REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 251 'B' OF 2007

MUMIAS SUGAR COMPANY LIMITED…….....
…….PLAINTIFF

VERSUS

SEMLIKI MINERAL RESOURCES LIMITED….....……DEFENDANT

AND

ARUA MERCHANTILE LIMITED…….....……INTERESTED PARTY

RULING

This suit relates to a consignment of sugar which is in 12,460 gunny bags. These gunny bags are alleged by the plaintiff to bear its label and trade mark. The plaintiff in this case sought an injunction to prevent the defendant from disposing that sugar; an order for general damages for passing off or interfering with the plaintiff's Brand name and trade mark and for an order of destruction of the gunny bags. This case was filed on 24th October 2007. On that day the court issued an ex parte injunction in favour of the plaintiff restraining the defendant from clearing that sugar from the Kenya Port Authority (K.P.A). The injunction was confirmed on 20th February 2008 for the period upto the determination of the suit. The court in issuing that injunction declined to order for the destruction of the gunny bags. This was because the court found:

"……..the destruction of the sugar is denied because the court will have lost the subject matter of the suit"

Following the plaintiff's application dated 7th April, 2011, this court delivered a ruling on 27th April, 2011 whereby the court ordered for the destruction of 12,460 bags of sugar lying at K.P.A Mombasa. The court further ordered for the Kenya Revenue Authority (K.R.A), K.P.A and Kenya Bureau of Standards (KEBS) to supervise the execution of the destruction of the said sugar. The court made that order having considered the report made by KEBS dated 23rd June 2010. That report found that the sugar had expired and was therefore unfit for human consumption.

The interested party **ARUA MERCANTILE LIMITED** was joined in this action on 16th May 2011 by an ex parte application. On being joined the interested party filed a notice of motion dated 19th May 2011 seeking orders for the variation or the setting aside or discharge of the order of destruction of the sugar

made on 27th April, 2011. Interim orders were granted stopping the destruction of the sugar but after inter partes hearing of that application it was dismissed on 16th December 2011. On that day the court granted the interested party leave to appeal against that ruling. The court also granted the interested party "*stay of execution for 30 days only*".

I am now considering the interested party's application dated 26th January 2012. The interested party seeks stay pending appeal. It has now filed a notice of appeal against the ruling of 16th December 2011. Although this is an application for stay of execution pending appeal, I wish to begin by first considering the interested party's argument that the stay granted on 16th December 2011 extended beyond the 30 days granted by the court because of the provision of order 50 Rule 4 of the Civil Procedure Rules 2010. The interested party argued that the 30 days having fallen during the Christmas High Court Vacation, the order of 16th December 2011 continued to subsist beyond the 30 days because of the provisions of that rule. Order 50 Rule 4 provides as follows:

"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: provided that this rule shall not apply to any application in respect of a temporary injunction." (*Underlining mine****)***

A careful look at that rule will show that the period between 21st December to 13th January are excluded from the computation of time when a party is amending, filing pleadings or doing any other act. That rule does not at all extend the order of stay as in this case. The interested party was wrong in its argument. That rule would have extended time only if the interested party was required to do an act, which was not the case here. It would therefore follow that the stay of execution granted on 16th December 2011 expired 30 days thereafter. If the plaintiff or any other party destroyed the sugar the subject of this claim, after the 30 days period, they cannot be said to have been in contempt of a court order because no such order existed. To iterate and reiterate, Order 50 Rule 4 extends time for a party who is required to either file or do an act within a given time. It does not extend orders.

The parties involved themselves in very protracted arguments in respect of the application under consideration. Some of the arguments went beyond what the court should consider in an application for stay pending appeal. The explanation for such exuberance could possibly be because of the value of the sugar in this matter. Some of the pleadings between the parties have put the value of that sugar to be US 937,000. Roughly, at today's rate that amount is Ksh. 76,834,000. The interested party submitted that when the application for setting aside the order for destruction was dismissed a temporary stay was granted. According to the argument of the interested party, the stay granted stayed the destruction of the sugar as ordered by the court on 27th April, 2011.The interested party further in support of its application submitted that it filed a notice of appeal on 20th December 2011 being an appeal against the ruling of 16th December 2011. It argued that if stay pending appeal was not granted, it would suffer loss to the investment that it had put in the sugar. That if that sugar was destroyed, it would be the end of this action. Further that the destruction of the sugar would destroy the evidence in another case involving the same parties being MSA HCCC NO. 249 of 2008. The interested party in HCCC 249 of 2008 has sued the plaintiffs and defendants in this case and another party.

The application was opposed by the plaintiff. The plaintiff began by posing a question to the court whether there was an order capable of being stayed as sought by the interested party. In this regard, the plaintiff referred to the ruling of 16th December 2011 and stated that the ruling of that day merely dismissed the interested party's application dated 19th May, 2011. The plaintiff argued that since the interested party's application of setting aside the order for destruction of the sugar was dismissed there was no order in that ruling capable of being stayed. The plaintiff relied on the following cases where the courts held that a negative order is incapable of being stayed save for execution of costs. Those cases are:

1. The Municipal Council of Mombasa Vs. Summit Cove Lines Company Limited Nairobi Court of Appeal Civil Appl. No. NAI 26 of 2011 (UR. 19/2011) – unreported.

2. Giant Holdings Limited Vs. Kenya Airports Authority Nairobi Court of Appeal Civil Appl. No. 193 of 2005 & 139 of 2007 – unreported.

3. Attorney General Vs. Law Society of Kenya & Another Nairobi Court of Appeal Civil Appl. No. 144 of 2009 (UR97/2009) –unreported.

4. Lazaro Kabebe Vs. Ndege Makau & Another Nairobi Court of Appeal Civil Appl. No. 7 of 2011 – unreported.

5. Irene Njoka Vs. Peter Njeru Nyaga Nyeri Courat of Appeal Civil Appl. No. 165 of 2010 – unreported.

The court of appeal in the case Giant Holdings Limited (*supra*) had this to say in that regard:

"We respectfully agree with submissions of KAA's counsel that the application for stay of execution is misconceived. The superior court merely dismissed the GHL's application for interlocutory injunction with costs. The superior court did not grant any positive relief to KAA nor order any party to do anything or refrain from doing anything. The appellant has not specifically sought stay of execution regarding costs (see Western College of Arts & Applied Sciences V Oranga & Others [1976] KLR 63)."

The court of appeal in the case the Municipal Council of Mombasa (*supra*) stated as follows in that regard:

"The order of 4th February, 2011 dismissing the application to stay or discharge the order of 31st January, 2011 was a negative order which is not capable of being stayed. Secondly, on the basis of the authorities cited, the Court has no jurisdiction to grant the application for stay of execution of the ex parte order of 31st January, 2011 being an order of injunction."

The plaintiff submitted further that since there was no order capable of being stayed the order of stay granted on 16th December 2011 was made without jurisdiction and the plaintiff was right to have ignored it. To support that argument, the plaintiff relied on the case Omega Enterprises (copy No. 7) where the court of appeal as per Pall J.A. stated as follows:

"Also Order 39 rule 3(2) mandates that no ex parte injunction in any case shall be for more than 14 days. I agree with Mr. Gautama that the learned Judge granted the said ex parte injunction for 16 days clearly in defiance of the mandatory provisions of this sub-rule. I agree with Mr. Gautama that an order granted in defiance of order 39 rule 3 is invalid, and null and void. It cannot have any legal effect.

In ***MACFOY VS UNITED AFRICA LTD [1961] 3 AII E.R 1169 Lord Denning said at pg 1172***:

"If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

As the proceedings of 15th January, 1993 were in pursuance of the order of 18th December, 1992, they were also of no legal effect, and a nullity in law."

The court in that case was considering an appeal against an injunction made by the high court in

contravention of order **XXXIX** of the old Civil Procedure Rules which was replaced by order 40 of the civil Procedure Rules 2010. In the judgment of Tunoi J.A, in that case he stated as follows:

"Thus, the ex parte order made by the learned Judge was made without jurisdiction since the maximum period for the validity of the interim order of 14 days was exceeded. I think, also, that the said order must be without any legal basis and hence null and void."

The plaintiff in further opposition of the interested parties application argued that the application must fail because the interested party although had been joined as a party in this action, the pleadings had not been amended to reflect the interested party's name. To support that argument the plaintiff relied on order 1 Rule 10(2) of the Civil Procedure Rules 2010. That rule is in the following terms:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

It was the plaintiff's argument that the pleadings having not been amended the interested party had no right to be heard on the stay pending appeal application. The plaintiff referred to a case filed by the interested party in Kampala High Court where the interested party had sued the defendant in this case seeking judgment for money that the interested party alleged to have used to invest in the purchase of the sugar the subject of this case. Judgment was entered in the Kampala court in favour of the interested party. The judgment amount in that case was equivalent to Ksh. 42, 037,955.00. That judgment was registered in this court by the interested party in MSA HCCC 249 of 2008 (O.S) as a Foreign Judgment under Foreign Judgment (Reciprocal Enforcement) Act Cap 43. The execution of that judgment was later stayed on an application made by the plaintiff in this case. The plaintiff argued that it was on that stay being granted that the interested party sought and obtained an order to be joined as an interested party in this cause. It was the plaintiff's argument that the defendant and the interested party in this matter were acting together that is they were cohorts. To support that submission the plaintiff stated that the learned counsel Mr. Asige Kaverenge acted for the defendant and filed the defence for the defendant in this matter but thereafter ceased to act and began to represent the interested party. That the said Mr. Asige began to act for the interested party when the execution of the judgment of the Kampala High Court was stayed.

The plaintiff was also of the view that the stay sought by the interested party could not be entertained without involving K.R.A, K. P. A and KEBS. The plaintiff so submitted because of the order made on 27th of April, 2011 which required:

"That the Kenya Revenue Authority, Kenya Bureau of Standards and the Kenya Ports Authority do supervise the execution of destruction of the said sugar".

The plaintiff in reference to the Ruling of 16th December 2011 stated that what the interested party should have done was to appeal against the finding of KEBS that the sugar was unfit for human consumption. In that regard plaintiff's learned counsel referred to the ruling of 16th December 2011 as follows:

"The Standards Act section 14 A (4) provides for an appeal against any grievance regarding an order for destruction of goods under that section. The interested party had an opportunity to follow that route but opted not to do so".

On the issue of whether the interested party would suffer substantial loss, the plaintiff referred to the deposition of *Calleb Manase Ananda* in his affidavit dated 31st January 2012 in reply to the application by the interested party as follows:

"That the only loss that the Applicant was bound to suffer is what it claims to be the value of the sugar and the interest of funds it claims to have provided for the purchase of the sugar. This loss has been fully covered and addressed in a decree issued by the HIGH COURT OF UGANDA (COMMERCIAL DIVISION) at KAMPALA IN CIVIL SUIT NO. 198 OF 2008 which has been adopted as a decree of this court in MOMBASA HIGH COURT CIVIL CASE NO. 243 OF 2008 (O.S). I will refer to the affidavit of EMILY OTIENO filed in this matter on 27.5.2011 and the Applicant's application filed herein on 19.5.2011 in support of this fact. That at any rate, it is a matter of sufficient notoriety the plaintiff is the biggest sugar company in Kenya listed in the stock exchange producing over 60% of Kenyan's Sugar production for local consumption and for export and with moveable and immoveable assets whose value is in billions of shillings and it is more than capable of making good any loss the Applicant stands to suffer, if at all such loss is attributed to the plaintiff."

The plaintiff submitted that the sugar having been condemned herein it was unfit for consumption both in this country and in Uganda. Plaintiff's learned counsel submitted that lives cannot be compared to any loss of money.

In a nut shell, that captures the parties' arguments. The question to first consider is, whether the interested party is seeking to stay a negative order? The ruling of 16th December 2011 dismissed the interested party's application seeking to set aside the order of destruction of sugar of 27th April, 2011. The Court on making the dismissal order on 16th December 2011 granted 30 days stay to the interested party. The court did not on that day specifically state what was being stayed but it is clear what was before the court was whether or not to set aside the destruction order of the sugar. It therefore would follow that what the court was staying for 30 days was the destruction order. I do make a finding that the interested party is not now seeking to stay a negative order but rather it is seeking stay of destruction of the sugar. I also reject the plaintiff's argument that the interested party's application for stay pending appeal is defeated by failure to amend the pleadings to reflect the interested party's name. I reject that argument because, who after all would be the party to amend the pleadings. The pleadings here are the plaint and the defendant's defence. It is only the plaintiff who can amend its plaint and similarly it is only the defendant who can amend its defence. The interested party cannot be blamed for those parties' failures to amend their pleadings. The fact that K.P.A, K.R.A and KEBS are not parties to the application before court does not defeat the interested party's application. This is because, a careful reading of the order of 27th April, 2011 reproduced above, will show that those parties involvement in the destruction of the sugar was because they have expertise which they were to offer in the destruction of the sugar. The appearance of those parties in this action therefore would serve no other purpose. The plaintiff's argument in respect of the Foreign Judgment registered in favour of the interested party and whether or not the interested party and the defendant are cohorts in this case or that the interested party failed to file an appeal against the finding that the sugar was unfit for human consumption are not issues for consideration in an application for stay pending appeal. Order 42 Rule 6 (2) is very clear on what the court should consider in an application such as the one before court. The Rule provides:

"No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

The interested party submitted that if the order of destruction of the sugar is not stayed, it would lose substantially the investment it made in the procurement of the sugar. I am in total agreement with the plaintiff's submission that the loss of investment cannot be considered when the lives of the people are at risk. I am also in agreement with the submissions that the lives of the people in Kenya deserve protection as well as the lives of the people in Uganda. There is a report made by KEBS in this file to the effect that the sugar in unfit for human consumption. The interested party has not brought before court another report showing to the contrary. The provisions of Article 10 of the Constitution of Kenya 2010 require or binds this court in interpreting any law to pay regard to the National Values and Principles of Governance

as set out in that Article. The values in that Article which are relevant to this case are in my view human dignity and human rights. To allow the sugar which is condemned by KEBS as being unfit for Human consumption to be retained as the interested party seeks, with the attendant risk that it may subsequently be released in the open market for human consumption would be contrary to those two values stated above. Even as the sugar is presently detained at K.P.A, both parties in their submissions intimated that there is or have been cases of that sugar being released for sale to unsuspecting members of the public. If that has happened, there is no doubt that the health of the unsuspecting members of the public has been compromised. Such a release is contrary to those persons' Human dignity and Human Rights. The court cannot accede to the application for stay of execution in the light of the dangers to the lives of the people of Kenya or Uganda. It is for that reason that the application is denied and accordingly the application dated 26th January, 2012 is hereby dismissed with costs to the plaintiff. For the avoidance of doubt, the temporary stay of execution granted to the interested parties on 16th December 2011 and 26th January 2012 is hereby set aside.

DATED and **DELIVERED** at **MOMBASA** this 15***th*** day of ***March, 2012.***

MARY KASANGO

JUDGE