



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Civil Suit 40 of 2007

AWENDO TOWN COUNCIL PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR COMPANY LIMITED DEFENDANT

JUDGMENT

The plaintiff is a Local Authority created under the provisions of the **Local Government Act Cap 265 Laws of Kenya**. It came into existence vide **Legal Notice Numbers 103 and 104 of 1999**. Its territorial jurisdiction extends to North Sakwa, Central Sakwa, West Sakwa and South Sakwa within Rongo District.

In paragraph 4 of the plaint, it was averred that the plaintiff is entitled to cess fee of 1% of the value of sugar cane produced by any farmer within its territorial jurisdiction. The plaintiff stated in paragraph 5 of the plaint that the defendant has grown and continues to grow sugar cane in its Nucleus Estates zoned as numbers 1, 2, 3, 4, 5 and 6 covering vast parcels of land within the plaintiff's jurisdiction and therefore ought to remit to it 1% of the value thereof per annum. Paragraphs 7, 8, 9, 10 and 11 of the plaint are as hereunder:

“7. The defendant has realized the following tonnage in production of sugar cane from its said Nucleus Estate since the creation of the plaintiff.

Year 1999/2000	93,346 tones
“ 2000/2001	78,778 ”
“ 2001/2002	122,565 ”
“ 2002/2003	92,643 ”
“ 2003/2004	93,533 ”
“ 2004/2005	93,101 ”
“ 2005/2006	104,547 ”

8. The defendant who is also producer of sugar has bought 1 tone of sugar cane at the average of Kshs. 2,000/= over

the period in question hence pegging the value of 1 tone of sugar cane at average (sic) of Kshs.2,000/=.

9. The defendant consequently owes the plaintiff the following cess fee in respect of the period in question.

YEAR	TONNAGE	VALUE @ KSHS. 2000/= PER TONE	1% THEREOF
1999/2000	93,346	186,692,000/=	1,866,920/=
2000/2001	78,778	157,556,000/=	1,575,560/=
2001/2002	122,565	245,130,000/=	2,451,300/=
2002/2003	92,643	185,286,000/=	1,852,860/=
2003/2004	93,533	187,066,000/=	1,870,660/=
2004/2005	93,101	186,202,000/=	1,862,020/=
2005/2006	104,547	209,094,000/=	2,090,940/=
TOTAL			13,570,260/=

10. The defendant has merely remitted cess fee on sugar cane grown by other farmers but neglected and refused to remit cess fee in respect of its own sugar cane grown on the aforesaid nucleus Estate.

11. The plaintiff claims against the defendant is for payment of the cess fee on sugar cane grown and produced by the defendant on its Nucleus Estate between the period of the year 1999,2000, 2001,2002,2003,2004,2005 and 2006 as more particularly shown in paragraph 9 above herein which money is owing and overdue to the plaintiff.”

The plaintiff prayed for judgment as hereunder:

“(a) Kshs. 13,570,260/= being cess fee on sugar cane grown on the defendant’s Nucleus Estate between 1999-2006.

(b) An order directing the defendant to promptly pay to the plaintiff any such further cess fee as may be due on account of sugar cane grown on its Nucleus Estate.

(c) Interest at Commercial rates since the dates of accruals to the date of payment in full.

(d) Costs of the suit.”

In its statement of defence, the defendant admitted the contents of paragraph 4 of the plaint but averred that it is a miller and producer of sugar, not a sugar cane farmer. The defendant added that it only grows sugar cane for demonstration purposes and is not bound to pay cess since it does not sell its produce to any third party.

In response to paragraphs 7, 8, 9, 10 and 11 of the plaint, the defendant pleaded as hereunder:

“5. The defendant denies paragraph 7 of the plaint in its entirety and states that the figures so placed are an exaggeration and creation of plaintiff’s imagination are phantom and cannot be a basis of any obligation to the plaintiff upon the defendant even in the event that the

defendant was to be bound in law to pay less.

6. Paragraph 8 of the plaint is denied in total and in particular the defendant denies that it has bought Sugar Cane at the average rate of Kshs.2000 per ton since 1999 and avers that the same is imagined and a falsehood.
7. The defendant reiterates the foregoing and denies paragraph 9 of the plaint in its entirety and avers that in so far the obligation created by the law between the plaintiff and the defendant is fiduciary the claim by the plaintiff is time bared, (sic) bad in law and unmaintenable.
8. The defendant admits paragraph 10 of the plaint to the extent that it has collected and remitted to the plaintiff all collected cess from the farmers produce but avers that it being not a farmer it is not bound to pay and thus has not committed any wrong to warrant this suit.
9. No notice of intention to sue nor demand was ever served and the defendant contends this suit is an abuse of the process of the court, is premature to that extent and the plaintiff would be disentitled to costs in all events.
10. The defendant reiterates the pleadings foregoing and denies in total the averments at paragraph 11 of the plaint as untenable in law.”

On 29th November, 2007 the plaintiff filed an application for summary judgment. The same was scheduled to be heard on 13th March, 2008 but on that day it was agreed by consent that the application be abandoned in favour of a full hearing on 24th July, 2008. Come the hearing date, the court was informed that the parties were sorting out various documents and were therefore desirous of an adjournment. The application for adjournment was granted. The hearing was eventually scheduled for 15th April, 2010.

On that day, both Mr. Kiseru for the plaintiff and Mr. Otieno for the defendant attended court. The plaintiff's representative also attended court but the defendant's representatives and/or witnesses were absent. Mr. Otieno sought an adjournment on grounds that he had been bereaved and was not in a proper state of mind to go on with the hearing. He also stated that his client's representative was absent. The application was strenuously opposed by Mr. Kiseru. The court declined to grant an adjournment.

The plaintiff called only one witness, **Mr. Joshat Ayonga, (PW1)** its Town Clerk. He produced **Legal Notices Nos. 103 and 104 of 1999 (P. Exh.1)** vide which the plaintiff was established. I must state that the plaintiff's proper name is **the Town Council of Awendo** and **not Awendo Town Council**. PW1 further testified that the plaintiff is entitled to cess from the defendant by virtue of the provisions of **Legal Notice No. 202 of 1988, P. Exh. 3**. This is the

LOCAL GOVERNMENT (AGRICULTURAL PRODUCE CESS) (ADOPTIVE BY-LAWS) ORDER,

1988. Clause 4 thereof states as hereunder:

“4. A cess at the rate of one percentum of the gross producer price produce purchased from an owner within the jurisdiction of the council shall be payable to the council.”

He said that the defendant was growing sugar cane in its nucleus estate zones as stated in the plaint. They stand on a parcel of land known as **L.R. NO. 16339** (Grant Number 1.R.76630) measuring 2997.70 hectares that is registered in the defendant’s name. A copy of the Grant was produced as **P. Exh.4**. He added that the Memorandum and Articles of Association of the defendant showed that one of the objects for which the company was established is to **“establish and manage sugar cane plantations and assist others to do so.”** A copy of the Memorandum and Articles of Association was produced as **P. Exh.5**.

The plaintiff had been supplied with the defendant’s details of costs and expenses schedule for financial years 1998/1999, 1999/2000, 2000/2001, 2001/2002, 2002/2003, 2003/2004, 2004/2005, 2005/2006 and 2006/2007, **P. Exh.6**. It shows that cane purchases from the defendant’s nucleus estate was as follows:

<u>FINANCIAL YEAR</u>	<u>AMOUNT IN KSHS.</u>
1998/1999	64,529,519
1999/2000	95,560,345
2001/2002	55,353,079
2002/2003	66,488,696
2003/2004	68,130,914
2004/2005	82,938,888
2005/2006	55,790,488
2006/2007	88,965,552

PW1 further testified that according to a memorandum from the Outgrowers Accountant to the defendant’s Finance Manager, the tonnes of sugar cane produced from the nucleus estate over the above stated period was as hereunder:

<u>FINANCIAL YEAR</u>	<u>TONNES PRODUCED</u>
1999/2000	93,346
2000/2001	78,773
2001/2002	122,565
2002/2003	92,643
2003/2004	93,533
2004/2005	93,101
2005/2006	104,547

However, a copy of the memorandum was not produced, though it had been marked for identification. But the above information is also contained in the defendant’s Directors’ reports for the years under reference which were produced as **P. Exh.9**. The price per tonne of sugar cane has been varying over the years as shown hereunder:

<u>DATE</u>	<u>PRICE PER TON (KSHS)</u>
--------------------	------------------------------------

1/3/1998	1,730/=
1/9/2000	1,800/=
11/9/2000	2,015/=
8/3/2003	1,700/=
7/6/2003	1,800/=
1/8/2005	2,000/=
1/2/2007	2,200/=
17/9/2007	2,500/=
1/6/2009	2,850/=

The above prices are contained in a document that was supplied to the plaintiff by the defendant and marked as **P. Exh.8**.

In the plaint, the plaintiff stated that the average price per tone was Kshs. 2000/=.

PW1 refuted the defendant's contention in its defence that it is a miller and not a sugar cane grower. He said that the defendant is also growing sugar cane at a profit and is therefore supposed to pay cess.

In cross examination, PW1 said that cess is payable and calculated at the point of sale. There was sufficient evidence that the defendant was purchasing sugar cane from its own nucleus estate, PW1 added.

The defendant did not adduce any evidence but both parties filed their respective submissions which I have duly considered.

The parties did not file a list of agreed issues but from the pleadings on record the major issues that arise for determination are as hereunder:

- (1) Is the plaintiff entitled to collect cess of 1% of the value of sugar cane produced by the defendant?
- (2) If the answer to the aforesaid issue is in the affirmative, has the defendant been remitting any cess?
- (3) Is the plaintiff's claim time barred?
- (4) How much cess, if at all, is payable by the defendant to the plaintiff?
- (5) What order should be made as to costs of the suit?

Determination of issue No.1

The defendant submitted that for any Local Authority to enforce any by-law, it must make the same in accordance with the Local Government Act or adopt adoptive by-laws as promulgated by a minister under an Act of Parliament.

Section 192 A (1) of the **Agriculture Act** states as hereunder:

“PART XIVA - AGRICULTURAL CESSSES

192 A (1) Subject to subsection (1A) a local authority may, with the consent of the minister given after consultation with the minister for the time being responsible for local government, by by-laws, impose a cess on any kind of agricultural produce, and may in the by-laws make such incidental provision as is necessary or expedient; and the cess shall form part of the local authority's revenues.”

The defendant submitted that the plaintiff's witness did not prove that the adoptive by-laws applied to the plaintiff. Without adoption or making of the by-laws the plaintiff lacked **Locus Standi** to demand or receive cess, the defendant stated.

It is necessary that I reproduce a portion of Legal Notice No. 202 of 20th May, 1988. The relevant portion thereof is as hereunder:

**“LOCAL GOVERNMENT ACT
(Cap 265)
THE AGRICULTURE ACT
(Cap 318)**

IN EXERCISE of the powers conferred by section 210 of the Local Government Act, and in conformity with section 192 A of the Agriculture Act, the Minister for Local Government and Physical Planning, with the consent of the Minister for Agriculture, makes the following order:-

**THE LOCAL GOVERNMENT (AGRICULTURAL PRODUCE
CESS (ADOPTIVE BY-LAWS) ORDER, 1988**

- 1.**
- 2. The By-laws set out in this order shall be the adoptive agricultural produce cess by-laws which any municipality, town or county council may adopt.”**

The interpretation section defines **“owner”** as **“the producer, trader, company, co-operative society, or person owning the produce.”**

“Produce” is defined as **“any of the commodities specified in the first column of the schedule.”**

Was the plaintiff obliged to prove that it adopted the by-laws in Legal Notice No. 202 of 1988?

The plaintiff stated in paragraph 4 of the plaint that:

“The plaintiff by virtue of the provisions of the Local Government Act (Cap 265 Laws of Kenya) is entitled to cess of 1% of the value of sugar cane produced by any farmer within the plaintiff's territorial jurisdiction.”

The defendant responded to the above quoted pleading as follows:

“5. The defendant admits the allegations at paragraph 4 of the plaint but avers that as registered and constituted it is a miller and producer of sugar and not sugar cane farmer as anticipated under Local Government Act.”

It is thus evident that there was no denial that the plaintiff is entitled to cess as claimed.

Although in cross examination PW1 did not expressly state that the plaintiff adopted the adoptive agricultural produce cess by-laws, he relied on the same and produced the relevant Legal Notice as **P. Exh.3**. in any event, there was no averment in the statement of defence that the plaintiff was not entitled to collect cess as claimed.

If an averment in a plaint is admitted by a defendant it is not necessary to adduce evidence to prove it. After all, the standard of proof in civil cases is on a balance of probabilities. No evidence was adduced by the defendant to controvert the plaintiff's evidence.

Sugar cane is listed in the first column of the schedule aforesaid as one of the produce for which cess at 1% of the gross producer price is payable. Under the said Gazette Notice, Sugar cane processing factories or other organizations which buy sugarcane are required to pay cess.

The defendant further submitted that it was not obliged to pay cess on produce from its own farm since it could not purchase its own produce. It referred to the sale of Goods Act which defines "**buyer**", "**contract of sale**", "**seller**", "**purchase**" and "**goods.**" However, in determining who is entitled to pay cess, regard must be had to the provisions of **Legal Notice No. 202 of 20th May, 1988** and not the sale of **Goods Act**.

The defendant is an "**owner**" of sugarcane and from its own documents supplied to the plaintiff, it purchases sugar cane from its nucleus estate which is within the jurisdiction of the plaintiff.

In my view therefore the answer to the first issue is in the affirmative.

Determination of issue No.2.

The answer to that issue is found in paragraph 8 of the defendant's statement of defence. The defendant collects and remits to the plaintiff all the cess collected from sugar cane grown by other farmers but not on sugar cane grown and purchased from its nucleus estate.

Is the plaintiff's claim time barred?

The defendant submitted that if it retained the cess that was supposed to be transmitted to the plaintiff, the cause of action herein is the tort of detinue and conversion and the limitation period for such cause of action is three years. In its view, if the retention started in the year 2000 or thereabout, then the suit ought to have been filed by the year 2003 and not later. The court was urged to find that the suit, having been filed in 2007, is fatally out of time.

On the other hand, the plaintiff submitted that the suit is founded on taxation laws as cess is a tax levied pursuant to an Act of Parliament. It was not a contractual obligation but a statutory one, it was contended. The suit is not therefore time barred, Mr. Kisera submitted.

Under **section 42 (1) (d)** of the **Limitation of Actions Act**, it

is only proceedings by the Government to recover any tax or duty or interest thereon that are not subject to the provisions of the Act. **Section 2** of the **Act** defines the Government to include only three corporations, that is, the Kenya Railways Corporation, the Kenya Ports Authority and the Kenya Posts and Telecommunications Corporation, as it then was. The plaintiff is a local authority and obviously not one of the aforesaid corporations. It cannot therefore seek to rely on the provisions of **section 42 (1) (d)**.

In my view, the plaintiff's suit falls under the provisions of **section 4 (1) (d)** of the **Limitation of Actions Act**, that is, an action to recover a sum recoverable by virtue of a written law, whose limitation period is six years from the date on which the cause of action accrued.

In that regard, since the plaintiff was entitled to the cess from the defendant's 1999/2000 financial year, six years lapsed after the defendant's 2004/2005 financial year. The plaintiff's suit was filed on 12th April, 2007. It therefore means that any sum that was payable prior to the date of filing suit is not recoverable.

The plaintiff's claim for Kshs. 13,570,260/= covers the years 1999/2000 to 2005/2006. That is a period of seven years. In essence, that part of the plaintiff's claim is time barred. The plaintiff can only blame itself for sleeping on its rights for all those years. But prayer (b) is valid. It seeks:

“An order directing the defendant to promptly pay to the plaintiff any such further cess fees as may be due on account of sugar cane grown on its nucleus estate.”

Since it has been established that the defendant is obliged to pay cess to the plaintiff at the stipulated rate, the defendant ought to pay all the accrued and accruing cess from the date of filing suit to date and continue to do so until such time as Legal Notice No. 202 of 20th May 1988 is revoked or amended.

As regards costs of the suit, the defendant stated in paragraph 9 of its defence that no notice of intention to sue was ever served and hence no costs of the suit are payable. The plaintiff did not adduce any evidence to disprove that contention. A substantial part of the plaintiff's claim has been dismissed as time barred. In the circumstances, I will not award any costs to the plaintiff. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF MAY, 2010.

**D. MUSINGA
JUDGE.**

14/5/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Ogweni for Mr. Kisera for the Plaintiff

Mr. Nyambati for Mr. Otieno for the Defendant

COURT: Judgment delivered in open court on 14th day of May, 2010.

**D. MUSINGA
JUDGE.**