REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE 23 OF 2012

GIDEON ANGACHI ANYINYA..1ST PLAINTIFF

JOHN MULESHE WERE..2ND PLAINTIFF

CHRISTOPHER ODHIAMBO OCHOLA.........................3RD PLAINTIFF

JOSHUA ANYANGA OMUKANI.......................................4TH PLAINTIFF

EGLAY AMAKOBE MAKOKHA.......................................5TH PLAINTIFF

MOSES WAMBOYE LISUNU...6TH PLAINTIFF

AGGREY MUKOLWEO MUSUMARI...............................7TH PLAINTIFF

PETER MALIKA ATSIMIRE..8TH PLAINTIFF

GILBERT MILTON OKAYE...9TH PLAINTIFF

OMUMIA KUSIMBA WERINGA.....................................10TH PLAINTIFF

MUMIAS SUGAR COMPANY LIMITED.........................11TH PLAINTIFF

~VRS~

WEST KENYA SUGAR COMPANY LIMITED......................DEFENDANT

RULING

On 7/3/2012 the Plaintiffs filed this suit seeking a permanent injunction to restrain the Defendant, its servants, employees, agents and officers from soliciting for sugarcane, constructing a weighbridge, interfering with the development of sugarcane, or causing the breach of contracts by the 20,000 farmers who are contracted to the 11th Plaintiff. Along with the suit was filed the present motion seeking an interlocutory injunction to restrain the Defendant, and all those acting under it, from soliciting for sugarcane, interfering with the developing of sugarcane, causing the breach of contracts by farmers who are contracted to the 11th Plaintiff, pending the hearing and determination of the suit. Pending the hearing and determination of the application, they sought an interlocutory injunction to restrain the Defendant from soliciting for sugarcane, constructing a weighbridge, interfering with the development of sugarcane and causing the development of sugarcane and causing the breach of contracts by farmers contracted to

the 11th Plaintiff.

There is a history to this dispute that is not in dispute. The 11th Plaintiff and the Defendant are sugarcane millers in Kakamega County. The 11th Plaintiff has contracts with about 20,000 farmers in Busia County. These farmers grow sugarcane which they sell to it. The 1st to 10th Plaintiffs are some of those farmers. The Defendant has not been left behind. It has gone to Busia County and constructed a sugarcane weighbridge at Tongakona in Olepito area in the County. It is in the process of contracting farmers in the County to grow cane and sell to it through the weighbridge. So far it has contracted 824 farmers. Before the construction of the weighbridge the Defendant obtained the permission of the County Council of Busia.

The complaint by the Plaintiffs is contained in paragraphs 12 and 15 of the affidavit sworn by Emily Kadenyi Otieno (Company Secretary/Legal Affairs Director of the 11th Plaintiff) to support the application. She stated as follows:

"12. The said construction of a weighbridge has all along been undertaken in total disregard of the existence of contractual obligations between the 1st to 10th Plaintiffs on one hand and the 11th Plaintiff on the other hand.

13. That the Defendant's sole intention is to hire the Plaintiffs and the 20,000 other farmers who have contract with the 11th Plaintiff into violating the subsisting agreement entered into with the 11th Plaintiff.

14. That the Defendant's unilateral conduct in constructing a weighbridge within entering into individual contracts with farmers is not only prejudicial to its contractual obligations with 20,000 other farmers within Busia zone and that it is a real threat to its source of cane and its crushing capacity and may grind its core activities to a halt.

15. That while the Defendant is free to recruit new farmers in the Busia Sugar Zone and invest in cane development in the area, the entrance of the Defendant in the said zone and the construction of the weighbridge to buy sugarcane, where none has been developed creates fertile grounds for sugarcane poaching which has severely affected the operation of the 11th Plaintiff in the past."

The other supporting affidavit was sworn by the 1st Plaintiff. It is basically on the same lines as the one sworn on behalf of the 11th Plaintiff. It questions the Defendant's action in constructing a weighbridge without first recruiting new farmers to develop cane and before entering into contracts with such farmers. In paragraph 10 he states:

"10. That since the commencement of the construction of the weighbridge, the Defendant agents and or fronts has commenced hiring, misleading, seducing and using all means possible to violate our contractual obligations with the 1st to 10th Plaintiffs and other farmers on the contract list."

The Defendant swore a replying affidavit through its Director Jaswant Singh Rai to say that the weighbridge has been constructed on their parcels of land L.R. Nos South Teso/Angoromo/8343 and 7885 and that the construction has been completed. It is now engaged in contracting farmers in Busia Zone to grow cane to supply to it through the weighbridge. It is investing in cane development in the area. These farmers are new ones, and not the ones contracted to the 11th Plaintiff. It denied that it has approached any farmer contracted to the 11th Plaintiff, or that it is hiring or seducing any such farmer to breach his contract with the 11th Plaintiff. In paragraphs 29 and 30 of the affidavit he deponed as follows:

"29. That the 11th Plaintiff's objection to the Defendant's weighbridge is initiated by bad faith as it seeks to unfairly restrict the Defendant from undertaking its operations in the light of the industry practice and policy that millers are free to obtain cane from any milling sugarcane farmer. The Defendant has constructed its weighbridge in Busia County in acknowledgment of the said practice and policy.

Similarly, in the Standard of March 9, 2012 the 11th Plaintiff has advertised a Building Tender for construction of the proposed Bumula and Navakholo Cane Buying Centres. Annexed hereto marked "JSR9" is a true copy of an excerpt of The Standard newspaper of March 9, 2012 bearing the said advertisement.

30. That further to the foregoing I wish to state that the 11th Plaintiff has no valid legal or contractual claim to exclusively harvest cane in the area commonly referred to as Busia Sugar Zone in the light of Government Policy to licence new Sugar Millers in the zones previously allocated to other millers. In addition the Kenya Sugar Board has often stated that it has no power to allocate exclusive zone(s) to any miller."

The Defendant filed a notice of preliminary objection to the suit and application. The objection was based on various grounds. One was that this court has no jurisdiction to hear and determine the suit in view of section 31 of the Sugar Act, 2001. The other was that, since the impugned acts and operations of the Defendant are in Busia County where the subject sugarcane is growing the suit ought to have been filed in the High Court at Busia.

Both the preliminary objection and the interlocutory injunction application were argued together. The court was addressed at length by Prof. Ojienda for the Plaintiffs and Mr. Kibe Mungai for the Defendant. I have considered what they said, what was contained in the written submissions and the authorities that were cited.

I will first deal with the merits of the application. The Plaintiffs' position is that while the Defendant is free to recruit new farmers in the Busia Sugar Zone and invest in cane development in the area, its entrance in the said zone and the construction of the weighbridge to buy sugarcane, when it has not developed any, has created a fertile ground for sugarcane poaching. This will severely affect the operations of the 11th Plaintiff. Further, the fact that the Defendant has no sugarcane of its own in the zone will lead to the interference with the contracts the 11th Plaintiff has with its farmers. The Plaintiffs have otherwise no problem with the Defendant approaching farmers in the area who are not contracted to the 11th Plaintiff and entering into contracts with them to grow cane and sell to it. Prof. Ojienda submitted that on the facts on record the Plaintiffs had demonstrated that the Defendant was procuring a breach of contract which is a known tort. He cited Butterworth's Common Law Series, the Law of Tort, 2nd Edition at page 1563 to explain the tort:

"The indirect forms of the tort arise where the Defendant unlawfully interferes with the claimant's contractual rights or expectations, for example, by placing physical restraint on the other contractual party, by interfering with the subject matter of the contract, or by persuading the others contracting party's employees to withhold their vital services. …. Another possible difference, advocated by some, is that the Defendant's conduct in the indirect forms of the tort must be somehow targeted to the claimant, which is something that may be presupposed on respect of direct procurement of breach."

Counsel referred to the decision by Lord Macnaghten in **Quinn v. Leathem [1901] A.C. 495 at 510** in which the common law principle of inducing breach of contract was defined in the following terms:

"*It is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."*

For an act of inducement of breach of contract to be actionable, Prof. Ojienda went on, three elements are to be shown to obtain:

a) the procurer must know of the existence of the contract and intend to interfere with its performance;

b) the procurer must not have had any sufficient justification for so acting; and

c) the contract must actually have been broken or is likely to be broken, causing actual damage to the Plaintiff.

It was submitted that the activities of the Defendant were inducing a breach of contract between the 1st and 10th Plaintiffs and the 11th Plaintiff and therefore needed to be restrained.

Mr. Kibe Mungai's response was that it had not been pleaded in the plaint or deponed in the supporting affidavit that the Defendant was committing any breach of contract, and neither had any particulars of such breach been pleaded or stated. Further, the evidence showed that the Defendant was contracting its own new farmers and that there was no evidence that he was interfering with the activities of the 20,000 farmers with the 11th Plaintiff.

The application for interlocutory injunction has to be decided on the basis of the settled principles in **Giella v. Cassman Brown & Co. Ltd [1973] EA 358**. The Plaintiffs have to demonstrate that they have a *prima facie* case with a probability of success; that they stand to suffer irreparably if the injunction is not granted; and that, if there is any doubt, the balance of convenience is in their favour.

The facts so far disclosed by the parties show that the 11th Plaintiff has contracted 20,000 or so farmers in Busia County through whom it is developing came for its factory. The Defendant has gone into the County for the same purpose and is recruiting its own set of farmers. The 11th Plaintiff fears that the Defendant is going to lure away its contracted farmers. The Plaintiff would have preferred the situation where the Defendant had first of all contracted farmers and developed cane before constructing the weighbridge.

Neither the court nor the Plaintiffs can question the Defendant's legitimate business decisions or strategy. It is upon the Plaintiffs to demonstrate acts or activities on the part of the Defendant that have led to the conclusion that the 1st to 10th Plaintiffs are being lured or seduced away, or that the contracts between the 1st and 10th Plaintiffs and the 11th Plaintiff are being breached by the activities of the Defendant.

It is material that the Plaintiffs have not brought a representative suit on behalf of the said 20,000 or so farmers. It is also material that the particulars of the induced breach of contract were not pleaded nor sworn to. There is no evidence or affidavit sworn by the 1st to 10th Plaintiffs, or by any other farmer contracted to the 11th Plaintiff, to say that the Defendant, or any of its named agent or employee, has approached them to abandon their commitment to the 11th Plaintiff. There was no plea or evidence tendered to show that the contracts are being breached, or are likely to be breached, owing to the activities of the Defendant. In other words, I am unable to find that the Plaintiffs have shown that they have a case that will probably succeed.

Has it been shown that if the interlocutory injunction is not granted the Plaintiffs will suffer such loss or damage that damages may not appropriately compensate? The 1st to 10th Plaintiffs have contracts whose value is limited to the amount of cane they will deliver to the 11th Plaintiff. The value was not disclosed, but it is instructive that the 11th Plaintiff stated that it has so far spent Ksh.500,000,000/= in sugarcane development through its 20,000 or so farmers. What is has spent on the 1st to 10th Plaintiffs is, therefore, substantially less than that amount. It was not pleaded or shown that the Defendant does not have the capacity to pay any such amounts.

Regarding the balance of convenience, it is my view that the 11th Plaintiff and the Defendant should be allowed to compete for farmers and for cane in Busia County, as long as each is not interfering with contracts already entered into by the other.

The other important consideration is that an interlocutory injunction is a discretionary equitable remedy. The court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to meet the approval of a court of equity **(Kenya Projects and Investments Ltd v. Kenya**

Post Office Savings Bank Ltd, HCCC No.2811 of 1995 at Nairobi). Delay, acquiescence and unclean hands would disqualify an applicant from this equitable relief. It is material that the Defendant brought to the attention of the court that three farmers contracted to the 11th Plaintiff had sued it in Busia CMCC no.9 of 2012 seeking a permanent injunction to restrain it from constructing, operating and or commissioning this same weighbridge. They were opposed to the weighbridge because it had been constructed without them, or other stakeholders in the area, being consulted. The other grievance was that the Defendant had no mill in the area and that the area in which the weighbridge had been erected was within the command of the 11th Plaintiff. I agree with Prof. Ojienda that the 11th Plaintiff was not a party to the suit, but it is clear that the suit was brought to benefit it and its contracted farmers. On 17/2/2012 the suit was struck out with costs for want of jurisdiction. There is no evidence that the Plaintiffs in the case appealed against that decision. Instead their fellow contracted farmers came and filed the present suit and application. In paragraph 31 of the plaint in the instant case it was pleaded that:

"31. There is no suit pending and there are no previous proceedings pending between the Plaintiff and the Defendant relating to the same subject matter."

There was no previous suit pending between the parties over the same subject matter as the Busia case had been struck out. However, the Plaintiffs were under a duty to disclose the fact that there was the Busia case which had been struck out. The suit was over the weighbridge and was substantially between the same parties.

When the Plaintiffs came to this court *ex-parte* on 8/3/2012 and obtained a temporary relief they did not disclose the fact of the Busia case. It is trite that a party who comes to court urgently and *ex-parte* for an interlocutory injunction must make the fullest possible disclosure. When he does not and the undisclosed facts later come to light, the obtained injunction will be discharged. Such a party would not deserve a discretionary equitable relief.

This brings me to the choice by the Plaintiffs to come to this court and not file the matter at the High Court at Busia. The view taken by Prof. Ojienda was that Busia Sugar Zone covers Busia, Bungoma and Kakamega Counties, and therefore the suit could be filed in any of the Counties especially now that the Defendant was based in Kakamega County. Mr. Kibe Mungai's objection to the choice of suing was based on the fact that the weighbridge subject of the suit was in Busia County which has a High Court where the matter could have been filed. He submitted that the choice of Bungoma High Court should be seen in the light of the case in Busia which had been struck out, a fact that the Plaintiffs did not want this court to know. The effect of coming to Bungoma, he argued, was to deny the sugarcane farmers in Busia the opportunity to participate in these proceedings. This, he submitted, was an abuse of the process of the court.

The pleadings are clear that the weighbridge subject of this case has been constructed on the Defendant's parcels of land in Busia County. The 1st to 10th Plaintiffs are farmers in Busia County. The cause of action arose in that County. Under section 12 (d) of the Civil Procedure Act, the suit ought to have been filed at the High Court at Busia and not in Bungoma.

But the more serious issue regarding jurisdiction relates to the Sugar Act. The position taken by the Defendant is that this dispute belongs to the Sugar Arbitration Tribunal set up under section 31 of the Act, and not to this court. The Plaintiffs' position was that, first, this court has unlimited original jurisdiction in both criminal and civil cases under Article 165 (3) of the Constitution of Kenya, 2010, and secondly, that, in any case, the Sugar Act cannot limit or oust the jurisdiction of this court to hear and determine the dispute.

There is no dispute that the 11th Plaintiff and the Defendant are sugarcane *"millers"* under the Act, and that the 1st to 10th Plaintiffs are sugarcane *"growers"* under the Act. Under section 31 (1) of the Act the Sugar Arbitration Tribunal is established

"for the purpose of arbitrating disputes arising between parties under this Act."

The Plaintiffs and the Defendant are parties under the Act, and theirs is a dispute under the Act. It is a dispute that should be heard and determined by the Tribunal. Parliament decide to enact the Act to

"provide for the development, regulation and promotion of the sugar industry, to provide for the establishment, powers and functions of the Kenya Sugar Board, and for connected purposes."

It decided to set up a Tribunal under the Act and to give it exclusive jurisdiction to deal with all disputes between parties under the Act. The consequence was to oust the original jurisdiction of the High Court in relation to disputes such as the one before the court. This did not, however, mean that the Tribunal was not ultimately subject to the judicial review process of this court **(Narok County Council v. Trans Mara County Council and Another, Civil Appeal no.25 of 2002 at Kisumu).**

It should be noted that the value of the Tribunal is that it has members two of whom have expert knowledge in matters related to the sugar industry. The parties herein will benefit from that expert knowledge in the resolution of their dispute over cane development in Busia.

Prof. Ojienda asked the court to consider that the Act preceded the Constitution of Kenya, 201 and therefore that its provisions are inferior and have been overtaken by the Constitution. The only thing I want to point out is that the Act and Regulations were saved under Article 7 of Part 2 of the Sixth Schedule of the Transitional and Consequential Provisions of the Constitution. I have not found anything in the Act or Regulations that offends either the letter or the spirit of the Constitution. The result is that this court is not the forum for the resolution of the dispute between the parties herein.

In conclusion, the application has no merit and is dismissed with costs. Further, for want of jurisdiction the entire suit is struck out with costs.

Dated, signed and delivered at Bungoma this 30th day of April, 2012.

A. O. MUCHELULE
JUDGE