for the applicants, sworn on the 6th June 2013. The principal complaint is that the Respondent Chief Magistrate in considering the ruling on a preliminary objection as to jurisdiction in some 40 suits filed against the defendant South Nyanza Sugar Co. Ltd, and without hearing the plaintiffs on the matter, ordered that the plaintiffs pay appropriate court fees within 30 days of the ruling and further subsequently directed that the order applies in 22 other suits filed by the firm of advocates representing the applicants against the defendant Sugar Company, which cases the magistrate had fixed for Notice to Show Cause for want of prosecution. The applicants/plaintiffs contend that the Chief Magistrate's acts were arbitrary in a *"manner that speaks of actual bias, prejudice and malice and with a very oppressive time frame"*, urging that the *"actual court fees"* were unassessed and unknown, and that the plaintiffs in the case instituted in 2004, 2005, 2006, 2009 and 2010 had to be traced and advised to pay the new fees.

4. In arguing the application for leave, Ms. Kwinga for the applicants submitted:

"Application dated 7/6/13. Chief Magistrate's court in 469 of 2012 made an order to apply in 40 cases to the effect that these cases would stand dismissed if unknown court fees were not paid within 30 days. The firm acts for all the plaintiffs in the 40 cases. The Chief Magistrate applied the orders in the case before her to the other 40 cases. The parties in the 62 cases have not been notified of the date of ensuring compliance. The fees have not been assessed by the court. The order was not clear for the applicants to comply. The applicants have already paid fees for the filing of the suits. The court has acted without jurisdiction and in bad faith. It amounts to an abuse of power. Affidavit of Ezekiel Oduk of 6/6/13. The time frame is oppressive. The decision is tainted with illegality as the issue was not raised before lower court and we were not given opportunity to be heard on the point".

5. On the merits, it would appear that the applicants' complaint with regard to the appropriate court fees is not well taken because, in accordance with Part IX of the Schedule to the Judicature Act, where the amount involved in the suit is ascertained, court filing fees are calculated under a scale set out therein as *ad valorem* fees payable immediately and any objection thereto is to be dealt with under Clause 2 thereof:

> ***2(1) In any case where a court fee is assessed and levied or sought to be levied by a registry of the High Court or of a subordinate court by virtue of these Rules the***

person required to pay the fee may, if he wishes to contend that such fee has been wrongly assessed or that no fee is leviable, pay the fee so assessed and within seven days thereafter file in that registry a protest in writing against the fee setting out the grounds upon which he relies in his contention; and upon receipt of the protest, the registry shall forthwith consider it and inform the person by whom the fee was paid in writing of the result of such consideration.

(2) If as a result of its consideration the registry is of the opinion that the fee paid was in excess of the lawful fee or that no fee was leviable it shall forthwith refund to the person by whom it was paid the amount of the excess or of the fee as the case may be.

(3) If the person by whom the fee was paid is not satisfied with the decision of the registry upon his protest he may require in writing that the registry thereupon refer the matter to a judge or resident magistrate (as the case may be) in chambers for determination and the order to be made in writing on that reference shall be final.

(4) A fee of sh. 100 shall be payable on a written protest which fee will be returnable to the person by whom it was paid in the event of the protest succeeding in whole or in part.

However, Judicial Review is concerned with the process of the decision-making rather than the merits of the decision. See ***R v. Attorney General***, Supra.

6. Without considering the complaint in depth so as not to prejudice the hearing of the matter, I find that the applicants have an arguable case with respect to want of fair hearing because:-

a. The issue of appropriate court fees for the suits was not raised and canvassed between the parties during the preliminary objection as to the jurisdiction of the court. It is clear that the court raised the issue on fees of its own motion. In her ruling on 7/5/13, the Chief Magistrate dealt with the issue of appropriate fees which had not been raised before her as follows: ***"There was also the issue that suits filed after the coming into force of the Sugar Act 2001 should be struck out. That could have applied if it was found out and established that the Sugar Act ousted the jurisdiction of the court. This is not being the case that argument is not tenable. I do therefore dismiss the preliminary objection and order that the plaintiffs in the various files do pay the appropriate fees as their claims are quantifiable and therefore fees should not have been paid as if general damages were being claimed for. This should be done within 30 days from date of ruling in various counts as allocated by the Chief Magistrate. Secondly, the plaintiffs in the various suits particularly those filed in 2004, 2005, 2006 and 2009 should have their suits prosecuted and determined within 6 months from date of confirmation of payment of requisite fees. Orders accordingly." (sic)***

b. The Notices to Show Cause on the 22 cases were not heard before the court ordered that the order in case no. 469 of 2010 do apply to these files.

The court would therefore grant leave to file Judicial Review proceedings.

7. While the Chief Magistrate's Court is to be commended for seeking to expedite the conclusion of cases pending before it as backlog from way back as 2004, 2005 and 2006, the Notice to Show Cause issued for that purpose must be heard and disposed of in accordance with Order 17 Rule 2(1) of the Civil Procedure Rules, allowing the plaintiffs an opportunity to show cause why the case should not be dismissed. In these circumstances, it may not be the case that the Chief Magistrate selectively targeted the cases filed by the applicants' advocates' firm as alleged.

8. However, the effect of the Chief Magistrate's court's order of 7/5/13 in the initial 40 suits and its subsequent application to the other 22 suits is that the 62 suits against the defendant South Nyanza

Co. Ltd will stand dismissed if the plaintiffs do not pay the appropriate fees within 30 days of the 7/5/13 and the cases prosecuted within 6 months of the payment.

9. It is not clear from the decision of the court what is to happen if the plaintiffs cannot pay the requisite fees in 30 days. Moreover, the original order in C.M.C.C. No. 469 of 2010, does not contain the default clause that the suits do stand dismissed if they are not *"prosecuted and determined within 6 months from the date of confirmation of payment of the requisite fees"*. The default clause is imposed by the later endorsement on the 22 other suits in terms that: *"Order in no. 469 of 2010 to apply. Suit to be [prosecuted] and determined in 6 months. In default stand dismissed."*

10. The prospect of the suits standing dismissed upon the default of payment of the appropriate fees and or failure to prosecute the case within 6 months of such payment, and the apparent lack of clarity as to the terms of the order of the court of 7/5/2013 and its application to 40 cases the subject of the ruling and the 22 cases to which the order was subsequently applied, justify a further order by this court that the grant of leave do operate as a stay of the said decisions.

11. Accordingly, I grant the orders sought by the applicants in terms of prayers nos. (b) (c) and (d) of the Chamber Summons dated 7/6/13, with costs in the cause.

12. Toward an expeditious disposal of this matter, the applicants will file their Notice of Motion within 21 days from the date of this ruling and the matter will be mentioned for directions as to hearing on the 3rd July, 2013.

Dated and delivered this 14TH day of JUNE 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

…….. for the Applicants

……. for the Respondent

Mr. Edwin Mongare – Court Clerk