



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE 41 OF 2008

MUMIAS SUGAR CO. LTD. :::::::::::::::::::::::::::::: PLAINTIFF

V E R S U S

1. FRANCIS MANYASA

2. MICHAEL MASHERE :::::::::::::::::::::: DEFENDANTS

3. SIMON WESECHERE

(T/A Mumias Sugarcane Farmers Association)

R U L I N G

The defendants have invoked the provisions of sections 3, 3A, 17 and 18 of the Civil Procedure Act, in an application in which they seek the following 2 substantive reliefs;

- (i) That the following 3 cases be transferred to the Sugar Arbitration Tribunal, Nairobi;**
- (a) This suit;**
- (b) Bungoma CMC Misc. Application No.173/2007; and**
- (c) Mumias PMCC NO.26 of 2008**
- (ii) That prior to the transfer of the 3 cases, there should be a stay in the hearing of any other applications.**

The defendants said that they had been made aware that disputes between sugarcane millers, sugarcane growers and any other stakeholders can be settled by the Sugar Arbitration Tribunal, Nairobi.

It is the defendants' contention that all the 3 cases cited above had been filed by the plaintiff herein although in different forms.

By that contention I understand the defendants to be saying that the plaintiff, who is a sugarcane miller is a party to all the said 3 cases, even though it may not be obvious from the case title.

If that be the position, the defendants appear to be saying that the said cases fall within the jurisdiction of the Sugar Arbitration Tribunal, and that therefore, this court ought to order that the cases be transferred

to that tribunal, for hearing and determination.

According to the defendants, prior to making this application, they had asked the Chief Magistrate's Court, Bungoma, to transfer the case which was before it, to the Tribunal. However, the Chief Magistrate's court declined the defendants' request, on the grounds that it did not have the mandate to transfer the case.

The defendants also disclosed to me that the Principal Magistrate's Court at Mumias also said that it lacked the requisite authority to order that the case before it be transferred to the tribunal.

At that stage, the defendants wrote to this court, asking it to make an order for the transfer of the cases. But the court responded to the defendants' letter by stating that the court does not act on the basis of letters, but only on applications.

It was in those circumstances that the defendants then made the present application. In doing so, the defendants assert that the 3 cases should be transferred to the tribunal because it was a "*special court*" for hearing and determining disputes between sugarcane growers and millers.

In answer to the application, the plaintiff submitted that the High Court cannot transfer a case which was filed before it, to a tribunal that is lower than the High Court.

It was the understanding of the plaintiff that sections 15, 17 and 18 of the Civil Procedure Act only envisaged the transfer of cases from one subordinate court to another or from the subordinate court to the High Court.

It was also the plaintiff's further understanding that in limited circumstances, the High Court could transfer a case to another High Court, but never to a court of a lower jurisdiction.

In any event, the plaintiff believes that it was only the High Court which has jurisdiction to give orders for perpetual injunctions. At any rate, the Sugar Arbitration Tribunal is said to lack jurisdiction to grant the kind of injunctive reliefs sought in the case before this court.

The plaintiff also pointed out that the case which was before the Chief Magistrate's Court Bungoma, had been dismissed. And although there was a pending application for the reinstatement of the suit, there cannot be any order for the transfer of the case before it was reinstated.

It is the opinion of the plaintiff that the real reason for the desire to have the cases transferred was driven by the wish to avoid or evade the consequences of an application for the committal of the defendants' herein to jail, for contempt of court, in the case before the court at Bungoma.

The plaintiff also invited this court to bear in mind the ruling it delivered on 17th July 2008, as that ruling determined the defendants' assertion regarding the identity of the parties in the three cases which the defendants wish to have transferred. In particular, it was the plaintiff's understanding that this court had already made a finding to the effect that the cases before the 3 different courts were not on the same matter.

Therefore, it was the plaintiff's submission herein that the defendants were trying to go around the court's ruling, by raising the same issue again. If that be the intention of the defendants, then they must be told, in no uncertain terms, that once an issue is determined by a court of law, it can only be revisited either on an appeal or by way of an application for review.

In the event that a court of law permitted any party before it, to re-open an issue that had already been determined, unless such an attempt was within the scope of review, there would be a real risk that there would be no end to litigation. Yet it is vital that there be an end to every litigation. One sure way of ensuring finality is through declining to re-open concluded issues, save only in the limited circumstances already discussed herein above.

In this case, the defendants have not and cannot have lodged an appeal to the very same court that made the earlier ruling. Secondly, the defendants have not moved the court by way of review. Therefore, they cannot re-open any issues which were already determined.

In this case I did make a ruling on 17th July 2008. In the course of my said ruling I expressed myself thus;

“In this case, the defendants have asserted that the plaintiff was a party to the suits at Bungoma and Mumias, respectively. However, in the case titles, the plaintiff is definitely not a party.

On the other hand, the defendants have not provided this court with any material which would satisfy me that the plaintiff in each of the two former cases had brought his claim for or on behalf of the plaintiff in this suit.

I am therefore unable to find, as has been suggested by the defendants, that those two former suits were brought by the plaintiff.”

In the light of that express finding, it was not open to the defendants herein to re-open that very issue before me, in the manner they have done.

For the defendants herein to move the court appropriately, they would have needed to make separate applications for each of the cases, unless they first sought and were granted an order of consolidation of the 3 cases.

In their defence herein, the defendants have asserted, inter alia, that;

“We declare that this suit is RES JUDICATA and therefore waste of precious court time and everybody else as the same claim of aiming to DEREGISTER our registered association at Bungoma C.R.M.C.C.C. 173 of 2007 and was decided on 21/11/2007 in the favour of the defendants and similar claim was filed at Mumias SRMCC NO.26 of 2008 and was dismissed on 13th day of May 2008.”

In the event that the above-cited assertions were factually correct, it would mean that the two cases at Bungoma and Mumias, respectively, have already been determined. Therefore, on the basis of the defence herein, there should be no issue which could be referred to Sugar Arbitration Tribunal, for hearing and determination.

But even if there were outstanding issues in the cases before the courts at Bungoma and Mumias, the defendants ought to have ensured that the persons cited as parties to those cases were given an opportunity to be heard on the issue of the intended transfer of the cases. By seeking orders of transfer in this case, yet without serving the parties to those other two cases, the defendants were trying to steal a march against those other parties. This court cannot permit itself to be used as a conduit for such a violation of the parties rights to a fair hearing.

In any event, by virtue of the provisions of section 60 of the Constitution of the Republic of Kenya, the High Court has unlimited original jurisdiction in civil and criminal matters. This court therefore has jurisdiction to hear and determine the case which the plaintiff lodged before it. To that end, the court had already given a ruling on one interlocutory application.

Furthermore, the defendants have not suggested that the High Court did not have jurisdiction to adjudicate on the matters raised in this case. If they had so suggested, the court would have told them that they were wrong.

Given the fact that the High Court has jurisdiction to hear and determine the case before it, I find no compelling reason to transfer the case to the Sugar Arbitration Tribunal, or to any other tribunal.

Accordingly, I reject the attempt to have the case transferred. I also decline to stay proceedings in this case as well as in Misc. Application No.173/07, Bungoma; and in Mumias PMCC NO. 26/2008.

The application dated 26th September 2008 is dismissed, with costs to the plaintiff.

Dated, Signed and Delivered at Kakamega, this 5th day of February 2009

FRED A. OCHIENG

J U D G E