



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 353-362 OF 2010

GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETYPLAINTIFF

VERSUS

**COUNCIL OF
KIAMBU.....1ST
DEFENDANT**

THE COUNTY

**DAIRY
BOARD
..2ND DEFENDANT**

THE KENYA

RULING

Githunguri Dairy Farmers Cooperative Society Limited (the Plaintiff/Applicant) through a chamber summons dated 11th November, 2010 brought under Section 3 of the Judicature Act, Section 3 of the Civil Procedure Act, Order XXXIX Rules 1-3 of the Civil Procedure Rules prays for an order stopping the enforcement of the Dairy Industry (Imposition of Cess and Levy) (Amendment) Regulations 2010 (hereinafter simply referred to as the regulations) by the County Council of Kiambu (1st Defendant/Respondent) and Kenya Dairy Board (2nd Defendant/Respondent) pending the hearing and determination of the suit. The application is supported by grounds on its face, a supporting affidavit sworn by Charles Ndichu Mukora on 11th November, 2010 and a supplementary affidavit sworn by John Kilonzo on 28th February, 2011.

The application is opposed through a supplementary affidavit sworn on 31st January, 2011 by Mr. Peter Ndendwa Mutua the Administrative Manager of the 2nd Respondent.

I have read the affidavits and the submissions filed by the Applicant and the respondents in respect to the said application. In my view the submissions appear to have been made with the main suit in mind.

There is only one issue to be addressed by this court namely whether the court should stay the enforcement of the regulations pending the hearing and determination of the main suit.

Mr. Gibson Kamau Kuria for the Plaintiff/Applicant submitted that the applicable principles for granting the order sought in this case are those for granting an injunction as enunciated in the celebrated case of **GIELLA V CASSMAN BROWN CO. LTD (1973) EA 358**. Those principles are so well known and I need not restate them here.

With respect to the learned counsel for the Plaintiff/Applicant, I must state that the declaratory and injunctive orders sought in the plaint dated 11th November, 2010 are orders available in the public law arena in England. In Kenya these remedies are available both in public law and private law. The matter before me is however a public law matter and the principles for granting an order of stay in judicial review proceedings are the ones applicable in this matter.

In judicial review, the threshold for obtaining leave to commence proceedings is a low one and obtaining leave is not in itself evidence of a strong case for staying proceedings. For leave to commence judicial review proceedings to be granted, one only needs to show that he has an arguable case. The threshold for granting a stay of proceedings is however a high one. Unless a law being challenged will cause irreparable harm to those who are supposed to comply with it, the courts will be reluctant to suspend the operation of such a law. In saying this, I am persuaded by the words of Lord Goff who explained in **R V SECRETARY OF STATE FOR TRANSPORT EX P. FACTORTAME (NO.2) [1991] A.C. 603 HL** that:-

“the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless, it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based to justify an exceptional course being taken.”

In the case before me, it is clear that even if the levies imposed by the regulations are collected, the same can always be refunded to the farmers. Enforcement of the regulations will not do irreparable harm to the dairy farmers. It is also noted that this matter can be heard and dispensed with without unnecessary delay.

I need not say more except to state that this application fails. This is a matter in which I expect the parties to proceed by way of affidavits and submissions. A perusal of the court file shows that the matter is ready for hearing. The parties are advised to take the nearest date available so that they can highlight their submissions and have the matter dealt with once and for all. There is no order as to costs.

Dated and signed at Nairobi this 2nd day of May , 2012

W. K. KORIR

JUDGE