



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 206 of 2010**

**WEST KENYA SUGAR COMPANY LIMITED ..... PLAINTIFF**

**VERSUS**

**KENYA  
SUGAR BOARD ..... DEFENDANT**

**RULING**

1. The plaintiff's suit filed on 1<sup>st</sup> April 2010 seeks for the following orders:

***“a. A permanent injunction restraining the defendants by itself, its servants and/or agents or otherwise howsoever from entertaining any application made to it by Butali Sugar Mills Ltd or any other person or corporate body a license to operate and or construct a sugar mill within a radius of twenty-four (24) Kilometers mill to mill of the location of the Plaintiffs sugar mill with zones allocated on a pro rata basis based on mill capacities.***

***b. An order compelling the defendant to issue an order requiring Butali Sugar Mills Ltd to forthwith desist from the construction of a sugar mill within a radius of twenty four (24) kilometers mill to mill of the location of the Plaintiff's sugar mill.***

***c. Costs of this suit.***

***d. Such further or other relief that the Honourable Court may deem fit to grant.”***

2. Simultaneously with the filing of this suit, the plaintiff filed a chamber summons seeking for temporary orders of injunction restraining the defendant from entertaining any application by **Butali Sugar Mills Limited** or any other Person or Corporate body for a license to operate or construct a Sugar Mill within a radius of 24 Kilometers of the plaintiffs' Sugar Mill location until the determination of this suit. A

further order is sought to compel the defendant to make an order requiring **Butali Sugar Mills limited** to forthwith desist from the construction of the Sugar Mill within a radius of 24 kilometers from the plaintiffs Sugar Mill. Following this application which was made ex parte in the first instance, this Court issued an interim order of injunction pending the interparties hearing of the application.

3. On 3<sup>rd</sup> May 2010, a Chamber Summons application was filed under the provisions of **Sections 1A, 1B 3A of the Civil Procedure Act, Order 1 rule 10(2) and 22 of the Civil Procedure Rules** by **Butali Sugar Mills Limited** (Herein after referred to as the applicant) seeking to be enjoined in this suit as the 2<sup>nd</sup> defendant. This application is the subject matter of this ruling. This application is premised on the grounds that the orders sought in the suit and also in the application by the plaintiff will affect the applicants. The applicant contends that it was registered as per the certificate of registration issued on 13<sup>th</sup> April 2005 in accordance with section 14 of the Sugar Act 2001. This is confirmed by a letter dated 13<sup>th</sup> April 2005 by the defendant. The applicant states that it came to learn about the present suit seeking which is seeking for both temporary and permanent injunctions to stop them from constructing a Sugar Mill within a 24 kilometers radius from the plaintiffs' Sugar Mill.

4. **Mr. Ochieng Oduol** counsel for the applicant further argued that if the orders sought are granted, they will affect the applicant who has already completed the construction of a Sugar Mill on LR NO. **Kakamega/Maraba/303**. The applicant is only waiting for an operating license. It will be necessary to have the applicant enjoined in this suit in the interest of justice. The rules of natural justice require that a party whose property will be affected by an order of the court should be heard. The applicant is cited severally in the plaint and the two prayers in the suit mention them. Counsel for the applicant submitted that the agreement dated 21<sup>st</sup> July 2006 between the plaintiff, the defendant and the Ministry of Agriculture, did not involve the applicant. The applicant has filed **HCCC 168 OF 2007** seeking for damages against the defendant after the applicant withdrew Judicial Review case No. 1127 of 2005 and the license of the applicant was stayed. The consequences of the order of stay of license of the applicant resulted in the costs escalation of the project thus the applicant filed the suit for damages. The applicants seek to be enjoined to present their interest in this case which is about a Milling license that is the centre of this dispute and will affect them.

5. This application was opposed; **Mr. Nagpal** relied on the replying affidavit sworn by **Jaswant Singh Rai** on 6<sup>th</sup> May 2010. According to the plaintiff, the application lacks merits and it was described as a mischievous ploy by the applicant to abuse the court process by invoking the provisions of the law that deal with the inherent powers of the Court as well as the Constitution which have no relevance to the matter. Firstly, it is not disputed that there was an agreement between the three parties which does not involve the applicant. Secondly, the applicant has admitted that they filed **HCCC 168 OF 2007** after the Judicial Review Proceedings were withdrawn. It is even indicated in the proceedings for the Judicial Review Application, that the applicant reserved their rights to file a case for damages. Thus the applicant should pursue all their interests within that suit.

6. Under the provisions of **Order 1 rule 10**, the court is given powers to add a necessary party to the proceedings. The suit before this court seeks the enforcement of an agreement which is the bone of contention between the plaintiff and the defendant. The applicant has nothing to do with the agreement and it is not a necessary party to these proceedings. Moreover the applicant does not have a license and this application should be disallowed. This application was supported by the defendant.

7. In considering this application, I find the provisions of Order 1 rule 10(2) instructive. It is provided as follows:-

***“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*”**

8. Is the applicant a necessary party to these proceedings? Will their participation in this suit aid the court to effectually and completely adjudicated upon and settle all the questions in the suit? What prejudice will the plaintiff suffer if the applicant is enjoined? At this point I do not wish to go into the merits of the issues raised regarding the agreement entered into and dated 21<sup>st</sup> July 2006 between the plaintiff, the defendant and the Government of Kenya which culminated with the withdrawal of **Misc Civil application No. 1127 of 2005**. I also do not wish to dwell on the issues raised **HCCC No 168 OF 2007** which are substantive matters to be canvassed later as they touch on the merit of the matter.

9. At this point of time, this court is only supposed to answer the above questions which lead me to the plaintiff's pleadings especially the orders sought in the plaint and the application. It is evidently clear that those orders are directed against the applicant and the applicant will be affected if the orders are granted. It cannot be said that the applicant is not an interested party in this matter. Indeed all the orders are directed against the applicant it cannot be a mere "**busy body**". The other issue I have considered is whether the plaintiff will be caused prejudice if the applicant is enjoined in this suit. I also see no prejudice that can be suffered by the plaintiff other than costs, and if it turns out that the applicant is indeed a "**busy body**" whose participation in the suit is unnecessary. In that event the applicant will pay the costs if their claim is dismissed.

10. Accordingly I allow the application dated 3<sup>rd</sup> May 2010. The applicant is allowed to be enjoined as the 2<sup>nd</sup> defendant. The applicant shall be served with the pleadings within 7 days of this order, and in view of the fact that this matter was certified as urgent, upon service, the applicant should file their replying papers within 7 days. Costs of this application shall be in the cause.

**RULING READ AND SIGNED ON 21<sup>ST</sup> MAY 2010 AT NAIROBI.**

**M.K. KOOME**  
**JUDGE**