



**REPUBLIC OF KENYA**  
**HIGH COURT AT BUNGOMA**

**MISC. CIVIL 20 OF 2006**

**ASHIOYA & CO. ADVOCATES        ::::::::::::::: APPLICANT**

**VS**

**BUSIA SUGAR CO. LTD        ::::::::::::::: RESPONDENT**

**AND**

**KENYA SUGAR BOARD        ::::::::::::::: 1<sup>ST</sup> OBJECTOR**

**JONES NDUBI        ::::::::::::::: 2<sup>ND</sup> OBJECTOR**

**RULING**

**The application before me is brought under section 3, 3A and 63(e) of the Civil Procedure Act. The applicant is seeking 2 prayers as hereunder:**

- a) That this honourable court be pleased to order that the execution do proceed against the respondent.***
- b) That the objection filed herein be struck out with costs of the same and the auctioneers to be borne by the objectors.***

**The application is premised on 2 grounds on the face of it as hereunder.**

- a) That the High court in Busia CC. No. 7 of 2006, has already found that the alleged placement under receivership of Busia Sugar Co. Ltd by Mumias Sugar Co. Ltd, and the Kenya Sugar Board were null and void ab initio.***
- b) That the purported debenture between Busia Sugar Co. and the Kenya sugar Board and Mumias Sugar Co. is null and void and that Busia Sugar Co. Ltd exists as an independent entity capable of suing and being sued.***

**It was not supported by any affidavit. Grounds of opposition were filed in opposition of the same. Among the grounds is the ground that the application is not supported by an affidavit and hence an abuse of the due process of the court. It is also stated that the same is defective and incompetent for want of compliance with the mandatory provisions of the law. I feel I should deal with these 2 grounds first before I can address the substantive issues raised. According to Mr. Makokha for the respondent, an application other than one brought to court under OVI r.13 1 (a)**

must be accompanied by a supporting affidavit. Mr. Ashioya on the other hand says that there is no law that demands that an application other than the ones under OVI r.131 (a) must be accompanied by a supporting affidavit. I have considered these submissions and I must say that Mr. Ashioya is right. OL r.3 does not make it mandatory for all applications to be accompanied by affidavits.

The same provides:-

*“Every Notice of Motion shall state in general terms the grounds of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served”.*

My interpretation of this rule which appears to be supported by Mr. Makokha is that if one is not relying on any evidence – i.e if there are no facts involved whatsoever, then the grounds on the face of the application suffice to support the application. If however one needs to refer or rely on any factual issue, then an affidavit becomes indispensable. The issue here is whether an affidavit was necessary in support of Mr. Ashioya’s application or not. It is agreed that he needed to rely on the ruling of Judge Ombija dated 7.6.2007. Instead of introducing the same as an annexure however, he served it on Mr. Makokha and on the court as an authority. Was this then the right procedure to bring the said authority on board? To my understanding, an authority is either a decided case, or even other legal texts or excerpts that a party relies upon to buttress or fortify his points of law in support of his application or suit. The same i.e the ‘*authority*’ cannot be a part of the proceedings in which his application or suit is filed or the ruling or judgment that the application seeks to enforce or execute. In this case therefore, since Mr. Ashioya’s application seeks to enforce the ruling in Busia HCCC No.7/2006, he cannot use it as an authority. The same can only be brought on board as an annexure – not as an authority. According to Mr. Ashioya, he does not need to annex the same because it already forms part of the court record. I beg to differ with him on this point. My view is that it is the duty of the party who files an application to ensure that all the materials that the court needs to be referred to are brought on board and made a part of the application in question. That is why, even in applications for review or in appeals, the applicant must annex the certified copy of the ruling he seeks to be reviewed or the decree he is appealing against notwithstanding that these 2 documents exist in the court file in their original form. This being my stand, I agree with Mr. Makokha that the ruling in question is not part of the application and the court cannot therefore be referred to the same. What Mr. Ashioya told the court in respect of the contents of the said ruling were therefore statements from the bar and are thus inadmissible.

The ruling in question in my considered view needed to be brought on board by way of an annexure and not an authority and this could only have been done if there was a supporting affidavit. In absence of the affidavit, the ruling cannot hang on the grounds on the face of the application. The same must therefore be disregarded. Without the ruling in question, the application then becomes hopelessly bad in law. The same cannot therefore stand. I agree with Mr. Makokha that the same is incompetent and I accordingly dismiss the same with costs to the respondents.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 19<sup>th</sup> day of July, 2007 in

presence of: Mr. Ashioya for the applicant. Mr. Makokha