



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI(MILIMANI LAW COURTS)
Judicial Review 436,437,438,439, 440, 441, 442 & 443 of 2009

REPUBLIC.....APPLICANT

AND

SUGAR ARBITRATION TRIBUNAL.....RESPONDENT

AND

JANET OLGA OGUTU.....INTERESTED PARTIES

THOMAS M. MARWA

WILLIAM MWITA

PAMELA AKINYI MBEO

JAMES M NYAMBEYA

SISILIA WANKIO MAROA

EDWARD OLE NGENDA

PETER MANGANGA

EX-PARTE APPLICANT.....SOUTH NYANZA SUGAR COMPANY LTD

JUDGMENT

Ex-parte Applicant’s Case

1. The matter subject of this judgment are consolidated and they arise from certain decisions of the Sugar Arbitration Tribunal (“the Tribunal”) established by **section 31(1)** of the ***Sugar Act (Act No. 10 of 2001)***(“the Act”) which provides as follows, ***“There is established a tribunal to be known as the Sugar Arbitration Tribunal for the purpose of arbitrating disputes arising between any parties under this Act.”***
2. The decisions of the Tribunal which are challenged arose from suit filed by various claimants, who are interested parties in these matters, seeking various reliefs for breach of contract.
3. The *ex-parte* applicants in the respective applications in each application seek the following orders;

(1) An order of Certiorari do issue to remove into the High Court for purposes of it being quashed, the decision, order and judgment and or decree of the Sugar Arbitration Tribunal in Sugar Arbitration, made issued dated and delivered on the respective date as shown in the relevant Sugar Arbitration Tribunal Dispute Number between each Interested Party and South Nyanza Sugar Company Limited.

(2) An order of Prohibition do issue and the same be directed against the Respondent, the Sugar Arbitration Tribunal prohibiting her from implementing and or executing its decisions, judgments, order and or decrees dated, issued and delivered on the various dates in the sugar Arbitration Tribunal Disputes between each Interested Party and Sought Nyanza Sugar Company Limited as the Respondent.

(3) Costs of this application be provided for.

4. The *ex-parte* applicant's central claims are set out in the statements, verifying and verifying affidavits of Gabriel Ouma Otiende supporting each motion. Written submissions dated 8th May 2012 were filed. The central thrust of the *ex-parte* applicant's case is that the Sugar Arbitration Tribunal, being a creature of statute, lacks the jurisdiction to deal with the claims before it.

5. Mr Chabala, counsel for the *ex-parte* applicant, argued that **section 31(1)** of the Act does not provide that the Tribunal shall either be a court to handle claims brought by the interested parties as the provision is silent on the functions of the tribunal and the manner in which the powers can be exercised. Mr Chabala contended that the tribunal bestowed upon itself judicial powers in like manner as a court of law and granted remedies outside the provisions of the statute.

6. It is the *ex-parte* applicant's submission that **section 4(2)(e)** of the Act provides that the Sugar Board is to, '*facilitate the arbitration of disputes among interested parties*' therefore the powers and functions of the Tribunal are excluded.

7. The *ex-parte* applicant also argues that matters concerning sugar industry agreements provided for under **section 29(1)** of the Act can only be dealt with by the Sugar Board and by virtue of **section 29(1)(e)** it is only the Board that can impose penalties and levies on growers. Therefore the remedies granted to the interested parties are outside *ultra vires* and if Parliament intended to give these powers to the Tribunal, it would have been clear.

8. Mr Chabala also stated that claims for damages or compensation for breach of contract or payment of penalties could only be determined by a court of law and **section 31** of the Act does not entitle the tribunal to appropriate such powers. In the circumstances, the *ex-parte* applicant contends that the tribunal committed grave errors of facts and law in arriving at its decisions and these decisions should be set aside.

Respondent's Case

9. Mr Kiage, counsel for the respondent, submitted that the intention of the legislature in enacting **section 31** was to mandate the Tribunal to arbitrate disputes arising between any parties under the Act and the section could not be any clearer. He further submitted that the Act must be read as a whole so as to discern the intent of Parliament give full effect to this intent. Therefore **section 4(2)(e)** which provides that the Sugar Board must facilitate resolution of disputes is not mutually exclusive to the jurisdiction of the Tribunal. The Board "facilitates" while the Tribunal "arbitrates" and there is no inconsistency.

10. The respondents aver that this Tribunal has full jurisdiction to deal with disputes and nothing has been placed before the court to show that the Tribunal exceeded its jurisdiction. Mr Kiage adopted the arguments set out in the submissions dated 8th May 2012.

Disposition

11. The jurisdiction of the Sugar Arbitration Tribunal is to arbitrate disputes between any parties under the Act. **Section 29(1)** which forms the basis of the agreements subject of the dispute between the *ex-parte* applicant and the interested parties identifies these parties as growers, millers, out grower

institutions. If there is a dispute between these parties on the matters set out in **section 29(1)**, then the tribunal must arbitrate these matters. **Section 29** of the Act provides;

29. (1) There shall be, for the purposes of this Act, agreements to be known as the sugar industry agreements negotiated between growers and millers, growers and out-grower institutions, and millers and out-grower institutions.

(2) The agreements referred to in subsection (1) shall conform to the guidelines set out in the Second Schedule.

(3) Without prejudice to the generality of subsection (2), the matters to be provided for in the agreements shall include-

(a) the designation of any agricultural crop from which it is possible to manufacture sugar which is subject to the agreement;

(b) a sugar-cane farming contract providing for the terms and conditions of the production of sugarcane and sugar and prescribing the rights and obligations of growers and millers,

(c) a formula for determining the price to be paid by millers to growers for sugarcane or any other designated agricultural produce, which may include any factor related to the sale or other disposal of sugar industry products;

(d) the functions to be executed by the Board in the execution of the agreement;

(e) the granting of powers to the Board to impose penalties prescribed in the agreement for the contravention of, or failure to comply with any term of the agreement; and

(f) the imposition of levies upon growers and millers for the purpose of enabling the Board to fulfil any obligation incurred by it in accordance with its constitution.

12. Since the disputes contemplated include disputes arising from **section 29** of the Act, it means the Tribunal must have the power to determine all the matters contained therein including the power to award the penalties due under the Act, where appropriate, and giving effect to the provision of the Act in resolving disputes.

13. The duty imposed on the Sugar Board is one of “facilitation” and it does not take away the Tribunal’s statutory authority, it merely provides an arena for dispute settlement ultimately it is the Tribunal to arbitrate disputes..

14. The argument that **section 31** of the Act does not state the manner in which power can be exercised does not have merit. The power is derived from the nature of the Tribunal. **“To arbitrate”** means to determine a dispute and this includes having the necessary power to hear matters between parties identified in **section 29**. Furthermore, the Third Schedule to the **Sugar Act, section 8** sets out the powers of the Tribunal in relation to its mandate which include;

8. Powers.

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; and the provisions of the law relating to Commissions of Inquiry in Kenya with respect to: -

(i) the protection of the members of the Tribunal from suit;

(ii) the form of summonses to witnesses;

(iii) to giving or fabricating of false evidence;

(iv) the duty and indemnity of witnesses, and the penalty for contumacy, insult or interruption of proceedings; and

(v) the appearance of advocates; shall with any necessary adaptations or modifications, apply to the members of, the witnesses before, and the proceedings before, the Tribunal in like manner as they apply to Commissions of Inquiry.

15. I therefore find and hold that the Sugar Arbitration Tribunal has jurisdiction and power to arbitrate disputes between parties contemplated under the Act.

16. The duty to arbitrate includes hearing matters and providing relief consistent with statutory provisions. The intendment of the Act is to provide a means by which Sugar industry disputes are handled by a tribunal set up specifically for that purpose and the legislative intention is to exclude Sugar industry matters from the ordinary courts of law subject to the High Court retaining its supervisory jurisdiction and this court is always alive to this stated legislative intention. (See the case of **R v National Environmental Management Authority Nairobi Civil Appeal No. 84 of 2010 (Unreported)**).

17. Finally it must be recalled that the scope and purpose of judicial review is now settled. **“The Court will not, however, on a judicial review act as a “court of appeal” from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesdaybury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by law the Court would, under the guise of preventing the abuse power be guilty of usurping the power”** (See **Chief Constable of North Wales Police v Evans [1982] I WLR 1155 p.1173** adopted in **R v Judicial Service Commission ex-parte Pareno [2004] I KLR 203**).

18. I have considered the various judgments issued by the Tribunal. Each case was based on a grower cane and supply contract which has the elements prescribed in **section 29** of the Act. In each case there was a statement of claim and a statement of defence filed. The proceedings demonstrate that the parties to the suit called witnesses who were examined and cross-examined. The parties were also given an opportunity to make their submissions and it is on that basis the tribunal gave judgment.

19. The tenor of the *ex-parte* applicant’s submission is that the Tribunal made errors in the manner of assessment of evidence and the conclusions it reached. I am unable to detect any errors of the nature that would attract orders of judicial review. In essence what the *ex-parte* applicant seek is an appeal from the Tribunal’s decision. That is outside the purview of judicial review.

20. These applications are dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 24th day of July 2012

D.S. MAJANJA
JUDGE

MrChabala instructed by Okong’oWandago and Company Advocates for the ex-parte applicant.

MrKiage, Litigation Counsel, instructed by the State Law Office for the Respondent.