



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 117 OF 2012

BETWEEN

GEDION ANGACHI ANYINYA 1ST APPELLANT

JOHN MULESHE WERE 2ND APPELLANT

CHRISTOPHER ODHIAMBO OCHOLA 3RD APPELLANT

JOSHUA ANYANGA OMUKAMI 4TH APPELLANT

EGLAY AMAKOBE MAKOKHA 5TH APPELLANT

MOSES WAMBOYE LISUNU 6TH APPELLANT

AGGREY MUKOLWE OMUSUMARI 7TH APPELLANT

PETER MALIKA ATSIMIRE 8TH APPELLANT

GILBERT MILTON OKAYE 9TH APPELLANT

OMUMIA KUSIMBA WERINGA 10TH APPELLANT

MUMIAS SUGAR COMPANY LIMITED 11TH APPELLANT

AND

WEST KENYA SUGAR COMPANY LTD RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Bungoma, (Muchelule, J.) dated and delivered on the 30th April, 2012

in

HCCC NO. 23 OF 2012)

JUDGMENT OF THE COURT

1. The appellants were the plaintiffs in **H.C.C.C. No. 23 of 2013** at Bungoma, which suit was instituted against the respondent. In that suit, the appellants sought a permanent injunction to restrain the respondent, its servants, employees, agents and officers from soliciting for sugar cane, constructing a weighbridge, interfering with the development of sugarcane, or causing breach of contracts by 20,000 farmers who had been contracted to grow sugarcane by **Mumias Sugar Company Limited**, the 11th appellant.
2. Along with the plaint, the appellants presented an application seeking interlocutory injunction in terms of the substantive orders sought, pending hearing and determination of the suit.
3. Following a full hearing of the application, the High court found the application lacking in merit and dismissed it with costs. Further, the court held that the dispute ought to have been filed before the Sugar Arbitration Tribunal and proceeded to strike out the entire suit for want of jurisdiction.
4. The appellants were aggrieved by that decision and preferred an appeal to this Court.
5. The memorandum of appeal raises 21 grounds of appeal. However, in their written submissions, the appellants' advocates collapsed them into three broad grounds as follows:

“(a) That the learned judge erred in law and fact by declining to exercise jurisdiction in this matter and making a blanket finding that all disputes between the parties under the sugar industry are not within the competence of the High Court.

(b) The learned judge erred in law and fact in his interpretation of Article 7 of the 6th schedule of the transitional clauses of the Constitution as any conflict between a statute and any substantive provision of the Constitution must be read together with Article 2 (4) [which] establishes the supremacy of the Constitution; and

(c) The learned judge erred in law and fact in arriving at an erroneous decision that the suit before it was res judicata by dint of Busia Chief Magistrate's Court Civil Suit number 9 of 2012, Venswa Okwara Mutoka & 2 others V. West Kenya Sugar Company Limited.”

6. What was the basis of the appellants' suit and application? Mumias Sugar Company Ltd, (*herein after referred to as “MSC”*) is a sugarcane miller in Kakamega County. Sometimes in 2006 Busia Sugar Company Ltd allowed MSC to deal directly with sugarcane farmers in Busia. Consequently, MSC recruited farmers in Busia sugar zone and entered into contracts with 20,000 of them. The farmers were to grow sugarcane and sell it to MSC. The 1st to 10th appellants are some of the farmers so contracted.
7. The respondent is also a sugarcane miller in Kakamega. Sometimes in December, 2011 the respondent, with permission of the County Council of Busia, began constructing a weighbridge at Olepito area along the Busia – Mumias Road, with intention of buying sugarcane in Busia sugar zone. The respondent also started contracting farmers in the area to grow and sell to it sugarcane, which was to be weighed at the weighbridge in issue.
8. MSC complained that the respondent's intention in constructing the weighbridge was to lure the 20,000 farmers it had contracted, including the 1st to 10th appellants, into violating the agreements MSC had entered into with the farmers.
9. The respondent opposed the appellants' application. It stated that the construction of the weighbridge on its parcel of land had been completed and it had started contracting new farmers

to grow and supply it with sugarcane. It denied that it had approached any farmer contracted by MSC or induced any such farmer to breach any existing contract with MSC.

10. Together with the replying affidavit, the respondent also filed a notice of preliminary objection to the appellants' suit and application. One of the grounds of the preliminary objection was that the High Court had no jurisdiction to hear and determine the suit in view of the provisions of **section 31** of the **Sugar Act, 2001** (now repealed). The respondent further contended that since its impugned acts and operations are in Busia County, the suit ought to have been filed in the High Court at Busia.
11. The issues raised in the preliminary objection were argued within the application for interlocutory injunction.
12. Rejecting the application, the trial court held that there was no evidence that the respondent was inducing any of the 20,000 farmers contracted by MSC to breach their respective contracts with MSC. Consequently, the court held that the appellants had not established a prima facie case with a likelihood of success.
13. The court faulted the appellants for failing to disclose that three farmers contracted by MSC had filed a suit at Busia Chief Magistrate's Court, to wit, **CMCC No. 9 of 2012**, seeking a permanent injunction to restrain the respondent from constructing, operating and/or commissioning the same weighbridge. Though MSC was not a party to that suit, it was obvious that the suit was to its benefit, the trial judge concluded.
14. As to whether the appellants' suit ought to have been filed in the High Court at Busia or Bungoma, the learned judge stated:

"The pleadings are clear that the weighbridge subject of this case has been constructed on the defendant's parcels of land in Busia County. The 1st to 10th plaintiffs are farmers in Busia County. The cause of action arose in that County. Under Section 12 (d) of the Civil Procedure Act, the suit ought to have been filed at the High Court at Busia and not in Bungoma."
15. Regarding jurisdiction of the High Court to hear and determine the suit, the Court observed that under **section 31** of the repealed **Sugar Act, 2001**, the Sugar Arbitration Tribunal was established "for the purpose of arbitrating disputes arising between parties under this Act," and since the appellants and the respondent are all parties under the Act, the dispute ought to have been referred to the said tribunal.
16. The court rejected the argument advanced by the appellants' advocate that since the Sugar Act, 2001, preceded the **Constitution of Kenya, 2010** its provisions are inferior and have been overtaken by the Constitution. The court went on to state that the Sugar Act, 2001, and the Regulations made thereunder were saved under **Article 7 of Part 2** of the **sixth schedule** of the Transitional and Consequential Provisions of the Constitution.
17. In his brief highlight of the appellants' written submissions, **Mr. Makokha**, holding brief for **Prof. Ojienda**, learned counsel for the appellants, submitted that in holding that the High Court had no original jurisdiction to hear the dispute, the court failed to appreciate that what was before it was a commercial dispute between two millers.
18. In the written submissions, the appellants contended that the jurisdiction of the tribunal was dependent on existence of sugar industry agreements that are provided for under **section 29** of the **Sugar Act, 2001**, that are negotiated between growers and millers, growers and out-grower institutions, and millers and out-grower institutions.
19. **Mr. Kibe Mungai**, learned counsel for the respondent, countered the appellants' submission regarding the court's jurisdiction, citing **section 31 (1)** of the **Sugar Act, 2001**. He reiterated that

the appellants and the respondent are “*parties*” under the Act. He added that **section 29** is not jurisdictional and there is nothing in the Act to suggest that in the absence of sugar industry agreements the tribunal would be divested of jurisdiction to adjudicate a dispute between parties under the Act.

20. Our view regarding the issue of jurisdiction is that **section 31 (1)** of the **Sugar Act, 2001**, established the Sugar Arbitration Tribunal for the purpose of arbitrating disputes arising between any parties under the Act. Who are “*parties*” referred to in the aforesaid section? In our view, they include growers of sugarcane, millers and outgrowers. The 1st to 10th appellants were growers while the 11th appellant and the respondent are millers. All the players in the dispute were “*parties*” and the bone of contention related to issues related to the sugar industry.

21. The appellants’ counsel’s submission was that the jurisdiction of the Sugar Arbitration Tribunal was dependent upon existence of agreements between the contending parties envisaged by **section 29** of the Act. Since there were no such agreements presented before the trial court, the court was not able to arrive at a jurisdictional finding, counsel added.

22. **Section 29** provided for sugar industry agreements between growers and millers, growers and outgrower institutions and millers and grower institutions. We do not agree that the jurisdiction of the tribunal was dependent upon existence of agreements between the contending parties. If a relevant dispute involving “*parties*” under the Act were to arise, even in the absence of an agreement between them, the tribunal would have had jurisdiction to arbitrate it. **Section 29** of the Act was not jurisdictional. There was obviously no agreement between the appellants and the respondent but the dispute between the two millers related to supply of sugarcane to them by growers, a vital and key role in the sugar industry as defined under the Act. The dispute, in our view, ought to have been referred to the tribunal, as rightly held by the High Court. The preliminary objection raised by the respondent regarding the court’s jurisdiction urged that the suit be struck out. We find that the trial court, having upheld the objection, it was right in proceeding to strike out the suit. [\[GK1\]](#) We agree that it was justified in so doing.

23. The next ground of appeal relates to the learned judge’s interpretation of **section 7** of the **sixth schedule** to the **Constitution of Kenya, 2010**. **Section 7 (1)** thereof states as follows:

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

The appellants’ advocate submitted that the **Sugar Act, 2001**, had been repealed by the **Crops Act, No. 16 of 2013** and therefore the Sugar Arbitration Tribunal created under the repealed Act had been abolished.

24. In his submissions before this Court, the appellants’ counsel stated that if we were to agree with the High Court that it had no jurisdiction to entertain the suit, the appellants shall be without remedy or forum to adjudicate the dispute. However, the appellants’ submission before the trial court was quite different. The appellants’ counsel urged the Court to consider that the Sugar Act, 2001, preceded the Constitution of Kenya, 2010, and therefore its provisions were inferior and had been overtaken by the Constitution. He cited, *inter alia*, **Article 159 (2) (d)** of the Constitution which requires courts to administer justice without undue regard to procedural technicalities.

25. In his considered ruling, the learned judge held that there was nothing in the Sugar Act or Regulations that offends either the letter or spirit of the Constitution. We agree with the judge’s holding. The **Crops Act, No. 16 of 2013** was not in force at the time the matter went before the trial court. The learned judge rightly interpreted the provisions of the Sugar Act as it existed then.

26. The last issue for this Court’s determination is whether the suit before the High Court was *res*

judicata by dint of **Busia Chief Magistrate’s Court Civil Suit No. 9 of 2012, VENSWA OKWARA MUTOKA & 2 OTHERS V WEST KENYA SUGAR COMPANY LIMITED.** In that suit, three farmers, who are not among the appellants herein, sought a permanent injunction to restrain the respondent from constructing, operating and/or commissioning a weighbridge. The suit was struck out for the reason that the court did not have jurisdiction to hear and determine it, given the express provisions of **section 31 of the Sugar Act, 2001.**

27. **Section 7 of the Civil Procedure Act** states as follows:

“no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in a former suit between the same parties, or between parties under whom they or any of them claim, litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

28. We do not think that the objection relating to the doctrine of *res judicata* was well founded. The two matters were neither directly and substantially in issue in the two suits, nor were the parties the same. More importantly, the earlier suit had not been finally decided, it had been struck out for want of jurisdiction and therefore the subsequent suit was not *res judicata*. See **CANELAND LIMITED & OTHERS V DELPHIS BANK LIMITED [2000] LLR. MULLA ON THE CODE OF CIVIL PROCEDURE** Volume 1 16th edition at Page 284 states that a matter cannot be said to have been heard and finally decided if the former suit was dismissed for want of jurisdiction. We must therefore uphold the last ground of appeal.

29. But having upheld the trial judge’s finding that the High Court had no jurisdiction to hear and determine the dispute before it, this appeal must fail, we so find.

Consequently, the appeal is dismissed with costs to the respondent.

Orders accordingly.

DATED and Delivered at Eldoret this 14th day of June, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

[\[GK1\]](#) Is there something missing here?