



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL CASE NO. 26 OF 2010

COUNTY COUNCIL OF NYANDO PLAINTIFFS

-VERSUS-

CHEMELIL SUGAR COMPANY LIMITED DEFENDANT

RULING

The application before court is dated 1st March, 2010 brought pursuant to Section 1(a) and (b), 3A and 63e of the Civil Procedure Act and Order XXXVIII Rules 1 & 5 and Order XXXIX Rules 1, 2, 3 & 9 of the Old Civil Procedure Rules. The same is seeking for the following that:-

1. This application be certified as urgent and it be heard ex-parte in the first.
2. Pending the hearing and determination of this application inter partes, the defendant/respondent by itself, its officers, servants, agents or otherwise howsoever be compelled by an order of mandatory injunction to pay to the defendant monthly crop cess for sugar and molasses produced at the stipulated percentage (1%) as stipulated by the Local Government (Agricultural produces adoptive by-laws) of 1988 issued pursuant to legal notice no. 202 of 20th May, 1988.
3. Pending the hearing and determination of this application inter parties, the defendant/respondent by its officers, servants, agents or otherwise howsoever be compelled by an order of mandatory injunction (an anton piller order) to allow the plaintiffs inspectors into the defendants premises (at business hours to be provided) to search for evidence, look at books of stock sold, and other relevant material regarding sugar/molasses produced and grant them permission to/remove for safe custody and/or photocopy the same in order to safeguard vital evidence which is needed by the plaintiff to prove his case.
4. That pending the hearing and determination of this suit the defendant be compelled to furnish sufficient

security for their appearance for sums claimed in the plaint and/or as may be fixed by this honourable court and such security be placed at court disposal within time to be fix by this honourable court.

5. That this honouable court be pleased to penalize the defendant respondent Managing Director by imposing a fine of Kshs 3,000/= for every month unpaid cess and/or be pleased to imprison him for 9 months for his flagrant disregard of the law (as provided for in by law 11 of the Local Government Agricultural produces adoptive by-laws order 1988).

6. That the mandatory orders prayed for in paragraph 2, 3 above be confirmed pending the hearing and determination of this suit.

7. That this honourable court be pleased to issue any other order it may deem fit in the circumstances of this case.

8. The costs of this application be awarded to the plaintiffs/applicants.

The application is supported by the affidavit dated 24th February, 2010 and a further affidavit dated 29th November, 2010 both sworn by SILAS KIPRUTO and on the grounds on the face of the application.

The grounds are that the defendant has failed to pay cess as required by the Local Government (Agricultural, Produce Cess) (Adoptive by Laws) Order, 1988 (Legal Notice no. 202 of 1988; the roads are in a poor state; the defendant is about to be privatized and sold; the defendant has decided unilaterally to withhold payment of cess; any payments since 2008 has been irregular; the community in Nyando has suffered and the loss cannot sufficiently be compensated; and that the defendant has failed to render, compete, true and accurate account of sugar produce.

The respondent opposed the application by filing a reply affidavit dated 11th March, 2010 and a further affidavit dated 24th November both sworn by E. K. Ngala. In the same the defendant admits that under the by-law authorized agents collect cess on sugarcane at 1% and remit the collections to the plaintiff. It denies that cess is payable on sugar and molasses; further it contended that the sugar it grows is for demonstration and own use, it denied that it was in the process of being privatized as alleged; that since the claim is from 1988 the same is time barred. The defendant in its further affidavit annexed cheque payment vouchers towards cess remittances.

Legal notice number 202 of 1988, the Local Government (Agricultural Produce Cess) (Adoptive By-Laws) Order, 1988 Section 4 provides for payment of 1% cess of the gross producer purchase from an owner within the jurisdiction of a Council. For sugarcane the authorized agents are sugar processing factories or other organization which buy sugarcane. The defendant falls under this category as it is a sugarcane processing factory, it must apart from growing sugarcane, be buying the same from sugarcane farmers. The defendant only made available payment vouchers of some alleged payment to the plaintiff between 2007 and July, 2010. The plaintiff on its part alleged sporadic payment of the cess collections.

The defendant is obligated by law to pay 1% cess which it ought to collect from producers, it is not clear whether since 2008 to-date the defendant has made due remittance to the plaintiff. Despite alleging payment the defendant did not produce acceptable evidence of the same. Payment vouchers of cheques without bank slip etc is not conclusive.

In the circumstances the court pending determination of the suit orders:-

1. That the defendant do furnish the plaintiff with evidence of payment of cess inform of stock purchase books, bank paying slip and any other records of the cess collected and monies banked from 2007 to date.
2. That the defendant do continue paying cess on sugar cane purchased from farmers pending determination at the full hearing as to whether cess is payable on sugarcane grown by the defendant.
3. The parties do comply with Order 11 Rule 2 of the Civil Procedure Rules within 10 days.
4. Pre – trial conference be convened 30 days after compliance with 3 above.

DATED AND DELIVERED IN KISUMU THIS 11TH FEBRUARY, 2011.

ALI-ARONI
JUDGE

In the presence of:

..... present for plaintiff

.....present for defendant.