



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 35'A' OF 2013

BETWEEN

KENYA SUGAR BOARD APPELLANT

AND

WEST KENYA SUGAR CO. LTD RESPONDENT

(An Appeal from the Ruling/Order of the High Court of Kenya at Kakamega (Dulu, J.) dated 23rd May, 2013

in

H.C. JUDICIAL REVIEW NO. 3 OF 2013)

JUDGMENT OF THE COURT

1. By a Chamber Summons dated 14th February, 2013, West Kenya Sugar Company Limited, (*the respondent*), sought leave to apply for an order of certiorari to quash the decision of the Kenya Sugar Board, (*the appellant*), contained in a letter and circular dated 15th August, 2012. The respondent also sought leave to apply for an order of prohibition to prohibit the appellant from enforcing the decision contained in the said letter.

2. In the aforesaid letter, the appellant asserted existence of sugar cane command areas (*which was disputed by the respondent*) and required the respondent to adhere to cane Harvesting Framework.

3. Prior to the hearing of the application for leave, the appellant filed a notice of preliminary objection to the said application contending that:

“(1) That the application is in contravention of the provisions of section 31 (1) of the Sugar Act Rule 6 (1) of the Sugar (Arbitration Tribunals) Rules 2008 which makes it mandatory for disputes between Industry stakeholders to be arbitrated in the Sugar Arbitration Tribunal in the first instance.

(2) That the applicant has no *locus standi* before the Honourable Court as its Director one Mr. Jawswant S. Rai, is a Board Member of the Respondent therefore creating an

untenable conflict of interest.

(3) That orders of prohibition can only be granted where an Administrative body has acted ultra vires, in excess of jurisdiction and/or powers, which is not the scenario herein as the respondent has acted within the confines of law and the Constitution of Kenya, 2010.

(4) That the application is incurably defective, void ab initio, untenable and an abuse of the court process.”

4. The High Court dismissed the preliminary objection in its entirety. As regards the provisions of **section 31 (1) of the Sugar Act (now repealed)** and **rule 6 (1) of the Sugar (Arbitration Tribunal) Rules, 2008** the court ruled:

“I have not been informed that the provision states that this court has no judicial review jurisdiction. In my view, even where there are other remedies available, a litigant can, for good reason, approach the judicial review court.”

5. Regarding the second limb of the preliminary objection the court held that a director of a company or statutory institution is different from the institution. The party who had moved the court was West Kenya Sugar Company Limited and not the named director. In the court’s view there was no conflict of interest. The court added that the objection required evidence to prove who the directors of the respondent were.

6. As to whether the appellant had acted *ultra vires* or not, that could only be determined upon hearing the application, the court held.

7. Lastly, the court was not satisfied that the application for leave was incurably defective. The court held that the application for leave had been filed within the statutory period of time.

8. Being dissatisfied with the said ruling, the appellant preferred an appeal to this Court. The appellant contended, *inter alia*, that the learned judge erred in law in finding that the application for leave was filed within six months from the date of the proceedings, by failing to appreciate that **section 31 (1) of the Sugar Act, 2001** (now repealed) and **rule 6 (1) of the Sugar (Arbitration Tribunal) Rules 2008** makes it mandatory for disputes between parties to be referred to the Sugar Arbitration first and generally by upholding the competency of the application for leave.

9. Mr. Mugoye, learned counsel for the appellant, started by pointing out that some of the issues raised in the preliminary objection had been overtaken by events, following repeal of the Sugar Act, 2001 by the **Agriculture, Fisheries and Food Authority Act, 2013**. That notwithstanding, **sections 4 (4) and 6** of the repealing Act permit courts to proceed with proceedings relating to the business of a former institution or proceedings where a former institution was a party. There was no dispute that both the appellant and the respondent were parties under the repealed Act.

10. Mr. Mugoye submitted that the respondent’s Chamber Summons application dated 14th February, 2013 was filed after six months from the date of the proceedings, contrary to the mandatory provisions of **order 53 rule 2 of the Civil Procedure Rules, 2010**. The impugned decision was made in 2010 and there are minutes to that effect, the letter of 15th August, 2012 was basically a reminder, he contended.

11. Responding to that argument, **Mr. Olendo**, learned counsel for the respondent, insisted that the decision sought to be quashed was made on 15th August, 2012. He stated that what took place in 2010 was a meeting of shareholders in the sugar industry where various issues were discussed.

12. In our view the date when the impugned decision was made was critical because of the express provisions of **order 53 rule 2 of the Civil Procedure Rules** that:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment,

order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act ...”

13. To ascertain the actual date of the decision sought to be quashed, the learned judge had to delve into evidence, since there was sharp disagreement on that critical issue. He had to peruse the file to know what transpired in the meeting held in 2010. That being the case; this was not an appropriate matter to be raised by way of a preliminary objection. It may, however, have been a valid issue to be raised during the hearing of the main application.

14. As per **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED V WESTEND DISTRIBUTORS LIMITED [1969]** E.A. 696, *“Preliminary point raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

15. As regards the provisions of **section 31 (1)** of the **Sugar Act, 2001** that required disputes arising between any parties under the Act to be referred to the Sugar Arbitration Tribunal for arbitration, the appellant’s counsel submitted that the respondent should have first exhausted the alternative dispute resolution mechanism before seeking judicial review orders.

16. Mr. Olendo countered that argument by submitting that judicial review reliefs can only be granted by the High Court, not a tribunal.

17. We agree with Mr. Olendo. None of the orders sought could be granted by the Sugar Arbitration Tribunal. But if the dispute between the appellant and the respondent could have been resolved by the tribunal, it would have been improper for the respondent to bypass the tribunal and move straight to the High Court. Of course the High Court had supervisory jurisdiction over decisions of the Sugar Arbitration Tribunal. We therefore uphold the judge’s finding regarding jurisdiction of the High Court.

18. Regarding the **locus standi** of Jawswant Rai, we agree with the learned judge that evidence was necessary to prove, not only the issue of directorship of the respondent, but also the nature of the alleged conflict of interest that was likely to be occasioned. The issue could not be exhaustively decided by way of a preliminary objection.

19. We believe the trial judge was right in rejecting the preliminary objection. We need not say more as we were informed that the suit that gave rise to this appeal is still live before the trial court.

20. We find the appeal lacking in merit and dismiss it with costs to the appellant.

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