



**Butali Sugar Mills Limited v West Kenya Sugar Co. Ltd & another (Civil Suit 168 of 2007)
[2023] KEHC 21992 (KLR) (Commercial and Tax) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 168 OF 2007
A MABEYA, J
SEPTEMBER 1, 2023**

BETWEEN

BUTALI SUGAR MILLS LIMITED PLAINTIFF

AND

WEST KENYA SUGAR CO. LTD 1ST DEFENDANT

KENYA SUGAR BOARD 2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 30/3/2007, the plaintiff claimed against the defendants, jointly and severally, Kshs.590,630,441/= plus interest thereon at 18% pa from 1/8/2006 until payment in full. The plaintiff also claimed the costs of the suit.
2. The plaintiff's claim was for loss incurred as a consequence of alleged unlawful interference of its business by the defendants. The plaintiff alleged that on 13/4/2005, it was registered by the 2nd defendant to construct and operate a sugar mill in accordance with Part III section 14 of the Sugar Act, 2000.
3. On 27/7/2005, the 1st defendant lodged in Court NBI Misc C.A. No. 1127 of 2005 R v Kenya Sugar Board Ex parte West Kenya Sugar Company Ltd & Ministry of Agriculture and Butali Sugar Mills Ltd ("the JR application"), to challenge and quash the registration of the plaintiff as a sugar miller. In pursuance thereof, the court granted a stay of proceedings on the 1st defendant's undertaking as to damages. That the said order stayed its operations, transactions and business in connection with its objects and undertakings as a registered miller.
4. Subsequently, the defendants entered into an agreement on 21/7/2006 whereby the 1st defendant withdrew the JR application. The plaintiff alleged that the actions of the defendants amounted to



unlawful interference of its business and investment and set out the particulars thereof. That by reason of the defendants' actions, the plaintiff's investment was delayed negated and scuttled whereby it suffered loss and damage particularized at Kshs. 590,630,441/= which the plaintiff claimed against the defendants.

5. The 1st defendant opposed the suit vide the Re-Amended Defence dated 3/12/2018. It contended that the registration of the plaintiff was contrary to an established policy of the Ministry of Agriculture, the former Kenya Sugar Authority and the 2nd defendant not to allow the establishment of any new sugar factory within the recognized sugar zone of a radius of 40km of an existing sugar factory.
6. That further, the registration was contrary to the 2nd defendant's four previous decisions of refusal to grant the plaintiff a licence to operate a white sugar mill within the plaintiff's zone; the assurance by the 2nd defendant not to allow any other sugar mill within the 1st defendant's sugar zone whereby the 1st defendant could proceed to expand its milling capacity at a cost of Kshs. 1.2 billion by an additional capacity of 1500 tonnes crushed per day "(TCD)" to 2500 TCD. Finally, that it was against the existing agreements between the 1st defendant and area outgrowers and the 1st defendant's legitimate expectation that its expansion programme would be honoured.
7. The 1st defendant further contended that it had operated a sugar factory at South Kabras, Kakamega County since 1979 and that under the Crop Production and Livestock Act, Cap 321, no licence could be granted to set up a factory within 25 km from an existing factory. That the Sugar Act 2001 did not compromise the vested rights of the existing sugar factories. That vide a letter dated 11/10/2000, the Ministry of Agriculture demarcated to the 1st defendant its sugar zone as specified therein.
8. The 1st defendant admitted that it lodged the JR application but that the same was meant to protect and further its own business interests. That the JR application was compromised vide an agreement dated 21/7/2006 by which the plaintiff was to relocate its factory from its site and be subsequently de-registered.
9. On the alleged unlawful interference of the plaintiff's business, the 1st defendant denied the allegation and alleged that the court lacked jurisdiction to determine most of the particulars pleaded in support thereof. It therefore denied the claim of Kshs. 590,630,441/= and contended that the plaintiff had no cause of action as the Court of Appeal had declared that the plaintiff's license to operate its sugar mill was null and void.
10. In addition, the 1st defendant issued a Notice of Claim against the 2nd defendant dated 2/3/2012. It alleged that the 2nd defendant made various representations and assurances, that it would not allow any other white sugar mill to operate within the zone allocated to it. That as a result of the said representations and assurances the 1st plaintiff made investments of Kshs. 3.5b. However, the 2nd defendant reneged on those representations and licensed the plaintiff which led to the filing of the JR application. That in the premises, the 2nd defendant should re-imburse the 1st defendant any award of damages that may be made against it in this suit.
11. In its defence dated 18/6/2007, the 2nd defendant was ambivalent with regard to the registration of the plaintiff. It admitted entering into a consent with the 1st defendant to have the JR application withdrawn and contended that the plaintiff could not question the efficacy thereof as it did not object to that consent at the time. It denied that the agreement of 21/7/2006 was meant to scuttle the business of the plaintiff or that there was any unlawful interference with the plaintiff's business.
12. The 2nd defendant further contended that the particulars of unlawful interference raised issues of public law which the court lacked jurisdiction to adjudicate upon. That the case as framed was an



infringement of the plaintiff's rights under public law and should have been litigated under Judicial Review and not by way of a suit.

13. In conclusion, the 2nd defendant contended that the Court lacked jurisdiction by virtue of section 31 of the Sugar Act, and denied that the plaintiff had suffered any loss.
14. As regards the 1st defendant's claim against it, the 2nd defendant admitted making representations and assurances but stated that they were subject to review and rescission. It denied that the 1st defendant had invested Kshs. 3.5b on reliance of the said representations.
15. The 2nd defendant contended that the 1st defendant was solely liable for any damages arising out of the stay orders of 27/7/2005 as it had given an undertaking as to those damages. That since the plaintiff was not party to the agreement of 21/7/2005, any breach of the undertaking given therein could not occasion any damages upon the plaintiff.
16. The plaintiff replied to the 1st defendant's defence vide an Amended Reply to defence dated 11/2/2019. It denied that its registration was unlawful. It contended that the issue of exclusive sugar zones had been determined and was res judicata.
17. The plaintiff reiterated that the 2nd defendant had no power to give the undertaking in the letter dated 23/9/2004 to the 1st defendant and denied that the Court of Appeal had declared its license a nullity as alleged by the 1st defendant.
18. At the trial, the plaintiff called 2 witnesses while each defendant called one each.
19. Atul Shah (Pw1) was the plaintiff's first witness. The Managing Director of PKF Consulting Ltd, adopted his witness statements and told the Court how his company was engaged by the plaintiff to consider and compute the plaintiff's claims.
20. He explained the steps his company undertook before preparing the reports he produced as PExh 1 and 2, respectively. That the claims were for loss of profits at Kshs. 135,975,479/= escalation in costs Kshs. 171,547,689/=, increase in construction costs Kshs. 39,748,900/=, preliminary expenses Kshs. 48,088,751/=, additional interest due to increase in LIBOR Kshs. 15,204,240/=, loss of profits due to increase in the sale value of sugar Kshs. 145,312,906/= and interest accrued due to additional borrowing Kshs. 34,752,476/=. He computed the total claim at Kshs. 590,630,441/=.
21. In cross-examination, he stated that he was involved in the conceptualization for setting up the business plan for the plaintiff's sugar Mill as well as the carrying out of the feasibility study. He had previously given transactional advice to among others, Mumias Sugar, Transmara Sugar, Zanzibar Sugar, Kibos Sugar as well as in Uganda and Ghana. He testified that the crop study showed that there was sufficient cane and land available to sustain the plaintiff's factory.
22. He further testified that he had both the feasibility study report of September 2004 and the crop report when preparing the report produced as PExh 2. That the initial planning was that it would have taken 12 months to construct the factory. That a consultant was appointed in June, 2004 and he gave a time frame of 72 weeks for commissioning of the factory which would have been in June, 2006. That when the factory was finally built in 2010, it took upto 16 months. That the plaintiff could not begin operations until January, 2007. That what he computed were actual expenses.
23. On the claim of interest, PW1 observed that as at the time the order was lifted, the rate of LIBOR had escalated from 3.5% to 10.11%. That there was enough land for cane farming. That the stay order disrupted the project.



24. Jayantilal Patel (Pw2), the Managing Director of the plaintiff relied on his witness statements of 23/11/2015 and 11/2/2019, respectively. He produced the plaintiff's documents as PExh 1 to 6. He had been in the sugar industry for 50 years. Butali Sugar factory was to be established on LR Kakamega/Malava/303 in July, 2005. The stay order paralysed the intended establishment of the Sugar Mill. As a result the plaintiff suffered loss of Kshs. 590,630,441/= as had been particularized by PW1.
25. That the plaintiff applied for the EIA report on 22/9/2004 and the same was granted on 11/7/2005 thereby paving the way for the works to start. That between 11/7/2005 and the date the order was served no contract of supply was entered. That the plaintiff abstained from making any further investment after the order of stay was issued. That the infrastructure works began in 2007 but because of other interferences, the works were completed in 2010 and the Mill commissioned in 2012. That the total cost was US\$4.9M.
26. When cross-examined by Counsel for the 2nd defendant, Pw2 indicated that the 1st defendant had objected to the registration of the plaintiff. That ever since being established, the plaintiff had co-existed with the 1st defendant and had expanded to 3000 TCD while the 1st defendant was at 6000 TCD. That, the zoning was to assist the farmers because of transportation to the sugar factories.
27. Jaswant Singh Rai (P1W1), the director of the 1st defendant, appeared as the sole witness of the 1st defendant. He relied on his statements made on 9/11/2017 and 9/3/2020, and produced D1Exh1, 2 and 3 respectively. He told the Court that each Sugar Miller has an own zone as per the letter dated 11/10/2000 by the Ministry of Agriculture. That the 1st defendant made extensive sugar development on its zone by engaging farmers. That the plaintiff wanted to establish a sugar mill within the 1st defendant's exclusive zone.
28. That the 1st defendant objected to the plaintiff's registration vide the JR application. However, the same was later withdrawn on agreement with the Ministry of Agriculture. That the plaintiff was never properly licensed. That the subject order did not refer to the plaintiff or stoppage of construction. That the 2nd defendant had agreed to the relocation of the plaintiff and the 1st defendant was to pay the costs thereof. That since the cost of the project was Kshs. 550M, the present claim of Kshs. 590,630,441/= was unjustified. He denied that there was any excess cane in the region.
29. That the plaintiff had not developed any cane. That it intended to rely 100% on the 1st defendant's cane development. That in the event there was any liability, the same be transferred to the 2nd defendant.
30. In cross examination he admitted that at the time he purchased the 1st defendant from its former owners, there was provision for liability in respect of this suit but was unable to recall how much was the provision. That the 1st defendant was entitled to challenge the decision of the 2nd defendant vide the JR application. He denied any disruption of the plaintiff's business as a result of the stay order. He admitted that although the particulars of the plaintiff claim were served in 2007, none had been rebutted.
31. Jude Chesire (D2W1) testified on behalf of the 2nd defendant. He was the 2nd defendant's legal officer and he relied on his statements dated 24/10/2014 and 4/3/2019 respectively. He also produced D2Exh1 and 2 in support of his evidence.
32. He told the Court that there is no sugar license attached to any exclusive zone. That the plaintiff was properly licensed and that the 2nd defendant had no role in the filing of the JR application. He denied that the 2nd defendant was liable to indemnify the 1st defendant.
33. In cross-examination, he admitted that the plaintiff complied with all the entire requirement for registration. That there was available adequate cane and land for cane development in the subject



area. That upon being registered, the plaintiff was entitled to start the factory. However, the same was disrupted by the stay order. That the 1st defendant's grievance was that it was expanding its production from 1000 TCD to 2500 TCD which was baseless considering on the circumstances on the ground. He denied there being any sugar zoning.

34. He blamed the CEO and Board of the 2nd defendant for some of the decisions that had led to the 1st defendant claiming some inexistent rights. He admitted that the decision of the 2nd defendant could be challenged through a JR application but asserted that the board had not sanctioned the assurances given to the 1st defendant by its CEO.
35. The parties filed their respective submissions which were hi-lighted by learned counsel. The Court has considered those submissions. The issues for determination are; whether this court has jurisdiction to determine this suit, whether this Court has jurisdiction to enforce the undertaking as to damages given in HC. Misc. C.A. No. 1127 of 2005 Republic vs Kenya Sugar Board Exparte West Kenya Sugar Company Ltd; Whether there was unlawful interference with the plaintiff's business by the defendants, jointly and severally, whether the plaintiff suffered any loss and damage as a result of such interference and if so, the quantum thereof; Whether the 1st defendant is entitled to be indemnified by the 2nd defendant, what orders as to costs?
36. On jurisdiction, although the 2nd defendant raised it in its defence, it did not pursue the same at the trial or in its submission. As for the 1st defendant, it argued this issue together with the 2nd issue that this Court has no jurisdiction to enforce the undertaking as to damages given in the JR application.
37. It submitted that since the undertaking was given in a JR proceeding which is a special proceeding, the Court did not have the jurisdiction to order an undertaking as that is not provided for under section 8 of the [Law Reform Act](#) or Order 53 of the Civil Procedure Rules. That in the premises, the undertaking given by the 1st defendant was a nullity ab initio. The case of Kenya Pipeline Company Ltd Vs Glencare Energy (UK) Ltd [2015] eKLR was relied on for that proposition.
38. It was also argued that, it is the Judge adjudicating the JR proceedings on merits who has jurisdiction to determine whether the stay was granted wrongfully or not. Further, that since the Judge who wrongfully issued the stay order is protected under section 6 of the [Judicature Act](#), the same protection should be extended to the 1st defendant. Finally, that some of the particulars of unlawful interference relied on were matters of public law and therefore not amenable to determination by this Court.
39. On the validity of the undertaking, it fries on the face of the 1st defendant to submit that, "yes, I misled the Court to make an unlawful order which it did not have power to make. The consequences therefrom do not matter." That the court should shield the 1st defendant from consequences of its own wrongful act. It is trite that no court should aid a man to benefit from his own wrong.
40. The grant of leave and stay under Order 53 of the Civil Procedure Rules is in the discretion of the court. The relevant parts of Order 53 provide: -

“3)The judge may in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposits bank guarantee or insurance bond from a reputable institution.

4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”



41. In the present case, it is clear that upon considering the matter, Nyamu J imposed a condition for the grant of stay. There is nothing in Order 53 aforesaid or section 8 of the Law Reform Act that barred the Judge in the exercise of his discretion from imposing the condition he did for the grant of stay. It is trite that, that which is not expressly prohibited by the law is impliedly permitted for the ends of justice.
42. In this regard, the judge knew that there may be adverse consequences as a result of the stay order. He exercised his discretion and ordered that if the 1st defendant wished to enjoy the fruits of that order, it should give an undertaking which it did. The 1st defendant cannot now be heard to turn around and argue that the order it enjoyed was a nullity and should not be bound by it. The view I take is that, the Judge had the jurisdiction to impose the condition he did. The undertaking was therefore validly given.
43. It was submitted, that only the Judge adjudicating the JR application on merit could determine if the stay order ought not to have been made in the first place. That submission is misplaced. Firstly, by the act of the 1st defendant itself, the substantive Notice of Motion did not see the light of the day. It compromised the Motion and denied the court the opportunity of pronouncing itself on the same.
44. Secondly, the fact that the 1st defendant sought another route which it thought was beneficial to it rather than the court pronouncing on its grievances meant that, there was an alternative and adequate route or remedy that should have been used in the first place instead of having rushed to court to obtain the stay order.
45. Finally, Nyamu J himself who had granted the stay order with the attendant condition ordered that the issue of damages be pursued in a different fora. That order was never appealed against. That fora is nowhere but before this court. That contention therefore fails.
46. The submission that the 1st defendant be protected by section 6 of the Judicature Act holds no basis. That section is clearly meant for judicial officers while exercising their judicial authority. It does not extend to litigants. Litigants have to face the consequences of their actions.
47. The last objection on jurisdiction was that the court lacks jurisdiction to determine the contention that the JR application was without any legal basis. Further, that the court lacks jurisdiction to determine the particulars in paragraph 12 (e)(f) and (l) of the plaint.
48. On the filing of JR application, no law was cited to show that this Court lacks jurisdiction to determine its efficacy. That case was part of what later came to be known as “the Sugar Wars”. Apart from the JR application, there have been others cases as follows:-
- (a) NBI HC.C. No. 206 of 2010 West Kenya Sugar Company vs Kenya Sugar Board & Anor [2017] eKLR
 - (b) Ksm CA Nos 89&90 of 2011 West Kenya Sugar Company vs Kenya Sugar Board & Anor [2014] eKLR
 - (c) Kkg HC Const. Peet. No. 26 of 2014 West Kenya Sugar Company vs Agriculture Fisheries & 11 Others [2017] eKLR
 - (d) NRB JR Appln No. 426 of 2014 Republic vs AFFA & 3 Others Exparte West Kenya Sugar Company [2015].
49. In the last case (d) above, Odunga J (as he then was) had this to say of the plaintiff and 1st defendant: -

“I cannot however fail to express my indignation at the number of cases the applicant and Butali have instituted in respect of the issues surrounding their operations. The parties



herein have persistently engaged in an unhelpful litigation geared towards championing protectionist interests in a manner reminiscent of the old imperialist tendencies to the detriment of the people who toil to ensure their industries thrive. They have turned the Courts of this Country into the legal drama theatre bordering on circuses to the detriment of the farmers interest

The applicant and Butali must learn to co-exist in an atmosphere of civilized competition without resorting to Machiavellian tactics with the legal process as the go between.....”

50. What the good Judge meant was that, there was unnecessary litigation between the parties that was not for the public good. That the narrow egocentric protectionist tendencies had no place in modern Kenya. That competition for the benefit of Kenyans was the way to go.
51. With such a background, can this Court be said not to have jurisdiction to determine the efficacy of the JR application? I don't think so. The fact that the parties to that application compromised the same without letting the court pronounce itself on merit, meant that the same may not have been necessary in the first instance. It is also not lost of this Court that the applicant had the opportunity to use the provisions of section 31 of the Sugar Act for appropriate remedy but chose not to.
52. Although the 1st defendant had a constitutional right to choose what it thought to be the most appropriate remedy to it, including the JR application, it must also be prepared to shoulder the obligation and the consequences that arise from its choice of fora. Accordingly, this Court has jurisdiction to look at the efficacy of that undertaking.
53. In view of the foregoing, the question arises as to whether there is jurisdiction to enforce the undertaking.
54. The subject undertaking given by the 1st defendant was as follows:-

“hereby give our undertaking to abide by any order that this Court may make for the payment of damages that may have sustained by reason of the said stay upon it being shown or demonstrated that the said order of stay ought not to have been made in the first place”
55. The effect of the undertaking was a promise to the Court by the 1st defendant that, the latter would pay any damages that would arise from the stay order if it is finally found that it should not have been given in the first place. That promise made the Court suspend the commencement of the construction of the sugar factory by the plaintiff.
56. In Halsburys Laws of England, 4th Edn Vol 24 Pare 983, the learned writers position of undertakings: -

“The plaintiff's undertaking as to damages on an order for an injunction remains in force notwithstanding the dismissal or discontinuance of the action, and if the plaintiff ultimately fails on merit the defendant is entitled to an inquiry as to damages sustained by reason of the interlocutory injunction, unless there are special circumstances. The undertaking applies, even if the plaintiff has not been guilty of misrepresentation, suppression or other default in obtaining the injunction and is equally enforceable whether the mistake in granting the injunction was on a point of law or the facts.”
57. In the other authorities relied on by the plaintiff of *Newcome Vs Coulson* [1878] 7 CHD 764 and *Church Road Development Ltd Vs Barclays Bank of Kenya Ltd & 2 Others* [2006] eKLR, it was held that a party cannot evade liability by merely discontinuing a suit. In the same way and manner, I hold that by terminating the JR application, the 1st defendant is not absolved from having the



enforceability of its undertaking being considered. It freely gave the undertaking, which undertaking had consequences.

58. Accordingly, I hold that this Court has the jurisdiction to enforce the undertaking given by the 1st defendant on 1/8/2005.
59. The next issue is whether there was unlawful interference with the plaintiff's business. It was the plaintiff's contention that it acquired LR Kakamega/Malava/303 over which the proposed factory was to be constructed. It engaged experts including PKF Consulting Ltd, West Kenya Agro-Developers Consultants and J.P. Mukherji & Associates to undertake various studies in readiness of opening the sugar factory. It obtained the relevant approvals for the development of the subject factory.
60. On 13/4/2005, it was issued with a Certificate of Registration as a sugar miller. That with such registration, it was ready to commence the construction and establishment of the milling factory. That however, with the JR application, the order made on 27/7/2005 froze all the aforesaid preparations. That it was unable to plan or undertake any steps in furtherance thereof until the order was discharged on 27/7/2006 when the JR application was withdrawn.
61. The plaintiff contended that the order of 27/7/2005 suspended its construction mobilization processes. That the letter of 23/9/2004 by the 2nd defendant which formed the basis for the JR application contributed to the interference of its business. That further, the agreement of 21/7/2003 was a further interference as the 2nd defendant sought to assure the 1st defendant that it will not license the plaintiff as a sugar miller. That all these actions amounted to unlawful interference with the plaintiff's business.
62. On its part the 1st defendant submitted that the order of 27/7/2005 having been issued by a competent court of law, it cannot constitute unlawful interference of the plaintiff's business. That no claim for damages can be predicated on an order for stay granted in the JR application. That the subject order did not restrain the plaintiff from proceeding with its business goals.
63. As for the 2nd defendant, it submitted that since the suit was predicated on the undertaking given by the 1st defendant on 1/8/2005, liability rests with the 1st defendant. It submitted that the letter of 23/05/2004 was not sanctioned by the Board of the 2nd defendant and was therefore not binding on it.
64. In Paragraph 12 of the plaint, the plaintiff gave a raft of actions, which it alleged constituted unlawful interference of its business. These were the 2nd defendant's letter of 23/9/2004, the order of stay of 27/7/2005 and the consent order of 27/7/2006.
65. The plaintiff was able to prove that it had acted diligently in undertaking elaborate preparations for the registration as a sugar miller and consequent operation thereof. It is not in dispute that in 2004, the plaintiff acquired LR Kakamega/Malava/303 whereon to construct the factory. In the same year, it engaged various experts who prepared reports that were crucial to establishing the factory. These included the feasibility study and crop study reports. J.P. Mukherjee & Associates (P) Ltd of India was also contracted to undertake consultancy contracts for design, engineering procurement and construction supervision.
66. The plaintiff further proved in PExh1 pgs 10-11 that it had floated bid documents in November, 2004 for supply of machinery to probable suppliers in readiness for the construction to commence in June, 2005. PW2 and his team travelled to India to firm up these engagements shortly after the registration was effected. In his evidence PW2 told the Court that the plaintiff had planned and projected that the construction was to take 12 months from July, 2005.



67. It is also clear and undisputed that the plaintiff duly obtained all the necessary approvals prior to July, 2005. The last to be obtained was the Environmental Impact Assessment License on 11/7/2005, the Environmental Impact Assessment Project Report having been submitted in 2004. The plaintiff also proved that it was financially ready to commence the construction of the factory. That the project was to cost Kshs 450m out of which the plaintiff had its own ready funds of Kshs. 150m. while the balance of Kshs. 300m was to be through financing. Indeed, an LC/Term Loan was confirmed by I & M Bank Ltd on 26/7/2005.
68. As regards raw materials, although Pw2 admitted that no cane development had been undertaken as of July, 2005, he was firm that from the crop study (pg 118 of PExh 2) and the report by the Ministry of Agriculture Taskforce (pgs 24,39,40 and 41 of D2Exh1), there was enough and surplus cane for optimal operation of 500 TCD by June, 2006.
69. Accordingly, the Court is satisfied that from the evidence on record, the plaintiff was able to show that as at July, 2005 it was ready able and willing to commence the construction of the factory. That the design for the plant had started way back in June, 2004 and the expected duration of the construction and commissioning of the mill was to take 12 months.
70. Then came the exparte Order of 27/7/2005. That order was, inter alia, in the following terms: -
- “ 1) That leave be and is hereby granted to the applicant to apply for an order of certiorari to remove into the High Court of Kenya and quash the decision made by Kenya Sugar Board, the Respondent herein, on or about 13th April, 2005 to register Butali Sugar Mills Ltd to operate a sugar Mill in accordance with Part III, section 14 of the Sugar Act 2001.
 - 2) That leave be and is hereby granted to the Applicant to apply for an order of certiorari to remove into the High Court of Kenya and quash the certificate of Registration dated 13th April 2005 issued by the Respondent to Butali Sugar Mills Limited.
 - 3) That leave be and is hereby granted to the applicant for an order of Prohibition prohibiting the Respondent from entertaining or granting a fresh application from Butali Sugar Mills Limited to construct or operate a sugar mill within the West Kenya Zone.
 - 4) That leave granted do operate as a stay of the proceedings in question provided the application for Judicial Review is filed as prescribed within 21 days and served within 8 days and on further condition that the applicants undertaking as to damages is filed with the Court on or before the close of business of the day Monday 1st August, 2005.
 - 5) That if both conditions are not met, the order that leave does operate as stay to automatically lapse.
 - 6) That the costs to abide the outcome of the Judicial Review application.”
71. It is clear from the foregoing that the JR application was directed at preventing the plaintiff from opening or operating any sugar mill. It sought the cancellation of the plaintiff's Certificate of Registration. It is the Certificate of Registration dated 13/4/2005 that would have enabled the plaintiff to complete the elaborate plans and preparations that it had undertaken since May, 2004 to construct



- and commission the sugar mill. According to Pw2, this was to commence in July, 2005 after his return from India where he had gone to seal all the loose ends on the production of the plant.
72. The order categorically stated and or directed that, the leave granted was to operate as a “stay of proceedings in question”. What were the proceedings in question? It was the registration of “Butali Sugar Mills Limited to operate a Sugar Mill in accordance with Part III section 14 of the Sugar Act, 2001.”
73. The uncontroverted evidence on record of both Pw2 and D2W1 was that the issuance of the Certificate of Registration marks the greenlight to an entity to put in place structures for the construction and commissioning of a Sugar Mill. The stay of proceedings in order No. 4 of the order of 27/7/2005 meant that the effect and efficacy of the plaintiff’s Certificate of Registration had been stayed. In this regard, the plaintiff cannot be faulted for ceasing or refraining from undertaking any further steps towards realization of the Sugar Mill until the order was lifted.
74. Accordingly, I hold that the order of stay of 27/7/2005 had the effect of staying any further steps on the part of the plaintiff to realize the establishment and commissioning of a Sugar Mill. Further, it cannot lie in the mouth of the 1st defendant to argue that the order did not restrain the plaintiff from procuring materials for the construction of the factory, yet the substantive orders sought were to nullify the Certificate of Registration and to stop the 2nd defendant from ever entertaining any subsequent application from the plaintiff to construct or operate a sugar mill within the area the 1st defendant termed to be “West Kenya Zone” wherein Kakamega/Malava/303 lied.
75. The Court is satisfied that the cumulative effect of the evidence of the reports by J.P Mukherji & Associates, West Kenya Agro-Developers Ltd and PKF Consulting Ltd, the plaintiff’s sugar mill should have been ready by June, 2006 and that there was enough Cane to satisfy the plaintiff’s projected milling of 500 TCD at commencement. That due to the order of 27/7/2007, the construction and commissioning of the mill was thrown into disarray. There were other intervening events which led to the same being realized in 2011 which are outside the purview of this case.
76. Was the order of 27/7/2005 warranted? I do not think so. The basis of the plaintiff’s argument was that there were exclusive Sugar Zones for the respective Sugar Millers. There was no evidence to show that there existed such a policy. If there was, the same was protectionist and unlawful. D2W1 was categorical that there was no such policy or law. That the assurances and representations relied on by the plaintiff were unlawful and had no basis in law. The fears of lack of cane to support both factories were also proved to be misplaced.
77. Accordingly, I make a finding that there was unlawful interference with the plaintiff’s business. The relevant period in this suit is between July, 2005 and July, 2006.
78. The next issue is whether the plaintiff suffered damage as a result of the said unlawful interference, and if so, the quantum thereof.
79. The evidence on record is that as a result of the unlawful interference of the plaintiff’s business, the plaintiff could not commence the construction and commissioning of the sugar mill by June, 2006 as had been projected. With the delay in the construction and commissioning of the Sugar Mill meant that there was lost opportunity. The evidence of PW1 and PW2 was that, as a result of the delayed construction and commissioning, the plaintiff suffered loss and damage which they quantified at Kshs. 590,630,441/=. It is instructive that the evidence of the plaintiff that it suffered loss and damage was not displaced and or controverted.



80. The 1st defendant submitted that the report by PW1 was based on the opinion of the plaintiff's advocates that the order disrupted the implementation of the sugar project. That the claim was based on projections and not actual losses and that the evidential basis of the claim was the invoices and quotations of suppliers during the procurement process rather than actual expenditure or cost. That the evidence of PW1 and PW2 did not show that the sugar mill could have been commissioned by June, 2006.
81. It is not true that the report of PW1 was based on the opinion of the plaintiff's advocates that the order of 27/7/2005 disrupted the project and business of the plaintiff. PW1 testified that he had wide experience in the sugar industry. That he had been involved in many feasibility studies for establishment of sugar mills within and outside Kenya and gave examples. That he undertook the feasibility study for the plaintiff. That from the advise of J.P. Mukherji & Associates, the preparation of the plant in India started in June, 2004 and the completion was projected to be in June, 2006. The witness produced a schedule of works chart which was neither challenged nor controverted.
82. Since the claim is for the period between July, 2005 and July, 2006 when the sugar mill had not been constructed, I do not think the plaintiff could have put the actual cost. There was evidence that quotations and invoices before and after the subject order were obtained and compared. There was evidence that the difference between the two the basis of the losses that was suffered by the plaintiff. The plaintiff could not put the actual cost as that would have meant making a claim on what happened in 2011 which is way beyond the interference period (2005-2006).
83. The irresistible conclusion therefore is that as a result of the unlawful interference of the plaintiff's business, the same latter suffered loss and damage.
84. It is trite law that special damages must not only be pleaded, they must be specifically proved. The plaintiff pleaded its damages as being Kshs. 590,630,441/= under seven (7) headings. These were captured in PExh 2 produced by PW1. The court will examine each heading separately.
85. Loss of profits for delay, Kshs. 135,975,479/=. In his report dated January, 2007 and produced as PExh 2, PW1 explained how the plaintiff had done the preparatory work and how it was expected to complete the plant and start milling by 30/6/2006. He explained that the order of 27/7/2005 created a disruption. The machinery ordered was cancelled. Release of funds was put on hold. That the estimated loss of profit was to be 2 years 6 months. That due to the change in circumstances, the increased demand of sugar globally and other orders in India, delivery of machinery increased to 18 months. That therefore, the projected commissioning would have been December, 2008.
86. It was submitted that the claim was speculative. That there was no evidence that the plaintiff would have commenced milling by 30/6/2006 as contended. The Court did see PW1 testify, he explained the various aspects raised by counsel for the 1st defendant and his evidence remained unshaken. The Court has also made a finding that it is satisfied that the commission of the factory would have been June, 2006. PW1 explained how the figure of Kshs. 137,975,479/= was arrived at pages 30 and 31 PExh 1. His testimony having not been displaced on this aspect, the Court is satisfied that this claim was proved.
87. Escalation in costs of machinery, Kshs. 171,547,689/=. It was contended that all that was produced was correspondence and not commercial agreements entered with suppliers. That no evidence that the mill would have been ready by June, 2006.
88. At page 13 of PExh 1, PW1 explained that orders had been placed from suppliers identified as Walchandnagar Industries Ltd, Bellies India Ltd and Jaya Impex. That by July, 2005, the machinery and associated costs were estimated at Kshs. 402.4m. That by October, 2006 the same was indicated to be Kshs. 573.7m. That machinery costs had increased mainly due to an increase in steel, brass and



copper, fuel, labour and raw materials triggered by domestic inflation pressures both in India and globally. The evidence was set out in detail at pages 184 to 302 of PExh 2. The Court is satisfied that this claim was proved to the required standard.

89. Increase on construction costs, Kshs. 39,748,900/=. At page 14 of PExh 2, PW1 explained that the construction costs in July 2005 was estimated to be at Kshs. 91.6m. That as at October, 2006, the same had increased to Kshs. 128,298,100/=. That the difference was the loss suffered. It was submitted that since no contract had been entered as at July, 2005, there was no loss suffered on this item.
90. The Court notes that the totality of the evidence on record is that the plaintiff was ready to commence construction in July, 2005. That PW1 explained that due to remobilization of contractors, increases in labour, steel and cement prices in Kenya, there was increased construction costs as at October 2006 when mobilizing to start afresh. The Court accepts that the evidence tendered proves that there was increased construction costs. However, the item on provision of project mobilization and cancellation claim was not explained. Accordingly, the amount of loss allowable is Kshs. 36,696,100/=.
91. Additional interest due to increase in libor, Kshs. 15,204,240/=. PW1 testified that interest rate applicable to borrowing a USD loan is negotiated using the libor rate. That the rate of interest as at July, 2005 was 8% while as at October, 2006 10.11%. That if the plaintiff was to borrow, there would have been an increase by Kshs. 15,204,240/=.
92. The 1st defendant contended that the borrowings of US \$ 4,483,000 and Kshs. 75m later increased to US\$ 7.8m. That therefore, the failure to commence work in 2005 was because of the plaintiff having under estimated the costs of the project and not otherwise.
93. There is evidence that the project financing was partially equity funds and through financing. The same was to be partially in dollars and partially in Kenya Shillings. It is clear that from the testimony of PW1 which was not displaced, that between July 2005 and October 2006, there was change in libor interest rates. In my view, although the plaintiff was to borrow, since there is another claim on interest, this claim is repetitive and is declined.
94. Preliminary expenses, Kshs. 48,088,751/=. At page 16 PExh 1, PW1 explained that the various costs incurred in 2005 and 2006 towards setting up the factory were sunk. That they represented lost value. The 1st defendant did not address this claim.
95. This claim was set out at page 16 of PExh1. They include Administration expenses, overheads, staff costs, legal and professional fees, directors salaries less drawings. The same were explained in PExh 4 and 5. They represent expenses incurred in 2005, 2006 and 2007. My view is that the period of claim is July 2005 and July, 2006. All expenses after the lifting of the order cannot be said to be sunk costs. This is not withstanding that the completion period of the factory had increased to 18 months.
96. In this regard, the expenses allowable are those of 2005 which is Kshs. 7,480,875/= and 7 months in 2006, which is Kshs. 10,786,563/70. Under this head, the allowable amount is Kshs. 18,267,438/70.
97. Loss of profits due to sugar price change, COMESA period protection, Kshs. 145,312,906/=. The 1st defendant submitted that this claim was based on 2 false assumptions, that the factory was to be operational within 1 year and that there would be sufficient cane.
98. PW1 testified on this head. He explained how he arrived at this sum. The calculations and explanations given were not displaced. The Court has already made a finding that the factory would have been ready by June, 2006. The feasibility and crop study were clear on the availability of the cane. There is evidence that even after the factory was opened 5 years later, there was enough cane for both the plaintiff and the 1st defendant. In my view, this claim was proved to the required standard and is accordingly awarded.



99. Interest accrued due to additional borrowing, Kshs. 34,752,476/=. It was contended by the plaintiff that due to increase in capital expenditure and construction costs, there would be increased borrowing which was estimated at Kshs. 211,296,589/=. That the interest on this amount amounted to Kshs. 34,752,476/=.
100. The defendant submitted that since the earlier projected period was of 12 months, the claim for 2.5 years was an attempt by the plaintiff to falsely enrich itself.
101. It is clear that there was to be increased capital expenditure and construction cost. This has already been determined to total Kshs. 211,296,589/=. The expert estimated that since 33% was to be equity, the additional borrowing would have been Kshs. 141,568,715/=. The interest on this being Kshs. 34,752,476/= would obviously be a loss on the plaintiff. The claim was proved and therefore allowed.
102. Accordingly, the court holds that the plaintiff was able to prove its claim on a balance of probability, that due to interference with its business, there was delay in constructing and commissioning of its factory. That the delay led to lost opportunity and an increase in the cost of the project. That as a result, it suffered the following losses:-
- (a) loss of profits for delay – Kshs. 135,975,479/=
 - (b) Escalation in costs of machinery – Kshs. 171,547,689/=
 - (c) Increase in construction costs – Kshsl. 36,696,100/=
 - (d) Additional interest due to increase in labor – Nil (e) Preliminary expenses – Kshs. 18,267,438/70
 - (f) Loss of profits due to sugar change COMESA period protection – Kshs. 145,312,906/=
 - (g) Interest due to additional borrowing – Kshs. 34,752,476/=
- Total - Kshs. 507,799,612/=
103. The next issue is whether the 1st defendant is entitled to be indemnified by the 2nd defendant. The 1st defendant contended that the 2nd defendant had made representations and assurances to it that it would not allow any other white sugar mill to be established within the borders allocated to the 1st defendant. That relying on such representations the 1st defendant undertook investments in excess of Kshs. 3.5b. That it is in reliance thereof that the 1st defendant instituted the JR application. That the 2nd defendant made the 1st defendant believe that it had its own sugar zone with a radius of 40 km within which no other miller was to be licensed.
104. In its defence to that claim, the 2nd defendant admitted making the representations and assurances but contended that the same were subject to rescission. The 2nd defendant in particular admitted the letter dated 23/9/2004 by its CEO but claimed that the same was written without the authority of the board. That the 2nd defendant could not indemnify the 1st defendant as the latter's liability arose out of its undertaking given on 1/8/2003 for the stay order.
105. It is clear that the claim by the plaintiff arises out of the undertaking given by the 1st defendant on 1/8/2005. However, there is admission in the defence of the 2nd defendant that it did make representations and assurances to the 1st defendant as alleged. Further, the court has seen the letter dated 23/9/2005 by the CEO of the 2nd defendant, the same gave the assurance that the 1st defendant's "sugar zone" was secure and no other miller would be licensed to operate therein.



106. Firstly, it cannot lie in the mouth of the 2nd defendant that it can make representations and assurances and make them subject to rescission. That can only hold if those representations were made without prejudice at the time they were so made. That is not the case here.
107. Secondly, the general rule is that, where a party makes a representation which it knows to be untrue and the party to whom the same is made acts on it to its detriment, the party making the misrepresentation is liable to the innocent party for damages.
108. In the present case, although the 2nd defendant sought to disassociate itself from the letter of 23/9/2004 by its CEO, it cannot avoid the consequences of the wrongful acts of its officers. I hold that in so far as the 2nd defendant made representations and assurances to the 1st defendant, which made the latter belligerently assert that there were sugar zones for which it was exclusively entitled to a portion, which was not the case both in law and fact, the 2nd defendant cannot escape the consequences. The 2nd defendant has to shoulder some blame for its own acts which led the 1st defendant to the disastrous misadventure. However, such blame is not 100%. The 1st defendant over stretched its reliance and asserted rights that never existed either in law and/or fact. It will shoulder 70% of the claim.
109. Accordingly, I hold that the 1st defendant is entitled to be indemnified by the 2nd defendant to the extent of 30% of the loss and damage suffered by the plaintiff.
110. In this regard, on the totality of the evidence on record, the plaintiff has proved its case on a balance of probability. Judgment is entered for the plaintiff against the 1st defendant for Kshs. 507,799,612/= . The 1st defendant is entitled to indemnity against the 2nd defendant to the tune of 30% on the damages.
111. The sum of Kshs. 507,799,612/= shall attract interest at the rate of 12% per annum from the date of the suit until payment in full. The plaintiff will also have the costs of the suit.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF SEPTEMBER, 2023.

A. MABEYA, FCIArb

JUDGE

