



**Bicorn Exim Limited v Githambo Tea Factory Company Limited & another  
(Civil Suit 26 of 2022) [2023] KEHC 22197 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 22197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 26 OF 2022  
F WANGARI, J  
MAY 22, 2023**

**BETWEEN**

**BICORN EXIM LIMITED ..... PLAINTIFF**

**AND**

**GITHAMBO TEA FACTORY COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KTDA MANAGEMENT SERVICES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to an application dated 6<sup>th</sup> October, 2022 which sought for the following orders: -
  - a. That this matter be certified as urgent and heard ex-parte in the first instance;
  - b. That Chief Inspector Peace Maithya as Inspector appointed under the provisions of section 800 of the Companies Act attached at Attorney General Multi Agency Inspection Team on Agriculture Reforms/Revitalization do release to the Plaintiff's advocates M/S C.O. Tolo & Co. Advocates the original tea contract No. 095.MGT.2021 executed between Githambo Tea Factory Company Limited and Bicorn Exim Limited dated 24<sup>th</sup> June, 2021.
  - c. That in default of compliance with order (b) above, any other police officer appointed under the provisions of Section 800 of Companies Act attached at Attorney General Multi Agency Inspection Team on Agriculture Reforms/Revitalization do release to the Plaintiff's advocates M/S C.O. Tolo & Co. Advocates the original tea contract No. 095.MGT.2021 executed between Githambo Tea Factory Company Limited and Bicorn Exim Limited dated 24<sup>th</sup> June, 2021;



- d. That in default of compliance with orders (b) and (c) above, the Chief Inspector Peace Maithya or the police officer in charge of Multi Agency Inspection Team on Agriculture Reforms/Revitalization be summoned to court to explain why the original tea contract No. 095.MGT.2021 executed between Githambo Tea Factory Company Limited and Bicorn Exim Limited dated 24<sup>th</sup> June, 2021;
  - e. That costs of this application be provided for.
2. The application was opposed through a replying affidavit dated 23<sup>rd</sup> October, 2022 sworn by the 1<sup>st</sup> Respondent's Chair of the Board of Directors and filed on 24<sup>th</sup> October, 2022. The 2<sup>nd</sup> Respondent equally filed its response dated 10<sup>th</sup> February, 2023 sworn by the 2<sup>nd</sup> Respondent's Company Secretary and filed on 14<sup>th</sup> February, 2023. The Applicant filed a supplementary affidavit on 1<sup>st</sup> February, 2023 and the same is dated 31<sup>st</sup> January, 2023.
  3. The application was disposed off by way of written submissions wherein both the Applicant and the 2<sup>nd</sup> Respondent complied by filing submissions together with various authorities in support of the parties' rival positions. On the part of the 1<sup>st</sup> Respondent, it only filed a response but no submissions.

### **Analysis and Determination**

4. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Applicant has made out a case for grant of orders it seeks. Corollary to this finding is the issue of costs.
5. The orders being sought by the Applicant is for the release of a document which has been described as the original tea contract No. 095.MGT.2021 executed between the Applicant and the 1<sup>st</sup> Respondent on 24<sup>th</sup> June, 2021. These are discretionary orders which the court reserves its right to grant or not grant. The orders are directed to one Chief Inspector Peace Maithya or any other authorized officer to release the original tea contract dated 24<sup>th</sup> June, 2021. Having considered the application and the responses, one thing can be clearly discerned and this is, that there was an order which empowered a police officer, C.I. Maithya to enter, have access to, search and obtain information within the premises of several tea broker companies among them the Applicant. The said order was issued on 22<sup>nd</sup> March, 2022 in Mombasa Chief Magistrates' Criminal Miscellaneous Case No. E151 of 2022. From the order, the purpose of the entry and search was to carry out inspection and investigations into allegations of manipulation of tea auction prices, price fixing of tea prices, abuse of office, conspiracy to commit economic crimes and money laundering among other offences.
6. I note that the Applicant in the miscellaneous application is indicated to have been the Honourable Attorney General. Juxtaposing the purpose of entry, search and carting away of the affected tea broker companies' vis a vis the Applicant in that case, it leaves no doubt that what was being investigated was suspected commission of crimes and/or offences. With the 2010 Kenyan Constitution, there is no provision which empowers the Attorney General to make such an application. If indeed there was an investigation, nothing stopped C.I. Peace Maithya from being the Applicant. Similarly, there is the Office of the Director of Public Prosecution (ODPP) which normally regulate such applications.
7. In the Applicant's affidavit in support of the application, the deponent therein avers that neither the Applicant nor its directors have been charged in relation to the said investigations. In response, the Respondents more so the 2<sup>nd</sup> Respondent at paragraph 5 of its replying affidavit argue that the



investigations are still ongoing. The 1<sup>st</sup> Respondent's deponent is neither C.I. Maithya nor an officer in charge of Multi Agency Inspection Team on Agriculture Reforms/Revitalization. How he knows that there are ongoing investigations is only known to him. Though I am alive to the provisions of Article 245 (4) (a) of the Constitution, it would make mockery of our Constitution and other laws to purport to undertake investigations for more than one (1) year without any status update and/or conclusion. If this was to be allowed, anyone who wishes to punish another through protracted and unending investigations would be having a field day. That would be the definition of abuse of power in its raw form.

8. The Applicant states that the document it seeks contain the terms of agreement between the Applicant and the 1<sup>st</sup> Defendant. None of the Respondents have denied the existence of the said document. I note that though the copy of the said document is not annexed to the Applicant's application in issue, inference can be drawn from the 2<sup>nd</sup> Respondent's letter dated 15<sup>th</sup> March, 2022. In the said letter, the 2<sup>nd</sup> Respondent explicitly makes reference to an agreement dated 24<sup>th</sup> June, 2021. Similarly, the 1<sup>st</sup> Respondent's response alludes to the matter being referred to arbitration. How would the 1<sup>st</sup> Respondent know with certainty that the matter ought to be referred to arbitration if it was never aware of the said agreement? I hold the view that the Respondents have not demonstrated any prejudice they stand to suffer if the orders the Applicant seek were granted. If indeed it shall aid in the resolution of the dispute and there being no affidavit that it does not exist or it is lost, I find that the application by the Applicant is merited.
9. Before I issue the final orders in relation to the application, the Respondents have argued that the Applicant ought to have made the present application before the court that issued the orders. The case of County Government of Meru v Ethics and Anti-Corruption Commission [2014] eKLR was cited for this proposition. I note that the case above was a Constitutional Petition wherein the County Government of Meru sought to enforce its fundamental rights and freedoms under the Bill of Rights. In dismissing the petition, the court held that Meru County Government is not a person as contemplated under the Bill of Rights capable of moving the court to enforce those rights.
10. The said case can be distinguished from the present one for among other reasons that, in the present case, there is a suit that was filed on 13<sup>th</sup> April, 2022 and that suit is what anchors the present application. This court has unlimited original jurisdiction in criminal and civil matters under Article 165 (3) (a) and I hold that nothing precluded the Applicant from making the present application before this court. A perusal of the plaint dated 12<sup>th</sup> April, 2022 and filed in court on 13<sup>th</sup> April, 2022 leaves no doubt that the subject contract forms the crust of the suit and it would be inimical to allow such argument to stand on the place to file the application.
11. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The application dated 6<sup>th</sup> October, 2022 is merited and it is hereby allowed with the attendant orders as follows: -
    - i. That Chief Inspector Peace Maithya, an Inspector appointed under the provisions of section 800 of the Companies Act attached at Attorney General Multi Agency Inspection Team on Agriculture Reforms/Revitalization do release to the Plaintiff's advocates M/S C.o. Tolo & Co. Advocates the original tea contract No. 095.MGT.2021 executed between



Githambo Tea Factory Company Limited and Bicorn Exim Limited dated 24<sup>th</sup> June, 2021.

- ii. That in default of compliance with order (i) above, any other police officer appointed under the provisions of Section 800 of *Companies Act* attached at Attorney General Multi Agency Inspection Team on Agriculture Reforms/Revitalization do release to the Plaintiff's advocates M/s C.o. Tolo & Co. Advocates the original tea contract No. 095.MGT.2021 executed between Githambo Tea Factory Company Limited and Bicorn Exim Limited dated 24<sup>th</sup> June, 2021;
- iii. That in default of compliance with orders (i) and (ii) above, the Chief Inspector Peace Maithya or the police officer in charge of Multi Agency Inspection Team on Agriculture Reforms/Revitalization be summoned to court to explain why the original tea contract No. 095.MGT.2021 executed between Githambo Tea Factory Company Limited and Bicorn Exim Limited dated 24<sup>th</sup> June, 2021 cannot be released.
- iv. Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MAY, 2023.**

.....

**F. WANGARI**

**JUDGE**

