



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**HIGH COURT MISC. APPLICATION NO. 49 OF 2011**

**MARGARET M. SHISIA .....1<sup>ST</sup> APPLICANT**

**WASHINGTONE KABENE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MUMIAS SUGAR CO.LTD. ....RESPONDENT**

**AND**

**JOHANAMN N. ATEKA.....INTERESTED PARTY**

**RULING**

**The Application**

1. By the originating Notice of Motion dated 10.10.2011 Margaret M. Shisia and Washington Kabene the 1<sup>st</sup> and 2<sup>nd</sup> applicants respectively are seeking orders that;-

1. The Application be certified urgent and be heard on priority basis as by its nature, a speedy disposal thereof shall meet the ends of justice.

2. This court do find that the detention or continued detention of the sugarcane proceeds by the Respondent Mumias Sugar Company Limited on sugarcane farming contracts on account numbers 21664 and 7534 is contrary to the law and/or without any lawful justification and this court so finds and declares.

3. This court do find that the sugarcane proceeds in the custody of the Respondent Mumias Sugar Company limited on sugarcane farming contract numbers 21664 and 7534 are the exclusive entitlements of the applicants as of right and do so declare and direct that the same be forthwith released to the applicants respectively.

4. This court do find that the proceedings in the Senior Resident Magistrate's Court Civil Suit No. 135 of 2010 on the basis of which Mumias Sugar Company is withholding the applicants monies due on sugarcane farming accounts Nos. 21664 and 7534 are null and void and so find and declare.

5. That the application dated 26<sup>th</sup> September, 2011 earlier filed in this matter[is] marked as withdrawn

6. The costs arising from and/or occasioned by these proceedings be recovered from the

Respondent and the interested party.

2. The application is based on the grounds set out on the face thereof and is supported by the annexed affidavit of Washington Kabene the 2<sup>nd</sup> applicant.

3. In his affidavit Washington explains that they planted sugarcane together with the 1<sup>st</sup> applicant in the year 2009. They then signed contracts Numbers with the Respondent Mumias Sugar Company in farming contracts 21664 and 7534 shown by annexure “WK1” and “WK2”. The sugarcane was thereafter harvested by the respondent’s workers and transported to Mumias town in July, 2010 as shown by copies of deliveries annexure “WK3”. The applicants never received payments from the Respondents as scheduled because the Respondent claimed that it had been served with a court order from Butere senior Resident Magistrate’s Court in Civil Suit No. 135 of 2010 on the basis of which they would withhold the monies.

4. After securing and reading through the pleadings in the above mentioned case (see WK4) the applicants were convinced that there was nowhere in Butere RMCC No. 135 of 2010 did the interested party claim sugarcane proceeds from their farming accounts. When they attended court to defend the claim the Butere Court ruled that it had no jurisdiction to entertain the suit because the suit related to a boundary dispute see “wk-6” being the ruling and orders of Butere Court. He explains that based on the Butere court’s ruling their advocate on separate occasions has demanded for the release of the money but the company has maintained that it will not release the money as the order served upon them from Butere Court authorizes them to retain the money in the manner they are doing see “WK7”.

5. The applicants contend that the company’s conduct in detaining their money is against the spirit of the farming contract and is irrational and unlawful because the respondent cannot withhold their monies on the strength of a court order which the trial court has ruled is issued without the necessary jurisdiction. They add that the interested party has nothing to claim from their sugar cane farming contracts as he has his own sugarcane on account No. 21663 where he has already been paid.

### **Interested party’s response**

6. The interested party filed his response on the 26.10.2011. In the response he depones that he is the proprietor of LP NO. Marama/Buchenya/509. He claims that the 2<sup>nd</sup> applicant’s agreement dated 27.11.2009 with the Respondent shows that the sugar cane farm is on Buchenya/8/511 but on the ground the sugar cane is on his parcel above mentioned.

7. The interested party further claims that the order issued on 9.8.2010 is still in force because it was extended by the said court.

8. He further claims that account numbers 21664 and 7534 were contracted on his land parcel. He also maintains that the Butere Court has Jurisdiction to hear and determine Civil Suit No. 135 of 2010.

### **Submissions and Determination**

9. From the records, the Respondents Mumias Sugar Company Limited did not file any response to the application. Mr. Musiega for the applicant filed written submissions on behalf of his client whereas the interested party has his replying affidavit. From the pleadings the following are the issues for determination.

a) Whether the 1<sup>st</sup> and 2<sup>nd</sup> applicants entered into sugarcane farming agreements with the respondent and whether they were paid.

b) Whether the orders of Butere Court in civil Suit No. 135 of 2010 issued on the 9.8.2010 to withhold the applicant’s monies lapsed.

c) Whether this court can issue the orders sought by the applicants.

10. In answer to the first issue the applicants have exhibited the agreements they entered into with the respondent being annexures “wk-1” and “wk- 2”. The agreements relate to plot LR.Nos. Buchenya/8/511 and Buchenya 8/510 for account Nos. 21664 and 7534 respectively. The applicants have also shown that the sugarcane crop was harvested and delivered to the respondents by annexing copies of delivery notes marked “Wk3”.

11. The Respondent has not denied entering into the sugarcane farming agreements with the applicants nor has the respondent denied harvesting the sugarcane. The interested party’s claim is that even though the agreement dated 27.11.2009 is between the Respondent and the applicants the farm where the sugarcane was harvested is his that is No. Marama/Buchenya/509 and not Buchenya 8/511. A part from the naked statement by the interested party, no evidence was offered to support the claim of the facts on the ground.

12. It remains therefore that the applicants entered into an agreement with the respondent and the respondent went ahead and harvested the sugarcane which was delivered to them but the same was not paid on grounds that the order issued on the 9.8.2010 restrained them from paying.

13. On the second issue which surrounds the orders of Butere Court in Civil Suit No. 135 of 2010 the same read as follows;- “IT IS HEREBY ORDERED THAT

1. That pending hearing and determination of this application order restraining M/S Mumias Sugar company Limited from paying out any cane proceeds on account No. 21664 and account No. 7534 plot Marama/Buchenya/510 and Marama/Buchenya/511 pending hearing.

2. That there be an inter parties hearing on 23.08.2010.

14. It is on the strength of this order that the court made another ruling on the 9.12.2010 where status quo was to be maintained until the parties went to a forum with jurisdiction to determine the issue of boundaries between the interested parties and the applicant.

15. I find that the orders granted on the 9.8.2010 were in the interim, subject to the inter parties hearing on the 23.08.2010 when they lapsed. The order made on the 9.12.2010 required that status quo be maintained. There were no orders granted by the court at Butere. The orders of 9.8.2010 were also not extended. ORDER 40 Rule 6 provides that;-

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reasons the court orders otherwise”

16. The suit in Butere Court Civil Suit No. 135 of 2010 has not been finalized since the orders of 9.8.2010. The said orders are therefore deemed to have lapsed as per the provisions of order 40 Rule 6 of the Civil Procedure Rules.

17. Lastly Article 165(6) and (7) of the Constitution gives this court supervisory powers over the lower court. I am also guided by the provisions of the Constitution under Article 159(2)(d) where it provides that the court will not be gagged by procedural technicalities in administering justice. This court therefore can issue the orders sought by the applicants as prayed.

## **Conclusion**

18. The conclusion of the matter therefore is that the application brought by way of originating notice of motion dated 10.10.2011 is allowed in terms of prayers 2,3,4 and 5 thereof with costs to the applicants

Orders accordingly.

Ruling delivered, dated and signed in open court at Kakamega this 15<sup>th</sup> day of September 2016

**RUTH N. SITATI**

**JUDGE**

**In the present of;-**

**Mr. Shivega for Musiega.....for Applicant**

**N/A.....for Respondent**

**N/A.....for interested party**

**Mr. Lagat.....Court Assistant**