



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 19 OF 2019

IN THE MATTER OF ARTICLES 3 (1), 10, 22 (1) & 165 (3) OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FEARED CONTRAVENTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS UNDERS

ARTICLES 19, 20, 21 (1), 40 (1) AS READ WITH 260 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 9, 10 OF THE CROPS ACT, 2013

BETWEEN

KIBOS SUGAR AND ALLIED INDUSTRIES LIMITED.....PETITIONER

VERSUS

AGRICULTURE AND FOOD AUTHORITY.....1ST RESPONDENT

COMMODITIES FUND.....2ND RESPONDENT

RULING

The application dated 10th September 2020 was filed by the Petitioner, **KIBOS SUGAR & ALLIED INDUSTRIES LIMITED** seeking 3 substantive reliefs which can be summarized as follows;

(a) The name of the Petitioner be immediately removed and expunged from the record of debtors, in the database of the METROPOL CORPORATION LIMITED, a Credit Reference Bureau and any other Credit Reference Bureau by whatever name called.

(b) An injunction do issue against the 2nd Respondent, THE COMMODITIES FUND, restraining it from forwarding, causing to be forwarded, requesting, seeking and/ or asking for the listing of the Petitioner as a debtor in the database of the METROPOL CORPORATION or any other Credit Reference Bureau by whatever name called.

(c) The 2nd Respondent be ordered to enter appearance within a specified time, and to respond to the Petition.

1. As the application was instituted under a Certificate of Urgency, it was first placed before the court on 14th September 2020. The court proceeded to hear the application exparte, in the first instance.

2. The court felt persuaded that

“potential prejudice that can be caused by any delay may be monumental if some measure of interim relief is not accorded forthwith.”

3. In the light of that considered opinion, the court directed that the name of the Petitioner be immediately removed from the record of defaulting debtors in the database of Metropol Corporation Limited.

4. The court expressed the view that the existence of this petition, which was filed in court on 27th September 2019, was prima facie evidence that there was a legitimate dispute regarding the alleged debt which appeared to be the basis upon which the Petitioner was perceived to be a defaulter.

5. However, even whilst giving that order, the court was cognizant of the fact that, at that stage, its view of the matter was based only on the material provided by the Petitioner. It is in that context that the court said;

“6. THAT being alive to the fact that there are normally two sides to every story, this Court grants liberty to the Respondents to apply, if they believe that the removal of the Petitioner’s name from the list of defaulting debtors was wrongful.”

6. In answer to the application the 1st Respondent, **AGRICULTURE AND FOOD AUTHORITY** filed Grounds of Opposition on 4th November 2020, raising the following issues;

“1. That the Orders sought, requiring the alteration of records of the Metropol Corporation Limited, by removal and expunction of the Petitioner’s name from such records may not properly, fairly lie in the absence of the said Metropol Corporation Limited as a substantive party to the proceedings and the Application, and if so granted would be in a Constitutional violation of the Company’s right to a hearing.

The non-joinder of the said Metropol Corporation Limited, in so far as it violates its fundamental

Constitutional rights to a hearing is fatal to the Application.

2. That the Orders sought in the Notice of Motion are besides the pleadings in the Petition dated 24th September 2019 and are therefore outside the jurisdiction of the Honourable Court to grant.

3. That the Petitioner asseverates in the Petition (paragraph 52 of the Petition) that ‘the 2nd Respondent has not been established as a Parastatal or Legal Person at all.

The Crops Act does not establish the 2nd Respondent as a body Corporate with capacity to sue or be sued, or with capacity to own property;’ that pleading binds the Petitioner and negates the Orders sought against the 2nd Respondent in the said Notice of Motion.

4. That the Honourable Court does not act in vain and has no jurisdiction to grant orders against any entity pleaded in the Petition to lack capacity of suing or being sued in its own name.

5. That the Notice of Motion does not satisfy the criteria or conditions for the grant of restraining Orders as set out in the case of Giella Vs Cessman Brown & Company Ltd [1973] E A 358 and in the circumstances of the Petition, the Notice of Motion is an abuse of the process of the Court, misconceived, bad in law and without merit.”

7. Meanwhile, the 2nd Respondent filed a “Reply to Notice of Motion Application and Petition.” The said “Reply” was drawn in the nature of an Affidavit, which was sworn by NANCY CHELANGAT CHERUIYOT, who is Managing Trustee for the Commodities Fund.

8. First, she deponed that the 2nd Respondent is a legal entity and a state agency which had been established under **Section 9 of the Crops Act No. 16 of 2013.**

9. The 2nd Respondent conceded that it had not given a loan to the Petitioner. However, it emphasized that;

“..... the loan of Kshs 133,972,375.00 was advanced by the former Kenya Sugar Board, whose lending arm under legislation now rests with the Commodities Fund under the new legislations specifically the Crops Act No. 13 of 2013 (along with the

subsequent amendments).”

10. At paragraph 14 of her affidavit, Ms Cheruiyot acknowledged having listed the Petitioner for non-payment of the outstanding loan balance.

11. Thereafter, at paragraph 17, Ms Cheruiyot said;

“THAT the Fund has however de-listed the Petitioner from the records of the Metropol Credit Reference Bureau temporarily, in adherence to the Court Orders.”

12. At the hearing of the application, the 2nd Respondent did not file any submissions, however, both the Petitioner and the 1st Respondent filed their respective submissions.

13. The 1st Respondent urged the Court to revisit the issuance of the order for the removal of the Petitioner’s name from the list of loan defaulters at Metropol Corporation Limited.

14. It was the submission of the 1st Respondent that it was only Metropol Corporation Limited that had the power to remove the name of the creditor from its database. Therefore, as the said Credit Reference Bureau was not a party to these proceedings, the 1st Respondent submitted it would be an act in futility if the Court were to give orders directed at a person who was not a party to these proceedings.

15. As the 1st Respondent pointed out, **Regulation 28 (0)** of the **Credit Reference Bureau Regulations** places the responsibility for the maintenance of a database, upon the Credit Reference Bureau.

16. However, pursuant to **Regulation 25** of the **Credit Reference Bureau Regulations**, it is the 2nd Respondent herein who is the “*Credit Information Provider*”, which is the person who furnishes credit information to the Bureau.

17. I believe that it is because the 2nd Respondent which provided the credit information which was then entered into the database of the Credit Reference Bureau, that the 2nd Respondent was able to have the Petitioner de-listed.

18. The fact that the de-listing was carried out when the Metropol Corporation Limited was not a party to these proceedings demonstrates that the Metropol Corporation Limited was not a necessary party to the proceedings.

19. I hold the considered view that the Credit Reference Bureau cannot insist on maintaining in its database, such Information as the Credit Information Provider has informed it, to have changed.

Sugar Development Levy

20. It was the Petitioner’s case that the Sugar Development Levy, was abolished by the provisions of **Section 42 (2) (d)**, of the **Crops Act, 2013**. Therefore, the Petitioner reasoned that that Levy was not payable since February 2015.

21. As the Petitioner had continued to remit payments in respect to the Levy, it was the Petitioner’s case that the 1st Respondent should refund the sum of Kshs 114,069,064/= to the Petitioner. Thereafter, the Petitioner says that it would top up the said refund, and then pay to the 1st Respondent the sum of Kshs 133,972,375.

22. In the Petition, the first prayer was for a declaration that the 2nd Respondent had no right to demand payment for the loans which had been advanced to the Petitioner by the Kenya Sugar Board.

23. At paragraph 14 of the Affidavit sworn by **NANCY CHELANGAT CHERUIYOT**, the 2nd Respondent acknowledged having listed the Petitioner for the non-payment of the outstanding loan.

24. Meanwhile, at paragraph 8 of her affidavit, Ms Cheruiyot confirmed that the 2nd Respondent had not loaned the Petitioner, the money in issue.

25. Meanwhile, the **AGRICULTURE AND FOODS ACT 2013** was enacted to consolidate numerous pieces of legislation within the Agricultural Sector, with a view to addressing the overlap of functions; to address obsolete legislation; and to facilitate the synchronization of systems that would enhance benefits from economies of scale.

26. Section 3 (3) of the **Agriculture and Foods Act ('AFA')** provides as follows;

“The Authority (which is the 1st Respondent herein) shall be the successor to the institutions established by the Acts repealed under Section 41 existing immediately before the commencement of this Act, the Crops Act, respectively.”

27. If the 1st Respondent was the successor to the institutions established by the Acts which have been repealed under **Section 41**, it would appear, on a prima facie basis, that it is the said Respondent who would have stepped into the shoes of the Kenya Sugar Board.

28. At paragraph 4 of the 1st Respondent's Response to the **Petition & Cross Petition**, it is stated as follows;

“The 1st Respondent admits that paragraph 7 of the first Schedule to the Agriculture and Food Authority Act, No. 13 of 2013 provides that every Agreement, Deed, Bond or other instrument executed by a former institution such as the Kenya Sugar Board established under the repealed Sugar Act No. 10 of 2001, shall have effect as if the 1st Respondent were a party thereto instead of the former institution.”

29. I hold the considered view that if it is the 1st Respondent that is deemed to be a party to such Agreement, Deed, Bond or other instrument that was executed by the Kenya Sugar Board, it would imply, on a prima facie basis, that it ought to be the said 1st Respondent that would have the right to demand payments of the loan which the Kenya Sugar Board had advanced to the Petitioner.

30. Indeed, at paragraph 20 of the 1st Respondent's Response to the Petition, the said Respondent asserts that it;

“..... is entitled to enforce or realize the charge by exercising all or any of its powers under paragraph 10 of the Charge”

31. By suggesting that the 2nd Respondent also had a legal right to demand that the Petitioner should repay the loan, the Respondents appear to be assigning to 2 entities, the authority to recover the same loan.

32. I find that the Petitioner has established a prima facie case concerning the doubt of the legal right of the 2nd Respondent to demand the loan repayment from the Petitioner. And if there is no clarity on that issue, it follows that arises a real issue as to whether or not the 2nd Respondent was entitled to forward to Metropol Corporation Limited, the credit information **concerning the Petitioner**.

33. I further hold that the *“negative information”* concerning the Petitioner has the potential of causing irreparable loss to the Petitioner, if the Court does not issue appropriate orders. I so find because the Petitioner has demonstrated, on a prima facie basis, that its bankers would most probably stop extending **financial facilities to the Petitioner, if the negative information remained in place**.

34. Accordingly prayer (b) of the application is granted, and shall remain in force until the petition is heard and determined.

35. The costs of the application dated 10th September 2020 shall be paid by the Respondents, to the Petitioner.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE