



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CIVIL APPEAL NO. 174 OF 2012

BETWEEN

ELIUD WAFULA MAELO APPELLANT

AND

MINISTRY OF AGRICULTURE FIRST RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF AGRICULTURE SECOND RESPONDENT

THE DIRECTOR OF AGRICULTURETHIRD RESPONDENT

THE CHIEF EXECUTIVE OFFICER,

KENYA SUGAR BOARD FOURTH RESPONDENT

(An Appeal from the Ruling & Order of the High Court Of Kenya at Bungoma (Muchelule, J.) dated 6th March, 2012

in

HCCC. NO. 72 OF 2011)

JUDGMENT OF THE COURT

1. On 17th June, 2011, the 1st respondent called for elections of grower and miller representatives to the Kenya Sugar Board. The appellant, being one of the unsuccessful contestants, was dissatisfied with the conduct of the elections and the results. By way of a plaint filed in the High Court of Kenya at Bungoma, the appellant urged the court to nullify the elections of the Nzoia Zone and order a repeat of the said elections in that zone.

2. Before the suit could be heard, the appellant instituted an application seeking a temporary injunction to

restrain the respondents from gazetting the results of the elections. The respondents raised a preliminary objection regarding the jurisdiction of the court to hear the appellant's suit. They contended that the forum for resolution of the dispute raised by the appellant was the Sugar Arbitration Tribunal set up under **section 31 of the Sugar Act (now repealed)**.

3. The preliminary objection was upheld with the result that the appellant's suit and the application were struck out.

4. Being dissatisfied with that ruling, the appellant preferred an appeal to this Court. In his memorandum of appeal, the appellant stated, *inter alia*, that the learned judge erred in failing to interpret the unlimited original jurisdiction in civil and criminal matters under **Article 165 (3)** of the **Constitution of Kenya, 2010**. He further stated that the Sugar Act, 2001 and the Sugar Arbitration Tribunal created thereunder did not oust the jurisdiction of the High Court.

5. When the appeal came up for hearing, **Mr. Kasamani**, learned counsel for the appellant, told the Court that the prayers that his client was seeking in the High Court suit had been overtaken by events. That notwithstanding, the appellant was still interested in pursuing the appeal against the trial court's finding regarding its jurisdiction to hear the dispute.

6. Mr. Kasamani submitted that under **Article 165 (3)** of the **Constitution of Kenya, 2010**, the High Court has unlimited original jurisdiction that could not be ousted by the provisions of **section 31 (1)** of the **Sugar Act** which had established the Sugar Arbitration Tribunal.

7. Counsel further submitted that the purpose of the tribunal is to arbitrate disputes arising between parties under the Sugar Act and such disputes, in his view, do not include disputes relating to elections. They are limited to candidature and the right to vote but do not include challenging of election outcomes. He cited **regulation 13** of the **Sugar (Elections) Regulations, 2002**, which states that a person aggrieved by the decision of the returning officer rejecting his candidature or right to vote may appeal to the tribunal within 14 days of the date of rejection.

8. **Mr. Odongo**, learned counsel for the 1st, 2nd and 3rd respondents as well as **Miss. Lunani**, learned counsel for **Saul Busolo**, an interested party, opposed the appeal. They submitted, *inter alia*, that the jurisdiction of the High Court as provided for under **Article 165** of the Constitution is not absolute; it can be limited by an Act of Parliament. In this case, the High Court's jurisdiction to hear disputes arising between parties under the Sugar Act had been taken away and vested upon the Sugar Arbitration Tribunal. Counsel cited several authorities to buttress their submissions, among them, **Narok County Council V Trans-mara County Council, [2000] E. A. 161**.

9. Miss Lunani, added that the appeal was incompetent, having been filed without leave of the High Court.

10. We have given careful consideration to the brief submissions made by counsel for the parties. It is not in dispute that the High Court has unlimited original jurisdiction in civil and criminal matters. That jurisdiction is conferred by **Article 165** of the Constitution. **Article 169** of the Constitution establishes subordinate courts including tribunals. **Article 169 (2)** confers power upon Parliament to enact legislation prescribing jurisdiction to be exercised by the subordinate courts and tribunals. **Article 159 (1)** of the **Constitution** states that judicial authority is exercised by courts and tribunals established by the Constitution.

11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In **Halsbury's Laws of England, Volume 10** at **paragraph 319**, the learned authors state:

"The subject's right of access to the courts may be taken away or restricted by statute." ...

Paragraph 723 states:

“Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”

12. In **Narok County Council V Trans-mara County Council** (*supra*) this Court held that:

“... though section 60 of the Constitution gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty.”

13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of the Constitution only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court in **THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR**:

“[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.”

14. Similarly, in **SULEIMAN IBRAHIM V AWADH SAID [1963] E. A. 179**, Windham, C. J. held that **section 33** of the **Rent Restriction Act** of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.

15. We think the intention of the Legislature in creating the Sugar Arbitration Tribunal was to provide a first port of call that was to provide relief in disputes that were to arise between parties in the sugar industry and thereby remove such disputes from the ordinary courts of law.

However, under **Article 165 (3) (c)** of the Constitution, the High Court has jurisdiction to hear an appeal from a decision of a tribunal.

16. **Section 31** of the **Sugar Act** established a specific tribunal with the sole purpose of arbitrating disputes arising between any parties under the Act. The parties included millers, growers, out-growers and such other relevant institutions as cited in the Act. **Section 32** of the **Sugar (Arbitration Tribunal) Rules, 2008** empowers the tribunal to grant interim and interlocutory relief pending finalization of a substantive case. In our view, disputes relating to elections of grower and miller representatives to the Kenya Sugar Board were not excluded. The election of such representatives was provided for by the repealed Act.

17. In view of the foregoing, we are satisfied that the learned judge did not err in holding that the High Court had no jurisdiction to deal with the matter that was before it. Consequently, we find this appeal lacking in merit and dismiss it with costs to the respondents.

DATED and delivered at Kisumu this 4th day of March, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

*I certify that this is
a true copy of the original.*

DEPUTY REGISTRAR