



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**CONSTITUTIONAL PETITION NO. 5 OF 2020**

**IN THE MATTER OF ARTICLES 2, 10 (2)(b), (c), 23 (1), 27, 50 (1), 201 (a), 227 AND 232 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION OF CONSTITUTIONAL RIGHTS AND FREEDOMS OF ARTICLES 2, 10 (2), 27, 201 (A) AND 232 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2015**

**AND**

**IN MATTER FO THE PRIVATIZATION ACT, 2005**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, CAP 5D**

**AND**

**IN THE MATTER FO THE AGRICULTURE AND FOOD AUTHORITY ACT NO. 13 OF 2013**

**IN THE MATTER OF THE INTERNATIONAL EXPRESSION OF INTEREST (IEOI) FOR LEASIGN AND OPERATING EACH THE FIVE (5) STATE OWNED SUGAR FACTORIES IN KENYA VIDE AN ADVERTISEMENT ON 10<sup>TH</sup> JULY 2020 BY THE DIRECTOR GENERAL, AGRICULTURE AND FOOD AUTHORITY AND GAZETTE NOTICES NOS 5433, 5434 AND 5435 OF 3<sup>RD</sup> AUGUST 2020 AND GAZETTE NOTICE NO. 5473 OF 7<sup>TH</sup> AUGUST 2020**

**BETWEEN**

**LINUS ROTICH TUM.....PETITIONER**

**AND**

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK,**

**FISHERIES & COOPERATIVES.....1<sup>ST</sup> RESPONDENT**

**AGRICULTURE AND FOOD AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF KISUMU.....1<sup>ST</sup> INTERESTED PARTY**

**COUNTY GOVERNMENT OF NANDI.....2<sup>ND</sup> INTERESTED PARTY**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> INTERESTED PARTY**

## RULING

Linus Rotich Tum, hereinafter referred to as Petitioner has come to court by way of petition against the Cabinet Secretary, Ministry of Agriculture livestock, Fisheries & Cooperatives, Agriculture and food Authority hereinafter referred to as Respondents and County Government of Kisumu, County Government of Nandi and National Land Commission hereinafter referred to as Interested Parties claiming that the 2<sup>nd</sup> Respondents has without adhering to the Constitution and in disregard of the functions and responsibilities of the National Land Commission commenced a process by which five (5) sugar factories shall be leased on a long term basis to private investors as set out in an advertisement in the Daily Nation and Standard Newspapers of 10/7/2020.

The applicant claims that in the said advertisement, the 2<sup>nd</sup> Respondent has invited bids by way of international Expression of Interest (IEOI) in which the Respondent seeks to have each of the five sugar factories Muhoroni Sugar Company Limited, Miwani Sugar Company Limited (In Receivership), Sony Sugar Company Limited and Chemelil Sugar Company Limited leased out to investors (successful bidders) on long term basis.

The petitioner contends that there are private actors and stakeholders in the sugar industry in Kenya who have legitimate expectations that the Agriculture and food Authority shall undertake its regulatory responsibilities to ensure the enactment of suitable regulations and rules to regulate the industry for the benefit of all.

According to the petitioner, the impugned actions/omissions of the 2<sup>nd</sup> Respondent has/shall have substantive ramifications and legal effects on the public interest in the five sugar factories earmarked for the intended long term leasing and yet there was no public participation in the resolution to have the said factories leased out to investors and that there was no compliance with Part VII of the public Private Partnership Act, 2013.

Moreover, that there was no environmental assessment done in line with the relevant provisions of the Environmental Management and Coordination Act, 1999 on the redevelopment of the said sugar factories into super of large complexes in line.

The Petitioner further claims that the actions/omissions of the Respondents jointly and severally amount to the contravention of the Constitution. The Respondents have without observing, obeying and or adhering to the relevant provisions of the Constitution by failing to involve the Public in making the decision to prepare and publish the advertisement inviting for International expression of Interest (IEOI) for the long term leasing of the five state owned sugar factories and disregarding the Court Order in Kisumu High Court Petition No. 4 of 2019, Kisumu High Court Petition No. 4 of 2019, The County Government of Kisumu vs The National Land Commission & 3 Others (suing as trustees of Nyando Valley Association directing that the claim is heard a fresh.

The petitioner laments that the respondents are dealing with the matters in the agriculture sector without regard to the provisions of Schedule 4 of the Constitution of devolved functions and by acting in disobedience to the values and principles of public service as set out in Article 232 (1) of the Constitution of Kenya by not being responsive, impartial, accountable, transparent and efficient, effective and economic use of resources.

Lastly by purporting to procure and or enter into a contract in breach of Article 227 of the Constitution by not being fair, equitable, transparent, competitive and cost-effective.

The Petitioner prays that:

- 1. A declaration that the 2<sup>nd</sup> Respondent has no legal authority, power and jurisdiction to make and or publish the advertisement and invitation of bids from investors for long term leasing of the assets including land as contained in the Daily Nation and Standard Newspapers of 10/7/2020, and hence its actions are ultra vires the relevant provisions of the mother statute and the said advertisement is null and void and of no legal consequences.**
- 2. A declaration that the acts of the Respondents jointly and severally in advertising and inviting bids from investors for long term leasing of the assets including land as contained in the Daily Nation Newspaper of 10/7/2020, is in breach of the Constitution, is null and void and of no legal consequences.**
- 3. A declaration that the 1<sup>st</sup> Respondent's revocation of the appointment of the members of the Board and appointing an Interim Management Committee to oversee the management of Chemelil Sugar Company Limited as contained in the Special Issue of the Kenya Gazette of 3<sup>rd</sup> August 2020 and Gazette Notice No. 5473 of 7<sup>th</sup> August 2020 are in contravention of the Construction and hence null and void and of no legal consequences.**
- 4. A declaration that the actions of the Respondents, jointly and severally are unconstitutional and amount to dealing with a matter whose subject is before a tribunal hence sub-judice.**
- 5. A declaration that all that parcel of land known as L.R. No. 11840 registered in name of Chemelil Sugar Company Ltd is the subject of a matter pending before the National Land Commission and therefore not available to be dealt with by the Respondents jointly and severally as they purport to do.**
- 6. An order removing Chemelil Sugar Company Limited from the list of sugar factories that are available and or are the subject of long term leasing to investors as intended by the Respondents.**
- 7. An order restraining the Respondents jointly and severally from proceeding with the implementation and progressing with the processing, and or awarding the tender based on the bids made pursuant to the invitation for International**

**Expression of Interest (IEOI) and the commencement and operationalization of the Interim Management Committee to oversee the management of Chemelii Sugar Company Limited as contained in the advertisement on 10/7/2020 in the Daily Nation and Standard Newspapers and gazette Notice No. 5473 of 7<sup>th</sup> August 2020.**

**8. An order revoking and or cancelling and declaring as null and void and of no legal consequences gazette Notice No. 5473 of 7<sup>th</sup> August 2020 and the advertisement inviting bids for long term leasing of assets of Chemelil Sugar Company Limited as contained in the advertisement in the Daily Nation and Standard Newspapers on 10/7/2020.**

#### **9. Costs of the Petition.**

Accompanying to Petition is the notice of motion under Rules 19 and 23 of the Constitution of Kenya (Protection of Rights and fundamental freedoms and enforcement of the constitution procedure and Proceedings Rules seeking orders that Pending the hearing and determination of this Petition, an order be issued suspending the implementation, effectuation and execution of the process of receiving and working on the invitation for bids in the International Expression of Interest in the long term leasing of the assets of M/s Chemelil Sugar Company Limited as advertised in the Daily Nation of 10/7/2020 and the commencement of the work of the Interim Management Committee as set out in Gazette Notice No. 5473 of 7<sup>th</sup> August 2020.

Pending the hearing and determination of this petition, an order is hereby issued removing M/s Chemelil Sugar Company Limited from the list of the state owned sugar factories the subject of the invitation for an International Expression of Interest for long term leasing as advertised in the Daily Nation and standard Newspapers of 10/7/2020. The petitioner seeks that the costs of this application be provided for.

The application is supported by the affidavit of the Petitioner who states that the actions of the 1<sup>st</sup> Respondent are an affront to the Constitution rights of the persons claiming a portion of the land occupied and in possession of Chemelil Sugar Company Ltd inter-alia.

The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Peter Gatiru Munya, the Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries and Cooperatives stating that the application is based on misunderstandings as the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent advertised the IEOI for leasing of assets including land for Chemelil Sugar Company in compliance to the Public Procurement and asset Disposal Act, 2015.

The 1<sup>st</sup> Respondent acted within his powers. The Lake Region Economic Block is currently represented in the Interim Management Committee vide Gazette Notice No. 6434.

The 2<sup>nd</sup> Respondent filed the application dated 22/9/2020, seeking to vacate, set aside or review the ex parte orders issued on 27/8/2020 pending the hearing and determinations of the Petition.

The application is based on allegation that the Petitioner failed to disclose to court of all material facts within his knowledge and thereby obtained ex parte orders that in effect suspended and paralysed the implementations of National Government Policy for restricting and reinvigorating the sugar industry through invitation of suitable and experienced invention to participate in an International expression of Interest (IEOI) for operation of all the 5 state owned sugar mills notwithstanding that the petitioner complaint appear to forget only Chemelil Sugar Company Ltd.

The 2<sup>nd</sup> Respondent states that the Petitioner failed to establish a prima facie case with a likelihood of success. That he failed to register any recognised interest in the lands owned by Chemelil Sugar Co. Ltd.

According to the 2<sup>nd</sup> Respondent, this court can't question the titles or rights of ownership of land registered in the respective names of five state owned companies unless the said companies are replaced and given a hearing under the Constitution. There is no evidence that the parcels of land are community land.

The application is supported by the affidavit of Anthony Muhiu Lubullella that basically reiterates the grounds of the application. The affidavit does not bring forth the material facts that the petitioner failed to disclose but criticises the ex parte order of the court on grounds that there was no prima facie case with a likelihood of success.

In the replying affidavit to the application dated 20/8/2020, the 2<sup>nd</sup> respondent through Antony Muriithi, the Acting Director General states that the process of the long term leasing of the assets (including land) of five state owned sugar factories was under undertaken within the law.

The Government of Kenya Established a Taskforce of sugar industry stakeholders under Gazette notice no. 11711 of 9/11/2018. In execution of its mandate, the taskforce invited members of public to submit memorandum, considered views from Expert presentation and externally reviewed other successful sugar models from countries in the common markets for Eastern and Southern Africa (COMESA) regions and internationally. The task force also held public participation meetings in all the sugar growing areas.

The deponent went through the whole process of leasing of the sugar factories in the implementation of the Government Policy. However, nothing was attached to the replying affidavit to demonstrate that the process was being undertaken with the knowledge of and participation of public.

I have considered both application and do find that the 1<sup>st</sup> issue to be determined is whether the 2<sup>nd</sup> respondent has demonstrated that the ex parte orders were issued without the Petitioner disclosing material facts. Non-disclosure of material facts leads to vacation of the interim orders issued by the court.

I do find that the interim orders were granted on establishment that the petition was not frivolous and that the matter before court was of public interest. I do find that the application dated 22/9/2020 for varying the interim orders is without basis as the petitioner disclosed all material facts before the court and that the applicant has not demonstrated that the petitioner withheld any important fact from the court and therefore the application is dismissed with costs.

On the main application for conservatory orders, I do find that the Petitioner has established on a prima facie basis that there was no proper public participation as the respondents did not avail any evidence of public participation that they conducted in view of the provisions of chapter 10 of the constitution of Kenya 2010.

Article 10 of the Constitution of Kenya provides for national values and principles of governance that bind all state organs state officer's public officers and all persons whenever any of them implement public policy decisions. The national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and ***participation of the people***. The respondents have not demonstrated any aspect of public participation and therefore the applicants have established a prima facie case with a likelihood of success. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. This court is satisfied that unless a conservatory order is granted the petitioner is likely to suffer prejudice as a result of a violation of the constitution.

The upshot of the above is that the Notice of Motion dated 20/8/2020 is merited. I do grant orders suspending the implementation, effectuation and execution of the process of receiving and working on the invitation for bids in the International Expression of Interest in the long term leasing of the assets of M/s Chemelil Sugar Company Limited as advertised in the Daily Nation of 10/7/2020 and the commencement of the work of the Interim Management Committee as set out in Gazette Notice No. 5473 of 7<sup>th</sup> August 2020.

Moreover, pending the hearing and determination of this petition, I do grant an order removing M/s Chemelil Sugar Company Limited from the list of the state owned sugar factories the subject of the invitation for an International Expression of Interest for long term leasing as advertised in the Daily Nation and standard Newspapers of 10/7/2020. Cost in the cause.

**DATED AT KISUMU THIS 25<sup>th</sup> DAY OF FEBRUARY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**