



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA NAIROBI**

**CAUSE NUMBER 1882 OF 2014**

**CHEMILIL SUGAR COMPANY LIMITED.....1<sup>ST</sup> CLAIMANT**

**MUHORONI SUGAR COMPANY LIMITED (in receivership).....2<sup>ND</sup> CLAIMANT**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS....RESPONDENT**

**SALARIES AND REMUNERATION COMMISSION.....INTERESTED PARTY**

**RULING**

1. By a motion dated 16<sup>th</sup> December, 2014, the applicant herein sought to be joined as an interested party and further sought a raft of orders including an order that the judgment delivered on 27<sup>th</sup> November, 2014 be set aside and there be a stay of execution of the orders emanating from the aforesaid judgment pending the hearing of the motion and lodging and hearing of an appeal.
2. The motion was brought on the main grounds that the applicant was not a party to the suit and the arguments advanced in Court tampered with the constitutional mandate of the applicant. The applicant further complains that it was not given a chance to be heard and that failure to join in the suit at the earlier stages was not out of indolence or ignorance on the part of the applicant.
3. The application was supported by the affidavit of Mr. Nicodemus Odongo who described himself as Acting Deputy Secretary to the applicant. The affidavit in essence elaborated on the grounds on which the application was brought and states that the applicant was shocked and baffled that the Court had quashed the applicant's jurisdiction and mandate as enshrined in the Constitution.
4. When the motion was placed before Lady Justice Monica Mbaru ex-parte as the then duty Judge, she granted prayer numbers 1, 2, and 3 of the motion and with regard to prayer 4 she granted a stay of judgment of 27<sup>th</sup> November, 2014 pending hearing inter partes before the trial Court.
5. When the matter came before me as the trial Court on 22<sup>nd</sup> January, 2015, Ms. Muigai for the applicant sought confirmation of the interim orders arguing in the main that the decision of the Court interfered with the jurisdiction of the applicant and affected other parastatals who based on the decision were saying the applicant had no jurisdiction over them to regulate how their workers are paid.
6. Counsel submitted that the issue before the Court was between the Claimant and the Respondents and had nothing to do with the mandate of the applicant. Ms. Muigai further submitted that the matter was of

public interest since it concerned the government's wage bill hence the applicant's application ought to be allowed.

7. Mr. Odhiambo for the Respondent opposed the application stating that the articles of the Constitution relied on do not give Court power to grant a stay. According to Counsel, jurisdiction of the Court is under Section 12 of the Industrial Court Act.

8. Mr. Odhiambo contended that he Court only made a ruling on 27<sup>th</sup> November, 2014 yet an order for setting aside can only be made upon a judgment. Counsel further submitted that it was clear the applicant was served with the application on 4<sup>th</sup> November, 2014 and never bothered to join as an interested party then.

9. According to Counsel the current application was therefore an abuse of the Court process. Counsel further submitted that the earlier application did not touch on the Constitutional mandate of the applicant and if it sought the interpretation of its Constitutional mandate, the applicant ought to have filed a Constitutional petition instead of the present application.

10. The applicant herein seeks from the Court, the exercise of its power to stay and or set aside its own decision. This power is discretionary and it is normally exercised in certain context and within certain parameters.

11. Under the Industrial Court Rules, there is no express provision on stay of execution or setting aside of judgment or ruling. However, rule 32 on review provides as follows:-

**32 (1) a person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling;**

**(a) if there is discovery of new important matter which after exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or**

**(b) On account of mistake or error apparent on the face of the record; or**

**(c) On account of the award judgment or ruling being in breach of any written law; or**

**(d) if the award, the judgment or ruling requires clarification; or**

**(e) for any other sufficient reason.**

12. If the Court exercises its review powers donated by rule 32 (1) cited above, it can if satisfied set aside its order, ruling or judgment or grant a stay thereof pending a further step such as an appeal or the happening of an event. However the application for review must meet one or more of the circumstances set out under the rule.

13. The applicant before me appears not to have appraised itself of this rule. The application as filed does not show or allege that new or important evidence has been found or that there is an error apparent on the face of the record or that the ruling of the Court is in breach of any law or that any of the remaining requirements under Rule 32 (1) have been satisfied.

14. Perhaps this is because the applicant felt the issues raised in the application could be canvassed under article 159 (2) (d) (e) of the Constitution. The article cited provides as follows:-

**159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles**

**(d) justice shall be administered without undue regard to procedural technicalities; and**

***(e) the purpose and principles of this Constitution shall be protected and promoted.***

15. In this application, the only procedural technicality I can surmise is the issue of whether it was necessary for the applicant to join in these proceedings earlier than they did considering the same was brought to their attention quite in time.

16. Whereas there may be some consideration of Mr. Odhiambo's submission on this issue, the Court is of the view that the omission to join in these proceedings earlier than the time the applicant did does not demonstrate indolence on their part but rather an excusable mistake which has been mitigated by the promptness of the present application. The Court will therefore not take into account the objection on this issue.

17. This then leaves for consideration, the issue of protection and promotion of the principles of the Constitution in the exercise of my judicial authority. While exercising my judicial authority I am enjoined by the Constitution to do so in a manner that promotes and protects the principles of the said Constitution. These principles are far and wide. They are dotted all over the Constitution but of relevance to the issue before me are articles 41(5) and 230 (4) which provide as follows:-

***41(5) Every trade union, employers' organization and employer has the right to engage in collective bargaining.***

***230 (4) The powers and functions of the Salaries and Remuneration Commission shall be to***

***(a) set and regularly review the remuneration and benefits of all State Officers; and***

***(b) advise the national and county governments on the remuneration and benefits of all other public officers.***

18. In the application dated 24<sup>th</sup> October 2014, brought by the Sugar Millers through Federation of Kenya Employers, I was confronted with a situation where the only reason the Sugar Millers were asking me to stay the implementation of the 2013-2015 collective bargaining agreement registered by the Court, was to pave way for due compliance with Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013.

19. The Sugar Millers in their application never alleged any defects in the Collective Bargaining Agreement or discovery of any new facts which would require the review of the Collective bargaining Agreement. They further did not raise any issue over its fiscal sustainability or any of the matters set out under rule 32(1) of the Industrial Court Rules.

20. In the course of the hearing of the said application arguments were advanced particularly by Mr. Odhiambo for the Respondent who questioned the role of Salaries and Remuneration Commission over the issue of Sugar Millers Workers' salaries. According to Mr. Odhiambo these workers were not public officers within the meaning of article 260 of the Constitution.

21. I retired to consider the application, and submission by Counsel Vis-a-vis the law and came up with the ruling of 27<sup>th</sup> November, 2014 which is the subject of the present application. I did the best I could to try and understand the arguments in the context of the Constitutional provisions regarding the right to collective bargaining, and the establishment and jurisdiction of Salaries and Remuneration Commission.

21. I further reviewed the law and policy governing state corporations in order to inform myself better about the matter and rendered myself the way I did in my ruling of 27<sup>th</sup> November 2014.

22. I readily concede that I may not have been perfect in my analysis of the law vis-à-vis the role of Salaries and Remuneration Commission in the ruling but in my honest opinion, that was the best I could do in the circumstances. The applicant if aggrieved, is well within its right to refer the matter like it intends to the higher echelons of our justice system.

23. In the case of *East African Breweries Limited v. Castle Brewing Kenya Limited HCCC No. 848 of 1998* Kuloba J (as he then was) stated as follows:-

*“with regard to the viability, prospects and chances or otherwise, of the appeal succeeding, it is really not for a trial Court, or the court appealed from to reconsider its own decision to find out whether it was probably wrong, and to assess the chances of the appeal against the decision succeeding. It is invidious, if not odious, for a judge of the Court from which an appeal emanates, whether he is the one who rendered the decision to be challenged on appeal, or some other judge of the same jurisdictional hierarchy, after a decision in his Court, to embark upon a reconsideration of the merits and demerits of the same case or application so as to change his mind and reach a different position and hold that he realizes that with hindsight, the decision rendered by his Court was wrong or doubtful and that there are reasonable or high prospects of the appeal succeeding.”*

24. I cannot agree more. In my view therefore, the applicant has not demonstrated any case to merit stay or the setting aside of the ruling delivered by this Court on 27<sup>th</sup> November, 2014 with the consequence that the application is hereby dismissed with costs.

25. It is so ordered.

Dated at Nairobi this 28<sup>th</sup> day of January 2015

Abuodha J. N.

Judge

Delivered this 28<sup>th</sup> day of January 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge