



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 2012

IN THE MATTER OF: SUGAR ARBITRATION TRIBUNAL DISPUTE NO. 1300 OF 2012

AND

IN THE MATTER OF: THE SUGAR ACT NO. 10 F 2001

AND

THE CONSTITUTION OF KENYA

THE REPUBLIC

(EX-PARTE EZEKIEL ODHIAMBO MIRUKAAPPLICANT

VERSUS

THE SUGAR ARBITRATION TRIBUNALRESPONDENT

AND

SOUTH NYANZA SUGAR COMPANY LTD
.....1ST INTERESTED PARTY

SUKARI INDUSTRIES LTD
.....2ND INTERESTED PARTY

NATHANIEL OMIA ACHOLA
.....3RD INTERESTED PARTY

GEORGE ODERA KONGO.....
.....4TH INTERESTED PARTY

WALTER ODEDE OWAGA
....5TH INTERESTED PARTY

SUSAN ATIENO OKAMBO.....
.....6TH INTERESTED PARTY

ORWA OKOMBO.....
.....7TH INTERESTED PARTY

KIDENGE MAJIWA
...8TH INTERESTED PARTY

RULING

The facts leading to this application are that on 8th February 2012 the 1st interested party hereinafter referred to as “**Sony**” filed a dispute or a claim at the Sugar Arbitration Tribunal against the 2nd interested party herein after referred to as “**SUKARI**”.

The said claim or dispute was that **Sukari** was interfering with **Sony's** farmers and in particular that it was purchasing sugarcane from those farmers whom **Sony** had contractual relationship with.

Upon hearing the application the Sugar Tribunal issued the following orders, inter alia:-

“A temporary injunction directed at Sukari restraining her agents servants workers and or any person claiming under them from buying, harvesting, transporting and or milling and or in any other manner whatsoever handling sugarcane from any of the growers and outgrowers in Section 1, Section II, Section III, Section IV, Section V, Section VI and Section VIII in the South Nyanza Sugar belt with whom Sony have in force a cane supply or cane growing contracts and whose names are as per the cane census reports appended and marked Appendix 1 pending the hearing and determination of the application inter partes”

This was Sugar Arbitration Tribunal Dispute number 1300/12. The exparte applicant being aggrieved by the decision of the tribunal filed a chamber summon application before this court seeking to quash the tribunal decision.

When the same came up for hearing exparte, as in the usual practice in regard to judicial review matters, this court granted leave and further ordered that:-

“The grant of leave shall operate as a stay of the order of the Sugar Arbitration Tribunal made on the 8th day of February 2012 and of the proceedings of Sugar Arbitration Tribunal number 1300/2012 pending the determination of this matter or further orders”.

Being aggrieved by the said exparte orders the applicant herein **“Sony”** on 14th March 2012 brought this application by way of Certificate of urgency seeking the following prayers:-

- (a) The application dated 17th February 2012 filed in court on the 20th February 2012 by the exparte applicant Ezekiel Odhiambo Miruka be heard on priority basis,**
- (b) The order number 2 issued by this court exparte on the 15th February 2012 at the instance of the Exparte Applicant, to the effect that the grant of leave shall operate as a stay of the order of the Sugar Arbitration Tribunal made on the 8th day of February 2012 and of the proceedings of Sugar Arbitration Dispute number 1300/2012 pending the determination of this matter and further orders be set aside, varied and or be discharged forthwith.**
- (c) The substantive Notice of Motion for Judicial Review orders of certiorari and prohibition and**

the application for leave filed herein be struck out with costs.

(d) The court be pleased to order the exparte, applicant such terms as are just to provide security as to costs and as to giving of security by way of a cash deposit for the losses which the 1st interested Party shall and continues to suffer consequent upon breach of the Sugar Industry Agreements prescribed under Section 29 (1) of the Sugar Act 2001 which huge and heavy financial losses informed the filling at the Sugar Arbitration Tribunal Dispute number 1300/2012.

(e) Cost of this application be provided for.

The same is supported by the affidavit of **Gabriel Ouma Otiende**, the applicants legal officer. I have perused the same together with its voluminous annexures. The application is opposed by both the exparte applicant **Ezekiel O. Miruka** vide his replying affidavit sworn on 12th April 2012 as well as the preliminary objection filed on 12th April 2012. Sukari industries has equally opposed the application through the replying affidavit of one **Fred Odhiambo Agin** sworn on 17th April 2012.

After the said application had been argued and finalized some other parties who were strangers filed some strange affidavits in support of the substantive Notice of Motion herein and clearly in opposition to Sony's application. These were **Nathaniel Ouma Achola, George Odera Kongo, Walter Odede Owaga, Susan Atieno Okambo, Orwa Okombo and Kidenge Majiwa.**

The said affidavits were filed without the leave of the court and I shall consequently proceed to expunge them from the courts record.

The said parties then filed their application dated 2nd May 2012 which sought the following reliefs:-

(a) That there be a stay of further proceedings pending the hearing and determination of this application.

(b) The applicants being persons directly affected by the exparte applicants application and therefore interested therein be enjoined to these proceedings as interested parties specifically the 3, 4, 5, 6, 7 and 8th interested party respectively.

(c) This court be pleased to receive submissions and arguments from counsel for the applicants in answer to the 1st interested parties application challenging these proceedings and to grant leave to the 1st interested party's application challenging these proceedings and to grant leave to the 1st interested party's counsel to respond in answer thereto before delivering its ruling thereon.

When this application came up at a preliminary stage it was agreed by the parties that the belated application be given a chance since at any rate the substantive ruling on Sony's application earlier on mentioned above had not been delivered.

It was argued by **Mr. Amondi**, counsel for the proposed interested parties that his clients had a stake in the suit between Sony and Sukari. In effect they were opposed to the application by Sony to set aside the stay orders earlier on granted in favour of the ex parte applicant, **Mr. Miruka**.

It was further their case that they had valid contracts between them and Sukari and that the order given by the respondent at the tribunal effectively affected them and that is why they felt they should be a party in this application.

Mr. Otieno for Sony vehemently objected to their inclusion. He argued that they were not only busy bodies but had come very late in the day. He contented that all along they were aware of this application and they chose to wait till the penultimate time when the ruling was due.

It was Sony's argument further that under the provision of Order 53 Rule 6 of the Civil Procedure Rules they cannot be made a party to this proceedings.

At this juncture it will be imperative to decide whether they should be enjoined as interested parties or not. If the answer shall be in the affirmative then I shall proceed to consider the relevance of the prayers to their application.

From the affidavit evidence before me as well as the oral submissions by the counsels it is crystal clear that the applicants have contractual relationship with Sony and Sukari. Their argument though is that the contract between them and Sony has by and large been extinguished by effluxion of time.

But should they be made parties to this proceedings in light of the provisions of Order 53 Rule 6 of the Civil Procedure Rules which Mr. Otieno suggested that they should not?. The provisions of Order 53 Rule 6 of the Civil Procedure Rules provides that:- **"On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard notwithstanding that he has not been served with the notice or summons and shall be liable to costs in the discretion of the court if the order should be made"**.

Having read the above portion of the law and heard the parties submissions I am inclined to allow the applicants to be enjoined as interested parties. They have demonstrated that they have contractual relationship between them and Sony and Sukari. Further they are essentially in opposition to Sony's

application to set aside the orders earlier own issued exparte. Contrary to the perspective taken by Mr. Otieno for Sony, the applicants are actually on the opposing side and they ought to be treated so.

I am further fortified by the provisions of Section 159 (2) (a) and (d) of the Constitution which provides that justice shall be accorded to all and sundry. In any event there shall be no prejudice suffered by either of the parties.

Having allowed the parties to join the fray I shall therefore proceed to consider the entire Sony's application and I shall incorporate the submissions of Mr. Amondi as well as the affidavits filed by the new interested parties and the replying affidavits by Sony.

The gist in a nutshell of the applicant's application is that this court entertained the exparte application by the exparte applicant and granted prohibitory orders without taking into consideration that it had no jurisdiction to do so. It further argued that it is only the Sugar Tribunal that could sort out the issues between the parties herein and by issuing the prohibitory orders the court has gagged the said tribunal which runs contrary to the intention of parliament when setting up the same.

Sony further argued that the exparte applicant is guilty of non disclosure of material facts and in particular that there existed an agreement between him and Sony and that had the applicant been candid, the court would not have issued the orders which it now seeks to have them set aside.

Mr. Otieno P. J equally argued that by the said order therefore Sony Sugar was incurring heavy losses and that Sukari Industries was taking advantage of the same by poaching her farmers.

Mr. Okero for the exparte applicant has opposed the application. His contention is that the order granted was within the law as his client had been locked out of the tribunal and the orders it issued in favour of Sony meant that he would not be in a position to sell his sugarcane to Sukari. As far as he was concerned, there was no valid contract between the exparte applicant and Sony as that which existed had expired by affluxion of time. Infact there was a valid current contract between him and Sukari.

Mr. Okero contents that the only remedy was to file this proceedings as the orders issued by the tribunal run contrary to the constitution. His client was never a party to the tribunals case number 1300/12 and that in any event the order issued directly affected him.

Sukari on the other hand supported the submissions of the exparte applicant. **Fred Odhiambo Agin's** affidavit reiterated what was alluded by the exparte applicant and further that Sukari was already working with Mr. Miruka. The interested parties, from the 3rd to the 8th, filed their respective affidavits. The substance of their respective affidavits is to oppose Sony's application and to pray that this court do uphold the orders granted exparte staying proceedings at the tribunal.

The duty of this court is not to determine the merits and demerits of the disputes the parties have. Judicial Review proceedings are by themselves a special and peculiar nature of proceedings. One of the cardinal principles of the Judicial Review Proceedings are to ensure that due process and procedures are followed in particular by public bodies. The principles of natural justice is the hall mark of this procedure as envisaged under Order 53 of the civil Procedure Rules, Chapter 21 laws of Kenya.

Having perused the pleadings herein and listen to the parties submissions, the issues inter alia to be determined are whether indeed by issuing the prohibitory orders earlier own alluded this court exceeded its jurisdiction. Further is the exparte applicant guilty of non disclosure?. What's the overall duty of the tribunal? Does its powers run contrary to the constitution?.

It's not in dispute that the parties herein are governed by the Sugar Act 2001. The exparte applicant Mr. Miruka and the interested parties are for all intent and purpose **growers** while Sony and Sukari are **millers**. **A "Grower" is defined under Section 2 of the Sugar Act as a person who produces sugarcane or any scheduled crop in Kenya for the manufacture of sugar but does not include an outgrowers institution".**

A "miller" on the other hand is defined as " a person licensed to operate a sugar mill or a jaggery mill in Kenya for the production of sugar including refined sugar and other by products".

Parliament further went ahead to establish the Sugar Arbitration Tribunal under Section 31 of the Act. Section 31 (1) states that:- **" There is established a tribunal to be known as the sugar Arbitration Tribunal for the purposes of arbitrating disputes arising between any parties under this Act"** The Act further permitted the tribunal to regulate its proceedings and procedures.

Pursuant to this therefore and as earlier own observed, there arose a dispute between **Sony** and **Sukari Industries**. The borne of contention was that **Sukari** was poaching **Sony** farmers without the latter's authority. **Sony** then proceeded to file the tribunal case number **1300/12** which granted the orders earlier quoted.

The exparte applicant Mr. Miruka felt aggrieved by the orders of injunction issued by the tribunal and decided to seek reprieve from this court. At the exparte stage, this court granted the orders and proceeded to prohibit the tribunal from further determining dispute number 1300 /12 till this proceedings are concluded.

Having perused the rival affidavits herein it has now emerged that Mr. Miruka entered into an agreement with Sony on 25th June 2006. The same was to expire on 26th May 2011. This was a valid agreement in line with Section 29 (1) of the Sugar Act which states:-

29 (1) “There shall be for the purpose of this Act, agreements negotiated between growers and millers, growers and outgrowers institution and millers and outgrower institutions”.

However on 21st February 2011 Mr. Miruka entered into a fresh agreement with Sukari. Clearly there was a valid subsisting agreement between him and Sony at the time he entered into a fresh one with Sukari. The details however as to the validity or otherwise is not for this court to determine at this stage.

Equally and on the same breath the 3rd and 8th interested parties did enter into contracts with Sony as hereunder:-

(a) Nathaniel Omia Achola on 20th January 2009

(b) Kidambe Majiwa on 9th February 2010

(c) Walter Odede Owaga on 23rd August 2010

(d) Orwa Okombo on 28th August 2009

(e) Susan Atieno Okambo on 9th December 2008

(f) George Odera Okongo on 29th December 2009

All these contracts were to last for 5 years and their terms are clearly spelt out.

Further it appears that at the tribunal, the battle is between the two millers Sony and Sukari. Neither the exparte applicant nor the interested parties are parties therein.

Mr. Otieno argued that the exparte applicant and the interested parties ought to have applied to the tribunal to be enjoined as interested parties.

Before going further it is relevant at this stage to interrogate the powers vested upon the tribunal. The third schedule to the Sugar Act at clause 8 thereof states:-

“The tribunal shall have the powers of the High Court:-

- (a) To administer oaths to the parties and witnesses to the proceedings.**
- (b) To summon witnesses and to require the production of documents.**
- (c) To order the payment of costs”.**

Rule 32 further states

- (1) Application seeking relief of an interim, interlocutory procedural or other relevant nature may be filed at the tribunal under and subject to existence of a substantive case filed and pending before the tribunal.**
- (2) All applications filed in the tribunal shall be by way of Notice of Motion as set out in the schedule hereto and shall have grounds in support of the application as well as affidavit in support.**
- (3) Any party wishing to oppose an application filed shall be at liberty to file grounds of opposition and a replying affidavit thereto**
- (4) The tribunal may upon its discretion make or pass such interim orders as the tribunal may consider appropriate at any stage of the proceedings.**
- (5) The reasons given by the tribunal in support of an order shall form a part of the order and shall be available in accordance with these Regulations.**
- (6) Any order and decision or communication by the tribunal shall be under the original seal of the tribunal and appropriately executed.**
- (7) Any order of the tribunal shall be communicated to the parties to the dispute.**

The tribunal under Rule 42 has been given powers to make “**such orders as may be necessary or expedient in the circumstances of each case**”.

From the above cited portions of the law it is evidently clear that the tribunal has been empowered to make very pertinent decisions including injunctive orders. I do not therefore agree with the suggestion by Sony that the powers vested by the Act goes contrary to the constitution. Parliament has established under Section 169 of the Constitution various courts and tribunals which includes the Sugar Tribunal.

The ex parte applicant nor the interested parties are not parties to the matter between Sony and Sukari at the tribunal. I have looked at the pleadings filed at the tribunal. The claimant (Sony) under paragraph 13 of its claim list various persons whom Sukari has entered into the contract with. Out of 28 names therein, none belongs to the ex parte applicant or the 3 to 8th interested parties.

The dispute therefore was between the two (2) sugar millers and not Mr. Miruka or the interested parties. If they were affected in any way, they ought to have applied to be enjoined. I do strongly believe that the powers vested upon the tribunal earlier own alluded gives it the ability and capacity to make such orders.

Further and as earlier own alluded the purpose of judicial review regime of law is to ensure that each litigant is given a fair hearing in any adjudication process. In as much as there was a dispute between the millers, Mr. Miruka and the interested parties did not bring themselves within the said dispute. They of necessity have agreements between Sony and themselves which seemed to have abated or are still subsisting. The ex parte applicant for example has a subsisting current contract with Sukari. These contracts whether valid or not grants them the locus before the tribunal. They are growers in terms of the definition earlier own quoted above and have locus at the tribunal.

This court shall not be dragged into the “**Sugar wars**”. This is the preserve of the tribunal. I am satisfied that for now there is no evidence that the tribunal has exceeded its powers or acted ultra vires. I am further pursuant to my above findings persuaded that the ex parte applicant and the interested parties should have applied to be enjoined in the tribunal case.

The ex parte applicant as well as his supporters, the interested parties, therefore are guilty of nondisclosure of the material facts. As was held in the case of **Milcah Adhiambo Otieno & Another vs AG and Kenya Sugar Board & Another (Kisumu HC Petition Number 33 of 2001) unreported**, Where there is a properly constituted tribunal it is incumbent for parties to first of all seek directions thereof prior to seeking redress in this court.

Further the prohibitory orders issued earlier own amounted to injuncting the tribunal. Justice Ibrahim (as he then was) said in the case of **Republic vs Minister of Information and Communication & 5 others ex parte Econet Wireless Kenya Ltd (2006) e KLR, Nairobi High Court Miscellaneous Civil Number 1640 of 2004**, which I shall quote extensively that:-

“In Kenya today, we do not have such legislation and this court therefore does not have jurisdiction to issue injunctions in judicial review proceedings. The applicant argued that the Civil Procedure Rules are not exhaustive and that the legislature is incapable of contemplating all situations that may arise. The court was invited to invoke Section 3A and apply its inherent jurisdiction. That I have to navigate and deal with situations depending on the peculiar circumstances. In this case, is this court ready to be judicially ingenious and innovate to grant an injunction in judicial review proceedings where the situation requires judicial intervention as suggested by the applicants counsel?. I do not know because the applicant denied this court the opportunity to consider whether this was an appropriate case for such judicial activism. The applicant was not candid enough or bold enough to expressly and openly decree that he was seeking injunctive orders. Instead it hid behind euphemisms like “stay” and “prohibition” when extracting the terms of Order number 5. Even when challenged through this application, it subsequently changed its position that Order number 5 was not an injunction up to right at the end when it said that it does not matter what the order was called provided that it met the desired result. This court will not on its own go on a voyage of exploration or visit the danger of departing from long established precedent by this court or possibility by higher precedent, without being openly and courageously invited or challenged to venture into such introdden frontiers. In such an event, this being an adversarial system, the court must be moved directly and given all necessary justification to take a new course in our jurisprudence. In this application, the prayer for injunction was hidden in a different clothing an innocuously tucked away as a consequential order and made to appear as an integral part of the order for leave and stay in the mind of the Court at the delicate exparte stage for judicial review application when the certificate of urgency is many a times treated by the court with little sacredness and solemnity than it would otherwise deserve. I do not see how I would invoke the courts jurisdiction in such circumstances”.

This is the position obtaining herein. Prayer number 2 was camouflaged. The exparte applicant was not candid enough. The sugar arbitration tribunal is the proper forum for the parties to ventilate their issues especially where there are such clear contracts.

Finally, therefore I shall allow the application dated 12th March 2012 as follows:-

(a) The order number 2 issued by this court exparte on the 15th February 2012 at the instance of the exparte applicant to the effect that the grant of leave shall operate as a stay of the order of the Sugar Arbitration Tribunal made on the 8th day of February 2012 and of the proceedings of Sugar Arbitration Tribunal Dispute number 1300 of 2012 pending the determination of this matter and further orders is set aside.

(b) The substantive notice of motion for judicial review orders of certiorari and prohibition and the application for leave filed herein is hereby dismissed.

(c) Costs to the applicant 1st interested party.

Dated, signed and delivered at Kisumu this 22nd day of May 2012

H. K. CHEMITEI

JUDGE

In the presence of:

.....for the applicant

.....for the respondent

..... for the interested parties

HKC/ao