



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISCELLANEOUS APPLICATION 10 OF 2012
AND IN THE MATTER OF THE SUGAR ACT NO. 10 OF 2001

AND

THE CONSTITUTION OF KENYA

THE REPUBLIC

(EX-PARTE ESTHER MOCHECHE AYIEKO)APPLICANT

VERSUS

THE SUGAR ARBITRATION TRIBUNALRESPONDENT

AND

SOUTH NYANZA SUGAR COMPANY LTD1ST INTERESTED PARTY

TRANS MARA SUGAR COMPANY LTD2ND INTERESTED PARTY

RULING

On 23rd February 2012 the exparte applicant made an application for leave for an order of Judicial Review and this Honourable Court granted the following orders:-

- 1. To apply for an order of certiorari to remove into this honourable court for the purpose of quashing the decision of the respondent made on 8th February 2012 in proceedings before it in the hearing of Sugar Arbitration Tribunal Dispute number 1301 of 2012 filed by Notice of Motion under certificate of urgency and a statement of claim by South Nyanza Sugar Company Limited (hereinafter) called “Sony” against Trans Mara restraining her, her agents workers and or any person claiming under them from buying, harvesting, transporting and or milling and or in any other manner whatsoever handling sugar cane from any of the growers and out growers in Sector 1, Sector 11, Sector III, Sector IV, Sector V, Sector VI and Sector VII in the South Nyanza Sugar Belt with whom Sony have in force a cane supply or cane growing contracts and whose names are as per cane census reports appended and marked Appendix 1 pending the hearing and determination of the application inter partes, (hereafter the Order of the Tribunal).**

- 2. To apply for an order of certiorari to remove into this honourable court for the purpose of quashing the proceedings in Sugar Arbitration Tribunal Dispute number 1301 of 2012 filed by Sony against Trans Mara.**

3. To apply for an order of Prohibition to prohibit the respondent from hearing a dispute between SONY and TRANS MARA relating to the buying, harvesting, transporting and or milling and or in any other manner whatsoever handling sugar cane of the applicant without involvement of the applicant

4. To apply for an order of prohibition to prohibit the respondent from exercising purported power under Rule 32 or Rule 42 of the Sugar Arbitration Tribunal Rules 2001, hereinafter the Tribunal Rules).

5. The grant of leave shall operate as a stay of the order of the Sugar Arbitration Tribunal made on 8th February 2012 and extended to 24th February 2012 and of the proceedings of Sugar Tribunal Dispute number 1301 of 2012 pending the determination of this matter or further orders.

6. The application by Notice of Motion for the substantive orders of certiorari and Prohibition to be lodged within ten (10) days hereof.

The exparte applicant indeed proceeded on 1st March 2012 to file the substantive application as ordered.

However being aggrieved by the orders earlier own granted to the exparte applicant at the time of granting leave the 1st interested party hereinafter referred to as “Sony” filed an application dated 26th March 2012 and sought the following prayers:-

(1) The application dated 28th February 2012 filed on 1st March 2012 by the exparte applicant Esther Mocheche Ayieko be heard on priority basis.

(2) The order number 2 issued by this court exparte on the 22nd February 2012 at the instance of the exparte applicant to the effect that “the grant of leave shall operate as a stay of the order of the Sugar Arbitration Tribunal made on the 8th February 2012 and of the proceedings of Sugar Arbitration Tribunal Dispute number 1301 of 2012 pending the determination of this matter and further r Order” be set aside varied and or be discharged forthwith.

(3) The substantive Notice of Motion for Judicial Review order of certiorari and prohibition and the application for leave filed herein be struck out with costs.

(4) The court be pleased to order the exparte applicant on such terms as are just to provide security as to costs and to issue orders as to giving of security by way of a cash deposit for the losses which the 1st interested party shall and continues to suffer consequent upon breach of the Sugar Industry Agreement prescribed under Section 29 (1) of the Sugar Act 2001 were high and heavy financial losses informed the filing at the Sugar Arbitration Tribunal Dispute Number 1301 of 2012.

(5) Cost

The substance of Sony’s case is clear and straight forward, namely that the exparte applicant has a contract with it and therefore instead of moving to this court, she ought to have applied to the Sugar Tribunal and be enjoined as a party. There is a very lengthy and voluminous affidavit by one Gabriel Ouma Otiende sworn on 26th March 2012 in support of Sony’s application.

Equally, the exparte applicant has filed a replying affidavit sworn on 20th April 2012. She equally filed grounds of opposition on 20th April 2012 Trans Mara did not file any response. The applicant Sony have further argued that this court is not seized of the necessary jurisdiction to entertain the claim by the exparte application but it is a preserve of the tribunal.

The Sugar Act 2001 indeed governs the issues and dispute relating, to growers, millers and out growers. The said Act has defined a “**Grower**” under Section 2 thereof as “**A person who produces**

sugarcane or any scheduled crop in Kenya for the manufacturer of Sugar but does not include an out growers institution”.

A “**Miller**” on the other hand is defined as “**a person licensed to operate a Sugar or a jaggery mill in Kenya for the production of Sugar and other products**”.

Parliament went a head to establish the Sugar Arbitration Tribunal Under Section 31 of the Act Section 31 (1) thereof states that “**There is established a tribunal to be known as the Sugar Arbitration Tribunal for the purpose of arbitrating dispute arising between ant parties under this Act**”.

This Act permitted the tribunal to regulate its proceedings and procedures.

There was a dispute therefore between Sony and Trans Mara, the two sugar industries herein. The matte went to the tribunal vide tribunal case number 1301 of 2012.

The tribunal issued interim orders of injuncion which stopped Trans Mara from dealing with Sony’s farmers or people it had contracted . Sony had contented that Trans Mara was poaching her farmers.

From the pleadings on record it is evidently clear that the exparte applicant herein has a contractual agreement between her and Sony dated 20th June 2010. The validity or otherwise of the said contract is not for this court to decide.

However for purposes of determination the said contract was clearly made in line with Section 29 (1) of the Sugar Act which states:-

“There shall be for the purposes of this Act, agreements negotiated between growers and millers, growers and out growers institution and millers and out growers institutions”.

From the affidavit evidence on record it is clearly manifest that the dispute pending at the tribunal is between the two sugar companies. The exparte applicant is not a party.

Does the exparte applicant have any locus in the case pending at the tribunal. Is the tribunal capable of entertaining her claim?.

The powers of the tribunal are vested under the Third Schedule to the Sugar Act where clause 8 thereof states:-

“The tribunal shall have the powers of the High Court;

- (a) To admister oaths to the parties and witnesses to the proceedings**
- (b) To summon witnesses and to require the production of documents**
- (c) To order the payments of costs.**

Rule 32 further states:-

1. Application seeking relief of an interim, interlocutory procedural or other relevant nature may be filled at the tribunal under and subject to existence of a substantive case filed and pending before the tribunal.

2. All application filed in the tribunal shall be by way of notice of motion as set out in the schedule hereto and shall have grounds in support of the application as well as affidavit in support.

3. Any party wishing to oppose an application filed shall be at liberty to file grounds of opposition and a replying affidavit thereto.

4. The tribunal may upon its discretion make or pass such interim order as the tribunal may consider appropriate at any stage of the proceedings

5. the reasons given by the tribunal in support of an order shall form a part of the order and shall be available in accordance with these regulations

6. any order and decision or communication by the tribunal shall be under the original seal of the tribunal and appropriately exercised

7. Any order of the tribunal shall be communicated to the parties to the dispute.

From the above quotation it is evidently clear that the tribunal has been given enormous powers by parliament. The exparte applicant is not a party to the proceedings at the tribunal as earlier own observed.

The Act by virtue of her being a growers and having contracted Sony, grants her the liberty of applying to be enjoined as a party at the tribunal.

For now what is before me is not to consider the merits or demerits of the exparte applicant's case nor the **"Sugar War"** between Sony and Trans Mara. The purpose of Judicial Review proceedings is to ensure that partes are granted a fair hearing at any Judicial proceedings.

The exparte applicant did not bring herself within the tribunal's case. The contract between herself and Sony grants her the liberty of applying and being heard at the tribunal. In short she has locus. I am therefore satisfied that the tribunal did not exceed its powers when it granted the injunctive relief. In any case neither Trans Mara nor Sony are unhappy with the injunctive orders as non of them has appealed to this court against them.

I am persuaded that the exparte applicant should have applied to be enjoined as a party in the tribunal case.

For the foregoing reasons, I do find that the proper forum is the tribunal. From there if any party is dissatisfied then they can proceed to this court.

In the premise I do allow the application, herein dated 26th March 2012 set aside the exparte orders issued on 22nd February 2012 and dismiss the Notice of Motion dated 28th February 2012 with costs to Sony.

Dated, signed and delivered at Kisumu this 13th day of July 2012

H. K. CHEMITEI

JUDGE

HKC/aa0