REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 26 OF 2014

WEST KENYA SUGAR COMPANY LIMITED.....PETITIONER

-VERSUS-

AGRICULTURE FISHERIS & FOOD AUTHORITY.....1ST RESPONDENT

SUGAR DIRECTORATE.....2ND RESPONDENT

ALFRED BUSOLO TABU.....3RD RESPONDENT

ROSEMARY MKOK.....4TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF A

GRICULTURE, LIVESTOCK & FISHERIES.....5TH RESPONDENT

HON. ATTORNEY GENERAL.....6TH RESPONDENT

BUTALI SUGAR MILLS LIMITED.....7TH RESPONDENT

WILLIAM KOPI & OTHERS.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF KAKAMEGA.....2ND INTERESTED PARTY

-AND-

BUTALI SUGAR MILLS LIMITED.....CROSS-PETITIONER

RULING

Introduction:

1. West Kenya Sugar Co. Ltd, a Limited liability company within the meaning of cap 486 (hereinafter referred to as the Petitioner) which is also a duly licensed sugar miller within the meaning of Section 15 of the now repealed Sugar Act 2001 and Section 20 of the Crops Act filed a petition against 7 respondents.

2. The 7 respondents are:

   The Agricultural Fisheries and Food Authority (herein after referred to as "**AFFA**" or the "**Authority**") a Statutory body established under Section 3 of the Agriculture, Fisheries and Food Authority Act hereinafter referred as AFFA Act as 1st Respondent. The 2nd Respondent is the Sugar Directorate being one of the directorates established under Section 11 of the AFFA Act. Alfred Busolo the 3rd Respondent and Interim Director General of AFFA holds a Statutory position established under Section 7 of the AFFA Act, Rosemary Mkok the Acting Interim Head of Sugar Directorate which is a directorate established under Section 11 of the AFFA Act is the 4th Respondent. The Cabinet Secretary Ministry of Agriculture Livestock and Fisheries is the 5th Respondent while The Honourable Attorney General who is the Legal Representative of the Government of Kenya is the 6th Respondent and lastly Butali Sugar Mills Limited a Limited liability company registered within the meaning of Cap 486 of the Laws of Kenya is the 7th Respondents (hereinafter referred to as the Cross Petitioner).

3. More parties were enjoined in the proceedings as Interested Parties. In all, there are five Interested Parties.

The Petition

4. The Petitioner by a petition dated 4th December 2014 set out the background to the said petition by highlighting the constitutional and Legal Foundations. It made particular mention of the Constitutional provisions that support its claim and those that have allegedly been infringed and/or violated by the Respondents. It also set out the facts and the grounds for the petition and highlighted how its rights have allegedly been infringed by each of the Respondents
5. The petition is supported by the affidavit of one TEJVEER SINGH RAI the Managing Director of the Petitioner. The petitioner seeks various declarations and orders in the petition including closure of the Cross Petitioners operations, compensatory damages, interest and costs of the petition amongst others.

Notice of Motion dated 4th December 2014

6. Together with the petition the petitioner filed a Notice of Motion dated 4th December 2014 brought pursuant to Article 20,22 and 23 of the Constitution and rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. In the Notice of Motion the Petitioner seeks *inter alia* various injunctive orders, against the respondents prior to the hearing of the petition. Essentially the effect of the orders sought shall be to stop the operations and to close the Cross Petitioner's Mill. The Notice of Motion is premised on the grounds set out on its face and supported by the Affidavit of TEJVEER SINGH RAI, sworn on 4th December 2014 and his Further Affidavit sworn and filed on 2nd March 2015.

The Replies/Responses

7. The Respondents and the Interested Parties have opposed both the petition and the Notice of Motion herein through their replying affidavits and or grounds of opposition.
8. ALFRED BUSOLO TABU the Interim Director General of the 1st respondents swore his replying affidavit on behalf of the 1st , 2nd and 4th respondent as well as on his own behalf. He wants the petition struck out against him and the 4th respondent claiming immunity for acts done as provided for under Section 14 of the AFFA Act 2013.
9. He gives a historical perspective of events particularly regarding the cases filed by the petitioner against the 1st and 2nd respondents and the Cross Petitioner which cases are pending in various courts. He says that through the various cases the petitioner has been laying claim to an exclusive monopoly to the Kabras sugar zone.

10. He explains that as the Court of Appeal in Kisumu was giving its orders in Kisumu Civil Appeal No.89 and 90 of 2011 directed at the Kenya Sugar Board, the Kenya Sugar Board no longer existed and its constituent legislation the Sugar Act No.10 of 2001 had been repealed by virtue of the provisions of Section 42 of the Crops Act No.16 of 2013 and as a result the decision and order of the Court of Appeal is now directed at the AFFA which is the Authority contemplated in view of the provisions of Section 4 of the third schedule to the Crops Act.
11. He adds that the 1st and 2nd respondents took action as provided by Section 20 (b) of the Crops Act by inviting the petitioner and the Cross Petitioner together with all stakeholders in the sugar industry for a stakeholders meeting on 6th October 2014 to give views on the intended licensing of the Cross Petitioner. Further invitations were made but before the process was complete the petitioner filed NAIROBI JUDICIAL REVIEW No.426 OF 2014 where leave was granted and which leave was to operate as a stay. He explains the events that led to the issuance of a license by the then Kenya Sugar Board to the Cross Petitioner on the 13th April 2005 which entitled it to construct a sugar milling plant in Malava cane area following a cane census and how the same was revoked and again reinstated.
12. He is of the view that granting the orders sought by the Petitioner threatens the viability and stability of the sugar industry and is discriminatory against the Cross Petitioner. He explains that Section 44 of the AFFA Act 2013 enjoins the 1st respondent to ensure fair competition by vigilantly protecting all stakeholders in the sugar industry against practices that occasion monopolies, abuse of dominant position and generally all acts proscribed by Section 23 of the Competition Act Cap 304 Laws of Kenya.
13. He further depones on the import and consequences upon the sugar sector and especially once a sugar mill commences its operations. He also explains the aspect of licensing and adds that the Cross Petitioner has been regulated for the past four (4) years that it has been in operation and that it is the petitioner who has impeded the licensing process of the Cross Petitioner. He depones that the sugarcane in the Kabras sugar area belongs to the farmers and that the petitioner has no right in law and cannot be compensated for sugarcane that does not belong to it. He emphasizes that the business of regulation of the sugar industry is by law intended to be left to the expertise of the 1st and 2nd Respondents. He explains in detail the issue of "exclusive sugar zones" and states that an enforcement of the zone in accordance with the Petitioners interpretation would cause confusion, irrationality and absurdity within the entire sugar industry. He gives examples of several mills that exist within shorter distances of each other than that between Petitioner and Cross Petitioner and concludes that there is no basis for the petitioner to claim monopoly of the Kabras sugar zone.
14. He states that in the meantime public interest dictates that Cross Petitioner continues in operation as its application for a milling license is being determined. He has asked this Court to dismiss the petition and the Notice of Motion with costs.

Replying Affidavit By Cross Petitioner

15. The Cross Petitioner responded to the petition and the Notice of Motion dated 4th December 2014 through a replying affidavit dated 7th January 2015 sworn by JAYANTILAL PATEL, The Managing Director.
16. Briefly the Cross Petitioner reiterates the grounds of opposition dated 17th December 2014. He explains how it acquired a registration certificate from the Kenya Sugar Board, the predecessor of the 1st respondent and how it went ahead to invest including construction of a sugar milling plant on plot No. Kakamega/Malava/1303 (Butali site). He adds that registration of the Butali site followed keen consideration of recommendations of a report of a task force that was set up by the then Minister for Agriculture and thus it was lawfully registered. He explains that the Cross Petitioner has spent kshs.8 billion to establish and improve its guar milling plant and it has over 5000 farmers registered and contracted to grow and supply sugarcane to its plant.
17. He further gives details of the amounts in Kenya shillings that the Cross Petitioner has paid to its various stake holders showing that it has significant consequences to the national economy and the County Government of Kakamega. He depones on what the Cross Petitioner went through at the instance of the petitioner and the Kenya Sugar Board who he feels were biased towards them prompting it to file **Kisumu J.R 17 of 2010 Republic –vs- Kenya Sugar Board Ex parte Butali**

Sugar Mills seeking orders of *mandamus* to be issued with a milling licence by the Kenya Sugar Board and an order of prohibition to prohibit the Kenya Sugar Board from unlawfully and unduly interfering with its business. That an order of *mandamus* was granted and on 31st June 2011 the Kenya Sugar Board issued a milling license to Cross Petitioner in accordance with the Sugar Act 2001.

18. He states however that an appeal was thereafter filed by the petitioner contesting the issuance of the order of *mandamus* in **Kisumu Civil Appeal 89 of 2011 consolidated with Civil Appeal No. 90 of 2011 West Kenya Sugar Company Limited –vs- Kenya Sugar Board and Butali Sugar Mills Ltd** through which the Court of Appeal went ahead and set aside the judgment of the High Court and ordered that the Kenya Sugar Board do hear and determine the application for a license by the Cross Petitioner within a reasonable time.
19. He depones that Cross Petitioner's application for a milling license is therefore with the 1st and 2nd Respondents. He explains that so long as one has applied for a milling license and being a continuing miller it is permissive of the party to continue operating pending the determination of the application and therefore it would be an unfair administrative action for the Court to shut down its plant.
20. He goes further to point out the various cases filed by the petitioner in various courts and maintains that some of those cases are *res-judicata*. He explains that the Cross Petitioner only sources its sugarcane from farmers registered and contracted to it and from independent farmers and that it has been milling sugarcane for now four years. He contends that the Petitioner has no right to the proceeds of any cane milled by the Cross Petitioner and as such cannot ask for compensation. He adds that the issue of zones has now been settled and that no sugar miller has any right to an exclusive zone and that farmers other than contracted farmers have the right to sell their cane to a buyer of their choice.
21. He believes that the petitioner is not entitled to the conservatory orders sought in its Notice of Motion for the reasons he has set out at paragraph 60 (a) – (h) of his affidavit. He also explains that granting the orders sought by the Petitioner shall violate the fundamental rights of the Cross Petitioner as guaranteed under the Constitution. Details of the alleged violations are set out at paragraph 62 (a) to (f) of the replying affidavit. He too wants the Notice of Motion dismissed with costs.
22. The 5th and 6th Respondents filed grounds of opposition to the Petition and the Notice of Motion dated 4th December 2014.

Grounds of Opposition to the Petition and Notice of Motion Dated 4th December 2014

23. In addition to its affidavit, the Cross Petitioner filed grounds of opposition dated 17th December 2014. In the main, it is contended that the Cross Petitioner which is a continuing miller has applied for a milling license and as such it has a legitimate expectation in law for non-interruption in its milling after lodging its application with the relevant authorities and after complying with all requirements and conditions for issuance of a milling license.
24. Further, that the Petition as filed does not raise any concerns over violation of fundamental rights and freedoms and that it has totally failed the test of law laid down in **Anisminic case**; That the Petitioner has no justiciable rights and freedoms to enforce and only seeks to vindicate the right for a monopoly through zoning, an issue that has been ventilated through cases filed by the Petitioner both at Kakamega and Milimani High Courts, Nairobi.
25. The Petitioner also contends that there is no exclusive zone to any miller and further that the matters raised in the Petition and the Notice of Motion are subjudice pending determination in:

a. **Nairobi HCCC No.206 of 2010 – West Kenya Sugar Company Ltd. – vs - Kenya Sugar Board & Another.**
b. **Nairobi HC Constitutional Petition No.59 of 2010 – West Kenya Sugar Company Ltd – vs - Kenya Sugar Board & 2 others.**
c. **Nairobi HC JR No.426 of 2014 – Republic – vs - Agriculture, Fisheries and Food Authority & others**

26. Further that issuance of orders sought in the Notice of Motion and Petition shall seriously violate the fundamental rights of the Cross Petitioner as guaranteed under Articles 27, 40, 260, 47 and the general protection of economic rights, apart from the said pleadings being a gross abuse of Court process as the Petitioner hops from one Court to another with this or that case in which it approbates and reprobates at the same time.
27. Finally, and among other objections the Cross Petitioner objects to the Notice of Motion dated 4th December 2014 on grounds that issuance of the orders sought therein shall contravene the Order of the Court of Appeal in Kisumu CA Nos 89 and 90 of 2011 (consolidated) in which the Court issued an order of "mandamus to Kenya Sugar Board to hear and determine the application for license by Butali Sugar Mills Ltd dated 10th April 2010 within a reasonable time according to the law giving the appellant right to be heard in opposition". The Cross Petitioner contends that there is neither jurisdiction nor legal basis for the claim for compensation of Kshs.200 million monthly or at all for reasons that the Petitioner has no right in law or at all on the property in the sugarcane of independent farmers for cane supplied to the Cross Petitioner; the Petitioner has no right of monopoly even over the Kabras sugar zone; any determination of compensation must await the outcome of the Petition and there is no jurisdiction to the High Court under Article 23 of the Constitution to exact any penalty/damages from a party for lawful enterprise and to a party without lawful injury and in the absence of any violation of fundamental rights and freedoms as in the instant case.

Replying Affidavit of 1st Interested Party

28. The replying affidavit of the 1st Interested Party is sworn by William Kopi on his own behalf and on behalf of 50,000 cane farmers from Kabras, Lugari, Nandi, Uasin Gishu and Bunyala East. Briefly, he gives a history of the dispute herein from a farmer's perspective. He depones that the orders sought by the Petitioner, if granted, will have a negative impact and effect on the rights of the over 50000 sugarcane farmers who depend on cane payments from the Cross Petitioner for their livelihood.
29. He claims that the farmers who stand to be affected most by the decision of this Court have never been heard in the many cases field by the Petitioner to stop operations of the Cross Petitioner. He also says that the farmers, having collectively invested over ksh.4.5 billion in their cane expect the same to be harvested by a miller of their own choice and the orders being sought herein if granted, will significantly and extremely affect the economic investment of the farmers.
30. He further depones that the interests of the farmers are linked to the Cross Petitioner's continued operation and that the Petitioner is not happy with Cross Petitioner's existence and seeks, through the numerous cases filed in Court to have the entire Kabras region as its exclusive zone. He maintains that there are no laws providing for exclusive sugar zones. He also avers that in the year 2014 AFFA sought and collected views on the licensing of the Cross Petitioner and the farmers fully supported the renewal of Cross Petitioner's milling license. He explains that between 1st July 2014 – 5th August 2014 the Petitioner operated without a license but was not shut down and farmers affiliated to it continued to supply cane and were paid and that by the same token, it would be an infringement of Article 27 (1) of the Constitution if farmers affiliated to the Cross Petitioners are subjected to different standards.
31. He adds that the delay by AFFA in considering Cross Petitioner application for a license not only violates the right of Cross Petitioner to fair and expeditious administrative action as provided for in Article 47 of the Constitution but also adversely affects and threatens the farmers' economic and social rights protected by Article 43 of the Constitution. He contends that shutting down of Cross Petitioner will create a monopoly in the provision of sugar development services and threaten the consumer rights of farmers as protected under Article 46 of the Constitution.
32. He explains the effects of granting the orders sought which may lead to the shutting down of Cross Petitioner's plant which will lead to massive losses to farmers. He concludes by stating that farmers are simply seeking for an opportunity to sell their cane to a miller who offers them the best prices in the market and that the Court should direct the relevant bodies to consider the Cross Petitioner's application for a license instead of shutting down its milling plant.

Replying Affidavit of the 2nd Interested Party

33. Mr. Francis Mungo Waswa the Chief Executive officer of the Kenya National Federation of Sugarcane Farmers (KNFSF) duly authorized by the National Executive Board on behalf of the Governing Council of the KNFSF swore an affidavit on the 11th January 2016 in which he explains the origin of KNFSF which is a society duly registered under the provisions of the Societies Act Cap 108 Laws of Kenya with the objective of generally representing and acting on sugarcane matters in any issue affecting farmers be they legal or otherwise. He avers that the issues in this matter go far beyond the interests of farmers in the Kabras sugar zone and do affect the sugar industry and the interest of farmers in the sugar growing zones countrywide.
34. He depones that sugar millers are registered under the relevant laws and once registered and operationalized they are permanent investments. He goes on to explain in some detail how registration of the Petitioner and Cross-Petitioner was done after feasibility studies. He avers that no miller had an exclusive sugar zone and that farmers have the absolute right to dispose of their product to any purchaser of their choice and in this regard, he says that the Petitioner's claim for damages has no basis in law and should not arise. He also notes that various cases brought both by the petitioner and Cross-Petitioner where the Petitioner seeks closure and re-location of the Cross-Petitioner and the Cross-Petitioner seeking orders to protect its business have no basis.
35. He states that the Petitioner and Cross-Petitioner have milling licenses for the period of 1st July 2015 to 30th June 2016 and that it will not be possible to close down either plant. He contends that the Petitioner herein has not been forthright in its dealings in the sugar industry. He wants the application herein dismissed with costs.

Cross Petition

36. In addition to its Replying Affidavit to the petition, the Cross Petitioner filed a Cross-Petition on the 6th March 2015 and with it a Notice of Motion of the same date.

Cross Petitioners Notice of Motion dated 06/03/2015

37. The Notice of Motion seeks the following orders:-

1. spent
2. THAT the Honourable Court be pleased to order that the instant application be placed before the Court on 10th March 2015 for directions and to order that the present application be heard simultaneously with the Petitioner's Notice of Motion dated 4th December 2014.
3. THAT pending hearing of the Cross Petition the Honourable Court be pleased to suspend milling Licence No.KSB/MLIC/003/2014 issued to West Kenya Sugar Company Limited and forwarded by letter dated 5th August 2014.
4. THAT pending determination of the Cross Petition or until West Kenya Sugar Company Limited makes a compliant application for milling licence for 2014/2015 satisfying the requirements demanded by Kenya Sugar Board in its meeting of 30th July 2014 and after due observance of section 20(6) of the Crops Act, 2013, the Honourable Court be pleased to order closure of West Kenya Sugar Company Limited sugar milling plant in Kakamega.
5. THAT the Honourable Court do issue any further, other or consequential orders herein in protection of fundamental rights of the Cross Petitioner;
6. THAT costs of this Application be provided for.

Which application is supported by the Replying Affidavit of Jayantilal Patel sworn at Nairobi on 7th January 2015 filed herein and the following grounds and reasons:-

a. The 2nd Respondent, a delegate of the 1st Respondent did on 5th August 2014 issue a milling licence no.KSB/MLIC/003/2014 to the 3rd Respondent in gross contravention of mandatory provisions of the Crops Act, 2013, particularly section 20(6) of the Act, which

makes mandatory that before the milling licence is issued the intention to issue the licence be gazetted for at least 30 days;

b. Further the milling licence was issued without authority of the 1st Respondent, who whilst in existence and operational, never sat and made any decision in August 2014 to issue the milling licence to the 3rd Respondent;

c. The 3rd Respondent is thus in operation **without a valid licence** and with a deficient application for milling licence, adjudged deficient by the Kenya Sugar Board on 30th July 2014 and required the 3rd Respondent to furnish further information and documents;

d. On 5th August, 2014, Kenya Sugar Board was not in existence, having been abolished with effect from 1st August 2014 by operationalization of the Crops Act, 2013 section 42 and Second Schedule to the Crops Act, 2013;

e. The 3rd Respondent's Milling Licence (*which is null*) was purportedly issued on 5th August 2014 by Kenya Sugar Board and signed by Mrs. Rosemary Mkok, the Chief Executive Officer of Kenya Sugar Board, which was nonexistent;

f. The 3rd Respondent's licence (*which is null*) was issued without and before the Cross Petitioner being heard thereon in contravention to the principles set out by the Court of Appeal in ***Kisumu Civil Appeal No.89 and 90 of 2011 West Kenya Sugar Company Limited vs. Kenya Sugar Board and Butali Sugar Mills Limited;***

g. The Cross Petitioner a miller is discriminated against, in the sense that whilst the 3rd Respondent was granted a milling licence on 5th August 2014 without Gazettement, the 1st and 2nd Respondent have declined to issue the Cross Petitioner a milling licence until Gazettement is done, although the Kenya Sugar Board on 30th July 2014 duly determined that a milling Licence be issued to the Cross Petitioner;

h. The Cross Petitioner is further discriminated against, in that whereas the milling licence was issued to the 3rd Respondent under tenure of the 1st and 2nd Respondents, the 3rd Respondent has since taken out ***Nairobi High Court Judicial Review 426 of 2014*** in which case the 3rd Respondent has averred that the 1st and 2nd Respondents are not operational and by those proceedings and for that reason, has stayed the licensing process of the Cross Petitioner by the 1st and 2nd Respondents;

i. Whilst all other regulated enterprises have been operational without actual licence but as long as they have applied and their application for licence is under process, including the 3rd Respondent, the Cross Petitioner whose application is equally under process is faced by the Petition and Motion for closure until actual licence at the instance of the 3rd Respondent.;

j. The circumstances above are of themselves discriminatory to the Cross Petitioner, have diluted and grossly infringed the right of the Cross Petitioner to fair administrative action and are egregiously scuttling the Cross Petitioner's investment put up and improved to the aggregate cost of over Kshs.7 Billion;

k. The 3rd Respondent is milling under an **invalid licence** and with a deficient application for licence without much of the Rule of Law which begets an inexorable obligation on the Honourable Court to intervene and ensure due process by urgently interrogating and where found due nullifying the offensive milling licence;

l. It is in the interests of justice and the Constitution of Kenya that the reliefs sought herein are granted.

Replying Affidavit of the 1st – 4th Respondents to the Cross-Petition and the Cross Petitioner's Notice of Motion

38. ALFRED BUSOLO TABU the interim Director General of AFFA responded to both the Cross-Petition and the Cross Petitioners Notice of Motion through an affidavit sworn on 7th January 2016. Briefly he depones that closing down a mill is a drastic event with dire consequences with imminent losses in millions of shillings to the millers and to the sugar farmers. He is of the view that the prayers sought by both the Petitioner and Cross-Petitioner have profound implications for the sugar sector, and that the same if granted may set dangerous precedents for the sugar industry. He explains that the Crops Act 2013 came into operation on 1st August 2014 and repealed the Sugar Act 2001 so that the decisions of the defunct Kenya Sugar Board were to be implemented by the 1st Respondent.

39. He adds that the 1st Respondent should now issue licenses to millers who had applied for the same from the Kenya Sugar Board as most of the millers were milling without licenses bearing in mind the fact that valid licenses are issuable by 1st July of each year. He also states that on 5th August 2014 the 1st Respondent issued mill licenses to all sugar millers who had applied to the defunct Kenya Sugar Board including the Petitioner herein. He avers that the partisan competition of the Petitioner and Cross-Petitioner even if they seek to vindicate some rights such rights should be considered subject to fundamental rights of others as provided by Article 24 (1) (d) of the Constitution. He avers that the ultimate public interest and highest justice is that both mills be kept operational subject to their continued compliance with the regulatory rules. He therefore prays that both the application and the Cross Petition be dismissed.

Interested Parties

40. We note from the record that like the 5th and 6th Respondents, some of the Interested Parties did not file responses to the Cross Petition. However, the 5th Interested Party filed replying affidavit sworn by Mameti Shaviya on 6th January 2016. He depones that he is the Chairman of the Kabras Council of Elders. The gist of his averments is that if the Petitioner's and Cross Petitioner's milling plants are closed, the entire population of the Kabras region whose economic activities revolve around sugarcane farming for sale to the millers, will be adversely affected. That such closure would result in families losing their livelihoods, children dropping out of school and a general state of destitution. He urges this Court not to allow the applications and to let both millers continue to operate.

Further Affidavit of the Petitioner

41. Upon being served with Replying Affidavits sworn by the Respondents and the Interested Parties, the Petitioner filed a Further Affidavit sworn by Tejveer Singh Rai, the Petitioners Managing Director; The Further Affidavit among other things raises the following issues:-

- The Court of Appeal judgment of 19/09/2014 pointing out that the effect of the Court order being void for lack of jurisdiction is that the Cross Petitioner has never had any license capable of renewal.
- The Court of Appeal judgment referred to above says that the Cross petitioner does not have a license and therefore cannot commence operations of milling sugar without their application for licensee is approved by the relevant authorities.
- Though the law allows a miller to continue with operations during the pendency of its application for renewal, the Cross Petitioner in this case does not qualify for that privilege and as such the Cross Petitioner is operating illegally for lack of approval of its initial application for a license.
- The registration of the Cross petitioner as a sugar miller was rejected many times by the

relevant authorities for reasons that its proposed location was too close to the Petitioner's plant and if registered was likely to put extreme pressure on the resources required for sustaining the sugar mill business.

- The Cross Petitioner was eventually registered as a sugar miller in contravention of the law and under controversial circumstances created by the then Ministry of Agriculture.
- The Petitioner appealed against the decision to register the Cross Petitioner as a sugar miller through High Court Civil application No.1127 of 2005.
- The said application was negotiated out of Court when a sub-committee mandated to deal with the dispute resolved among other things, that the establishment of the Cross Petitioner as a sugar miller would be subject to a minimum radial distance of 24km between the Cross Petitioner and the Petitioner and further that the Cross Petitioner would relocate to any other site that satisfied the requirements for the 24km radial distance.
- Inspite of failing to meet the resolutions of the sub-committee and even after failing to raise the requisite capital for construction of a factory the Cross Petitioner went ahead and commenced construction in December 2002 on a site that contravened the 24km radial distance which is observed by other major sugar milling companies.
- As a result of the establishment of the Cross Petitioner as a sugar miller the sugar zone for the Petitioner has greatly reduced to the detriment of the Petitioner; the number of farmers has also grossly reduced and farmers earnings have also decreased.
- The totality of the foregoing is that the Cross Petitioner is not a continuing miller but a new applicant who does not have a milling license and is thus operating illegally.
- The deponent urges this Honourable Court to grant the orders sought vide its Notice of Motion dated 4th December 2014.

Notice of Preliminary Objection by the Petitioner

42. The Petitioner filed the Notice of Preliminary Objection dated 10th March 2015 on points of law to the Cross Petitioner's application dated 6th March 2015 and the entire Cross Petition seeking to have the Cross Petition struck out with costs on the following grounds:-

1. The Cross petition is incompetent having been filed in contravention of Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedural Rules, 2013.
2. The Cross petition was filed outside 21 days after service of the Petition on the Cross Petitioner without leave of Court.
3. The court lacks jurisdiction to hear and determine the issue relating to the validity of the Petitioner's licence as Section 21 of the Crops Act has stipulated on how to deal with the late renewal by imposing penalties.
4. The Cross Petitioner is not a competent petitioner as the 3rd Respondent West Kenya Sugar Company Limited has not violated any Constitutional Right of the Cross petitioner and or breached any legal provision by being granted an alleged invalid licence by the Kenya Sugar Board.

SUBMISSIONS

Petitioner's Submissions

43. The Petitioner begun by submitting that from its standpoint its application simply seeks to ensure that as the due process of law takes place in relation to the application for license submitted by the Cross Petitioner on 10th April 2010 to the Kenya Sugar Board, it is imperative that the law and existing court orders be upheld, respected and defended by all the parties and, above all by this Court. The Court's attention was drawn to 3 cases which it was urged to take into account in order to understand the background against which these proceedings have been instituted. The cases are:-

i) KSM HCJR NO.17 OF 2014 BUTALI SUGAR MILLS V. KENYA SUGAR BOARD

ii) NRB HCCC PETITION NO.59 OF 2010 mWEST KENYA SUGAR CO. LTD. V. HON. ATTORNEY GENERAL & 2 OTHERS KISUMU COURT OF APPEAL

iii) CIVIL APPEALS NO.89 AND 90 OF 2011 WEST KENYA SUGAR CO. CO. LTD. V. KENYA SUGAR BOARD AND ANOTHER

44. Counsel submitted that the Sugar Act 2001 was enacted to secure proper resource utilization and management in the sugar sector and also to provide for the establishment powers and functions of the Kenya Sugar Board and connected purposes, that the most critical function of the Kenya Sugar Board was to license sugar millers and that it was an offence under Section 14 of the repealed Sugar Act as it is under Sections 18 and 19 of the Crops Act 2013, to operate a mill without a license.
45. He made a distinction between grant of a license and removal of a license. He stated that the Cross Petitioner commenced operations upon being granted a license by the Kenya Sugar Board on 13th January 2011 which license was negated by the decision of the Court of Appeal in its 19th September 2014 judgment in Kisumu Court of Appeal No.89 and 90 of 2011 (above). He contended that once the said license was annulled the subsequent renewal became invalid and that the Cross Petitioner is operating illegally. He invites this Court to uphold the law by shutting down the Cross Petitioners factory.
46. Counsel for the Petitioner also contends that the Kenya Sugar Board unlawfully demarcated the Petitioner's zone into 2 in order to allow the Cross Petitioner to operate in half of it as Cross Petitioners Replying Affidavit reveals. He also contends that the Court of Appeal in considering the Cross Petitioner's application for grant of a license, the 1st Respondent will have to determine whether the Petitioner's zone can accommodate 2 millers and where the Cross petitioner should be located. He submitted that as such the Petitioner is entitled to protection against harvesting of cane within its zone by the Cross Petitioner and/or any other person not licensed to do so.
47. Counsel also submitted that it is discriminatory for the 1st – 4th Respondents to treat the Cross Petitioner as if it is not subject to the law. The Petitioner prays that his application be allowed. Counsel has placed reliance on a number of authorities which we have carefully read and need not reproduce here.

Submissions of the 1st – 4th Respondents

48. The 1st – 4th Respondents submitted that the 3rd and 4th Respondents by dint of the provisions of Section 14 of the AFFA Act 2013 are wrongly sued and pray that these proceedings be struck out as against the said 3rd and 4th Respondents.
49. On the merits, they argued that the Petition and application as filed are a gross abuse of the Court process by the Petitioner in view of the numerous cases filed by the Petitioner, some of which are pending determination by the Courts. Counsel submitted that the specter of the multiplicity of suits is untenable because of the likelihood of Courts of concurrent jurisdictions reaching different decisions thereby causing serious embarrassment to the administration of justice.
50. It is contended that this application is not brought to vindicate any rights as the pleading camouflage but to stifle out competition and to ensure the Petitioner gets a monopoly of the Kabras sugar zone. The Petitioner is accused of approbating and reprobating at the same time.
51. Counsel submitted that as held by the Court of Appeal in Civil in Appeal nos.89 and 90 of 2011 (supra) the business of regulation of the sugar industry should be left to the 1st and 2nd Respondents and that therefore the numerous suits filed by the Petitioner are interfering with the discharge of the 1st and 2nd Respondent's mandate and hurting public interest. He therefore invites this Court to be categorical in protecting public interest.
52. Counsel argued that the Petitioner in abuse of Court process has claimed in JR 426 of 2014 that the 1st and 2nd Respondents have no jurisdiction and power to act at all and has in fact sought the writ of certiorari to quash all their actions so far. In the present Petition and application, the Petitioner seeks orders against the 1st and 2nd Respondents based on their mandate under AFFA and the Crops Act. That as such this inconsistent pleading constitutes an estoppel of record against

the Petitioner and is abuse of court process as all proceedings including constitutional petitions must be founded on utmost good faith so as to prevent ensuing orders from visiting hardship on innocent parties. The Court was urged to exercise its jurisdiction to prevent abuse of its process by striking out the present application with costs to the 1st, 2nd, 3rd and 4th Respondents for being an abuse of Court process.

53. The 1st – 4th Respondents dispute the Petitioners allegation that its rights under Article 27 of the Constitution have been/or are being violated. They rely on Section 44 of the AFFA Act 2013 which enjoins the 1st Respondent to ensure fair competition by vigilantly protecting against practices that occasion monopolies abuse of dominant position and generally all acts proscribed by Section 23 of the Competition Act, Cap 504 of the Laws of Kenya.
54. Regarding the Petitioner's accusations that the 1st – 4th Respondents have been acting unprocedurally by purportedly excluding relieving or excusing the Cross Petitioner from compliance with the laws, it was submitted that the Cross Petitioner just like any other miller has been regulated for the last 4 years it has been in operation. That the overall objective of the Crops Act 2013 which is to facilitate development and trade on crops licensing is not a draconian machination that is intended to obstruct potential or current millers and their dependants, and this is the reason why existing millers are usually allowed to operate even when their licenses have expired as the regulator considers their application for new annual licenses. The 1st – 4th Respondent also submit that the case of the Cross Petitioner is not different from that of the other millers and contend that the Cross Petitioner has already made an application and all that remains in the consideration of that application within the lawful process under the new licensing regime.
55. In their opinion therefore, the 1st – 4th Respondents are saying that the Cross Petitioner like all other millers must be allowed to continue milling, for to hold otherwise would be to discriminate against the Cross Petitioner.
56. On the Petitioners prayer for compensation, Counsel submitted that such compensation does not accrue to the Petitioner as the Petitioner has no property in the cane grown by the farmers who are independent farmers and who can sell their cane to whomsoever they please. Secondly that security is ordinarily issued in settled circumstances for example where a defendant is likely to move assets out of jurisdiction or to himself abscond. It was submitted that the Cross Petitioner has permanent investments in excess of Kshs.8billion and is not moving assets out of jurisdiction.

Submissions of the 5th and 6th Respondents

57. These two Respondents neither filed written submissions nor made oral submissions.

58. **Submissions of the Cross Petitioner**

The Cross Petitioner submitted that there is in fact no proper Petition before the Court to even qualify the application for conservatory orders. The argument being that whereas the Petition as filed alleges violation of rights under the Bill of Rights – CHAPTER FOUR – what the Petitioner is really seeking is to compel the 1st – 4th Respondents to carry out their mandate under the Crops Act, 2013; that enforcement of an administrative Statutory duty does not sound in Constitutional rights violation but is remedial.

59. Further, Counsel for the Cross Petitioner argues that the conservatory orders sought cannot be granted at this stage as their effect would be to determine the petition finally and can only issue upon hearing the petition. That indeed prayer 8 of the application is on matters sub-judice. (See **Kamau Mucuha –vs- The Ripples Limited (Civil application No. Nairobi 186 of 1992**) and also **Sharrif Abdi Hassan –vs- Nadhif Adam [2006] e KLR**.
60. Counsel further submits that in any event, the threshold for the issuance of a conservatory *interim* order in a Constitutional petition has not been met. For this proposition Counsel relies on the decision of the Supreme Court in the case of ***Gatirau Peter Munya –vs- Dickson Mwenda Githinji and 2 others – Petition No.2 of 2013*** where the Supreme Court said:-

> "Conservancy orders bear a more decided public-law connotation: for these are orders to

facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the applicant's case for order of stay. **Conservatory orders consequently, should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes."**

61. Counsel contends that there is no doubt that there is an issue of public interest in this matter and that to grant the reliefs sought by the Petitioner shall be against public interest as it is shall render nearly 400,000 persons destitute; shall destroy sugarcane of registered farmers to the Cross Petitioner to the aggregate value of Kshs.4.5 billion, shall deny revenue in billions both to the National and County Governments and shall lead to social distress affecting basic livelihood needs.
62. Counsel has also argued that the orders sought by the Petitioner cannot be granted as some of the matters are sub-judice among them the issue of validity or otherwise of the Cross Petitioner's registration certificate which is directly in issue in Nairobi HC Constitutional petition No.59 of 2010 (supra).
63. Further, the Cross Petitioner submits that in the history of regulation and as admitted by the 1st – 4th Respondents, no miller has ever been shut down pending the consideration of their application for a license for the coming year and as such they argue that they have a legitimate expectation that this shall apply to them. To this end, reliance is placed on the case of **Keroche Industries Limited –vs- Kenya Revenue Authority & 5 others [2007] e KLR**. They argued that milling without a formal license is not happening out of obstinacy to law and Court orders but according to the informal license issued by the 1st and 2nd Respondents pending formal license and according to a legitimate expectation that has been confirmed and/or created by the practice in the sector.
64. Concerning the Petitioner's prayers to restrain the 1st and 2nd Respondents from considering the Cross Petitioner's application for license, Counsel submits that for as long as the decision of the Court of Appeal is in force, they are obligated to do so and therefore that this Court ought not to grant that prayer.

Submissions of the 1st Interested Party

65. In summary the 1st Interested Party (Julius Keter, William Kopi, John Otido, Meshack Shatimba, Timothy Kiruiyo and Fifty Thousand farmers of Kabras, Lugari, Nandi, Uasin Gishu and Bunyala East submitted that the Petitioner's application does not meet the threshold for interlocutory injunctions as set by ***Giella V. Casman Brown***; that the Petitioner has not established a prima facie case with a probability of success; that the 1st Interested Party has shown that the Petitioner will suffer no irreparable damage if prayers sought are granted and that it is the Cross Petitioner that stands to suffer irreparable harm due to loss of reputation, goodwill and market share together with the certain likelihood that the Petitioner will fail to honour any undertaking as to damages that this Court may impose.
66. Further that the balance of convenience favours the respondents and the interested parties as the petitioner will effectively be granted a monopoly while the Cross Petitioner will be subjected to loss of market share, farmers, employees and revenue and the 1st Interested Parties and their families shall be rendered destitute. They also submitted that the 1st – 6th respondents will be effectively barred from discharging their statutory obligation in a fair, procedural and timely manner as by Article 47 of the Constitution. In urging that justice and equity favour the protection of already poor farmers from abject destitution pending the determination of the issue at hand this Court's attention is drawn to the decision of the Supreme Court of Canada in **Potash Corp.of Saskatchewan Inc V. Mosaic Potash Esterhazy Limited Partnership [2011] SJ No.627 (ca)** where it was stated:-

"……..the strength of the case, irreparable harm and balance of convenience consideration, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead they should be regarded as the framework in which a Court will assess whether an injunction is warranted in any particular case. The ultimate focus of the Court must always be on the justice and equity of the situation in issue…….there are important and considerate interconnections between the three tests. They are not watertight compartments."

67. In the highlights Counsel for the 1st interested party submitted that it is for the interest of farmers (Interested Parties) that the Petitioner and Cross Petitioner co-exist. He argued that his clients being independent farmers are at liberty to sell cane to anybody including Mumias in the lower region and that should this Court issue a conservatory order it will have a far reaching effect on farmers. He contended that the Petitioner has not demonstrated a prima facie case with any likelihood of success but is only keen to execute the exclusive economic zone. He submitted that prayers 2, 3 and 4 cannot be granted and that prayer 5 has been overtaken by events whereas prayers 6 and 7 do not seek conservatory orders. He urged the Court to dismiss the applications.

Submissions of the 2nd Interested Party

68. For the 2nd Interested Party it was submitted firstly that this matter raises an important issue of law. The Court was cautioned not to look at the substantive issues with finality. It was submitted that there is need for further examination of the issues raised and the Court may even wish to consider them by way of viva voce pleadings. Counsel also raised the issue of prejudice and submitted that the pleadings have evidence of the 2nd Interested Party's dependence on these millers as it relies on revenues obtained from them. He argued that there is no evidence of the prejudice these millers will suffer should the other exist until the final determination of the petition and cross petition. He contended that should this Court close down the mills there will be chaos. He wondered how a person who has dropped out of school, or who sleeps hungry because the mills have been shut could be compensated. He reiterated that the millers can await the determination of the petitions and further submitted that this Court is enjoined to take judicial notice of the chaos caused by those kind of orders and cited the cases of closure of Webuye Paper Mills and Miwani Sugar Factory. He drew the attention of the Court to **West Kenya Sugar Company V. Kenya Sugar Board [2010] e KLR** where the Court declined to grant injunctive orders to the Petitioner. He submitted that as things stand there is not an order of any Court or of the 1st and 2nd Respondents revoking the license of the Cross Petitioner and this Court cannot revoke that license at this interlocutory stage. He contended that that being the case the application is overtaken by events and stated that Mr. Kibe for the Petitioner had conceded that this application is now untenable unless the petition is amended. Like Counsel for the 1st Interested Party he was emphatic that the two millers should co-exist and reiterated that there is not a prejudice that either one of them will suffer that is not redressable; that indeed there is a quantification of Kshs.200 Million damages. Finally he submitted that the nature of redress sought by the Petitioner is one falling under Article 3 of the Constitution but not under the Bill of Rights. He prayed that the application be disallowed. Counsel relied on the Supreme Court decision in the **Gatirau Peter Munya Case (supra)** (balancing the rights of the applicant and those of others who may be affected).

Submissions of the 3rd Interested Party

69. The Advocate for the 3rd Interested Party was a late entrant to these proceedings and did not file written submissions. Nevertheless the Court heard the oral submissions of Mr. Menezes, Advocate when the rest came for highlighting.
70. Relying on the replying affidavit of Francis Gichuru filed on 5th January 2016 Counsel submitted that his client represents about 3000 employees within the Petitioner's zone. He submitted that what this employment means to them is housing, food, medicine, education and so on and the

employment is property to them; that in his understanding the Petitioner seeks the closure of the Cross Petitioner despite the fact that it provides livelihood to thousands of people. He submitted that the Petitioner's rights under Articles 19, 20, 21 and 24 of the Constitution are subject to those of the employees. Like the Advocate for the 2nd Interested Party he drew the attention of this Court to the aftermath of the closure of Webuye Paper Mills and Miwani Sugar Factory and the result was a rise in crime, poverty and even suicide. He also submitted that he had not heard of any one violation of the Petitioner's rights or cross petitioner's rights and prayed that the application be dismissed. He referred to them as being a total waste of time.

Submissions of the 4th Interested Party

71. The 4th Interested Party submitted that the two applications had been overtaken by events, and in particular that the Petitioners application had been overtaken by the grant of a license to the Cross Petitioner. He stated that it is the duty of the licensing authority to issue a license and once that is done that issue is exhausted and the AFFA having done that in the case of the Cross Petitioner these proceedings will only turn out to be an academic exercise. He submitted that preserving the status quo is what would commend to this Court. He contended that the cane the two parties are fighting for here belongs to the farmers and should they co-exist that cane will have a market; that importation of sugar shall only escalate if the two millers are closed. Like Counsel for the 1st Interested Party and Counsel for the 2nd Interested Party he submitted that the farmers rely on the cane as their livelihood and that only an order that the two millers co-exist will serve the interests of justice.

Submissions of the 5th Interested Party

72. Counsel begun with the statement. "**In view of the dual operation of these two millers one would ask what purpose will be served by issuing a conservatory order against that status**." He then submitted that neither miller has demonstrated the loss or prejudice they have suffered because of the other's existence; that all the elders have heard is about the irregularities in the licenses but not about any prejudice arising therefrom. He contended that what the elders have presently is the improvement of education, roads and so on and a conservatory order would only lead to a stop of this social development; it will mean a stop to levies to the County government upon which the community rely for development of other infrastructure, families will fall apart, lose income, children will drop out of school and security will be compromised. He stated that on the contrary complementary existence should be considered with keen interest. He further submitted that Article 56 of the constitution provides for the rights of the marginalized and elders and the elders here employ themselves through the cane they supply to the two millers. Closure of these millers will therefore mean loss of their dignity and may lead to dependence on good Samaritans who are few. He submitted that the elders are entitled to take part in the affairs of this society and see the Petitioners as seeking to foster a monopoly which in modern economic sense amounts to greed. Counsel argued that this is not in the interest of justice and stated that the elders would like this Court to maintain the status quo. He drew the attention of this Court to the decision of Odunga J. ***in Judicial Review No.451 of 2012***. He contended that by virtue of Section 120 of the Evidence Act the Petitioner is stopped from challenging the license issued to the Cross Petitioner as they too are enjoying a license issued by the same body notwithstanding that they are alleging that it is not properly constituted.
73. The Court also heard Counsel for the Petitioner and the Cross Petitioner in reply.

Analysis and Determinations:

74. We have considered the Preliminary Objection, the two applications, the various affidavits filed in support of and in opposition to the applications as well as both the written skeletal submissions and the oral highlights.
75. From the onset we would like to add our voices to the fact that this Petition has joined the plethora of suits between the Petitioner and the Cross-Petitioner in respect of the issues surrounding their operations. In so doing we echo the words of our brother G.V. Odunga, J in **Republic -vs-**

Agricultural Fisheries and Food Authority and 3 others exparte West Kenya Sugar Company Limited (2015) eKLR (Nairobi High Court Judicial Review Application No. 426 of 2014) when he expressed himself as follows;-

> ***"199. I cannot however fail to express my indignation at the number of cases the Applicant and Butali have instituted in respect of the issues surrounding their operations. The parties have persistently engaged in an unhelpful litigation geared towards championing protectionists interests in a manner reminiscent of the old imperialist tendencies to the detriment of the people who toil to ensure their industries thrive....."***

We say no more.

76. Since the Petitioner's Preliminary Objection dated 10th March 2015 has challenged the jurisdiction of this Court in some way, we propose to first deal with that objection since to us jurisdiction is cardinal and takes precedence over all the other issues. The starting point would be a look at the statement of law regarding preliminary objections. Law, J.A. in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say:-

> ***"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration....."***

77. Our brother Mwita, J. in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in more clearer terms when he stated that: -

> ***"The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law."***

78. Before we leave this discourse, our attention has been drawn to the words of Hon. Ojwang, J *(as he then was)* in the case of **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the **Mukisa Biscuits case (supra)** went on to stay that: -

> ***"A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a Preliminary point....***
>
> ***Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....."***

79. It is on the basis of the foregone clear legal position that the Petitioner raised the Preliminary Objection in issue. In asking us to strike out the Cross Petition with costs, the Petitioner put forth four grounds. It is the third ground which expressly stated that we do lack jurisdiction to hear and determine the issues on the validity of the Petitioner's license since **Section 21 of the Crops Act** provided on how to deal with issues of late renewal of licenses.

80. We have looked at the said **Section 21** of the Crops Act and we do agree with the Petitioner to the

extent that the said provision truly provides for the late renewal of licenses. As to whether that provision ousts our jurisdiction to deal with the issue of the licensing of the Petitioner, we remain clear in our minds that jurisdiction is everything and without it a Court cannot make any more single legal step. Once the jurisdiction of a Court is challenged, that Court must first determine that question at once, and should it hold the opinion that it lacks jurisdiction, it should down its tools. In the famous case of **The Owners of Motor Vessel "LILIAN "S" -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** Nyarangi, JA. stated at page 14 that: -

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

81. The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction:-

> ***"So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."***

82. Turning back to the issue of the renewal of the Petitioner's license, it is readily agreed that the issue forms the basis of the Cross-Petition and going by the materials before us, we do not see any consensus on the factual averments surrounding that issue. The issue is hotly contested and it therefore calls for further interrogation. We therefore decline to find that the ground relates to a pure issue of law as the facts thereto remain unsettled and subject to further interrogation.
83. On the fourth ground in the Preliminary Objection, we have no hesitation in finding that the same is a purely unsettled factual issue and it also requires further analysis so as to ascertain whether or not the Petitioner violated or breached any of the Cross-Petitioner's constitutional rights. That ground equally fails.
84. The first and second grounds in the Notice of Preliminary Objection relate to **Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. The said grounds in essence raise the argument that the Cross-Petition was filed outside the legal time-lines and without the leave of the Court and as such the same ought to be struck out. We have carefully addressed our minds to the said **Rule 15** and we are unable to agree with the Petitioner that the rule deals with time-lines within which a Cross-Petition ought to be filed in constitutional petitions. That rule basically relates to the time-lines within which responses are to be filed by Respondents or any other interested party in constitutional petitions and not the time-line within which a Cross-Petition ought to be filed. The grounds appear to have been anchored on misapprehension of the law and as such have no legal legs to stand on and do likewise fail.
85. We however wish to state that despite the said **Rule 15** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 not providing for the time-lines within which Cross-Petitions ought to be filed, any party to a petition intending to lodge a Cross-Petition ought to do so within a reasonable time and in any event before directions are settled and the Petition set for determination. Allowing parties to file Cross-Petitions at will can easily derail the overriding objectives of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as contained under **Rule 3** thereof. In the case before us, the Petition was filed in December 2014 and the Cross-Petition filed way before the ruling on certification was made. We are of the considered view that there was no delay in the filing of the Cross-Petition.
86. The upshot is therefore that the Preliminary Objection dated 10th March 2015 is unsustainable in law and is hereby dismissed.

87. We will now deal with the twin applications. A look at the Petitioner's Notice of Motion dated 4th December 2014 reveals that the Petition is seeking both mandatory injunctions as well as prohibitory injunctions against the Respondents. On the other hand, the Cross-Petitioner also seeks orders in the nature of mandatory injunctions in its application. The bigger and clearer picture is that both applications primarily seek the stoppage of the operations and the closure of each other's factory on grounds of licensing by way of mandatory and prohibitory injunctions.
88. It is also worth pointing out that the Petitioner also seeks other orders including the summoning of the third, fourth and fifth Respondents to show cause why they have acquiesced in, aided and abetted the operations of the Cross-Petitioner's factory in violation of the law, the deposit of a monthly security at Kshs. 200,000,000/= on account of compensation and that the third and fourth Respondents be restrained from participating in the consideration of the Cross-Petitioner's application for a manufacturing license.
89. As a result of the commonality of the issue of licensing which forms the basis of the call to stop the operations of both factories and to eventually close them, we intend to first deal with that issue.
90. However before we so venture into that consideration, we remind ourselves that the grant of mandatory injunctions at an interlocutory stage ought to be treated with caution and be only allowed in the clearest and exceptional cases. **Volume 24 of the Halsbury's Laws of England, 4th Edition at paragraph 948** buttresses the foregone in stating that;-

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendants attempted to steal a match on the plaintiff.....a mandatory injunction will be granted on an interlocutory application."***

91. The Court of Appeal in the case **Nation Media Group & 2 others -vs- John Harun Mwau (2014) eKLR** had the following to say on the subject of interlocutory mandatory injunctions: -

> ***"It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of clear and special circumstances (See: Kenya Breweries Limited -vs- Washington Okeyo, Civil Application No. 332 of 2000.)"***

92. With the foregone caution in our minds, it is readily agreed that the principles for consideration in interlocutory mandatory injunctions are the same as those established in the case of **Giella -vs- Cassman Brown (1973) EA 358.** However in constitutional applications, Courts have settled for an approach which is not restrictive in terms of *locus standi* and have given prominence to public interest considerations. (See the Supreme Court decision of **Gatirau Peter Munya -vs- Dickson Mwenda Githinji & 2 others (2014) e KLR).**
93. On our part we also concur that the aspect of public interest ought to be one of the prime considerations in interlocutory mandatory applications in constitutional petitions. In saying so we echo the words of Muriithi, J. in the case of **Mombasa Branch (Acting in the interest of its members to the exclusion of those who may have sought relief in their own right) v. Mombasa County Government; Mombasa High Court Constitutional Petition No. 3 of 2014**, on the issue where he stated: -

> ***"With respect, although the Counsel for respondents submitted on the basis of the standard of prima facie case with regard to temporary injunctions in civil cases as established by the decision of Giella v. Cassman Brown (1973) EA 358, the test for the grant of conservatory orders under constitutional applications must be qualified to take into account the premium that the constitution places upon the enjoyment of fundamental rights. Such premium is to be seen in the easy access to the court that is granted to applicants in terms of locus standi and the formality of documentation. See Article 22 of the constitution. In such circumstances, the balance of convenience test upon an arguable case being demonstrated by the applicant is more appropriate to***

preserve the enjoyment of rights pending hearing and determination of the Petition for breach of fundamental human rights and freedoms. Needles to state, in terms of Article 24 of the Constitution, the balance of convenience must involve balancing the rights of the applicant against the rights of others whose enjoyment of those or other rights may be jeopardized or affected by the enjoyment by the applicant of the rights in question." (emphasis added).

94. Having said so, we now turn to the two applications at hand. Whereas this court remains alive to the truism that the applications are indeed interlocutory and that the Petition and the Cross-Petition are still pending, we must refrain from making definite or final findings on disputed facts at this stage as doing so may embarrass the hearing of the Petition and the Cross-Petition. To that end we do concur with Counsels for the Cross-Petitioner the Interested Parties. The applications must however be determined on the basis of the pleadings, affidavits and submissions on record.
95. We shall, for purposes of understanding where this matter has come from, revisit the history of the licensing of the Petitioner and the Cross-Petitioner. The Petitioner traces its background to the 1970's when it was licensed to mill sugar under the then **Crop Production and Livestock Act, Chapter 321 of the Laws of Kenya** (now repealed) and the **Crop Production and Livestock (Sugar Factory) Rules** made thereunder. Since then the Petitioner has been operational and has witnessed the changes in the sugar sector regulatory regimes all through to the **Sugar Act No. 10 of 2001** and the current **Crops Act No. 16 of 2013**.
96. The Cross-Petitioner was incorporated on 23rd August 2004. Sometimes in the month of October 2004 the Cross-Petitioner made an application under the then operational Sugar Act No. 10 of 2001 (hereafter referred to as the ***"Sugar Act"***) for registration as a miller. That was pursuant to **Section 16** of the Sugar Act. That application was approved and the Cross-Petitioner was registered as a miller and a Certificate of Registration No. KSB-MREG 0009 issued. The Certificate is dated 13th April 2005 and it allowed the Cross-Petitioner to construct a Sugar Mill on the parcel of land known as **L.R. NO. Kakamega/Malava/1303.**
97. Upon the said registration, the Cross-Petitioner was to seek for and obtain a milling license under **Section 14** of the Sugar Act to enable it undertake the milling of sugar. However before that happened the Petitioner filed a judicial review application Misc. Civil Application No. 1127 of 2005 for an order of prohibition prohibiting the Kenya Sugar Board from granting fresh application to the Cross-Petitioner to construct of operate a sugar mill within the Petitioner's zone. It then seems that amid complaints and objections from the Petitioner, the then Kenya Sugar Board which was a legal entity under the Sugar Act charged with *inter alia* the registration, regulation and licensing of the players in the sugar sector declined to issue the license. The refusal to grant the license was followed by the revocation of the Certificate of Registration earlier on issued to the Cross-Petitioner by the Kenya Sugar Board (hereafter referred to as ***"the Board"*****).** That was on 03/10/2008.
98. Sometimes on 26/02/2010, the Certificate of Registration of the Cross-Petitioner was reinstated but without a milling license. That prompted the Cross-Petitioner to also approach the corridors of justice at the High Court of Kenya at Kisumu in April 2010 and filed Judicial Review Application No. 17 of 2010 where it applied for leave to apply for an order of mandamus and an order of prohibition to compel the Board to issue an operating license to it and to direct the Board to desist from unduly interfering with its operations. The substantive judicial review application was heard and allowed and subsequently the Board issued the Cross-Petitioner with a milling license.
99. The Petitioner who was then aggrieved by the said decisions lodged two appeals before the Court of Appeal which became Civil Appeal No. 89 of 2011 and Civil Appeal No. 90 of 2011. The appeals were consolidated and heard together. The judgment was rendered on 19th September 2014 and quashed the license which the Board had issued to the Cross-Petitioner pursuant to the decision of the High Court. By the same judgment of the Court of Appeal the Board was compelled to consider the Cross-Petitioner's application for a milling license with the involvement of the Petitioner in accordance with the relevant law.
100. By the time the Court of Appeal made the pronouncement on the 19th September 2014, the law regulating the licensing of sugar millers in Kenya had changed on 01/08/2014 when the Crops Act became operational.
101. The Crops Act is an Act of Parliament to consolidate and repeal various statutes relating to

crops; to provide for the growth and development of agricultural crops and for connected purposes. The Crops Act repealed *inter alia* the Sugar Act. It also provides for the regulation and licensing of entities dealing with the scheduled crops thereunder which crops include sugar cane.

102. Like Section 16 of the Sugar Act, the Crops Act at Section 18 requires an entity to acquire, by application, an initial ***manufacturing license*** (the equivalent of the Certificate of Registration under the Sugar Act) so as to put up a factory as well as to obtain a milling license to sanction its milling operations. According to both the repealed Sugar Act and the now Crops Act, the milling license once issued is renewable annually.

103. In this particular case the Petitioner's contention against the Cross-Petitioner is that the Cross-Petitioner's license is not a valid license as it was issued by the Board pursuant to the decision of the High Court at Kisumu which decision was later on quashed by subsequent decision of the Court of Appeal. In other words the Petitioner contends that a license that does not exist cannot be renewed. On the other hand, the Cross-Petitioner argues that the Petitioner is operating illegally since its milling license was not renewed by the Board.

104. The Crops Act came with a repeal and saving section. That is **Section 42**. For ease of our discussion and for clarity, we reproduce the said section hereunder: -

> ***"42.(1) The written laws specified in the second scheduled are repealed.***
>
> ***(2) Notwithstanding the provisions of sub-section (1)-***
>
> ***(a) anything done under the provisions of the repealed law shall, unless the Authority otherwise directs, be deemed to have been done under this Act;***
>
> ***(b) Permits, licenses and all statutory instruments issued or issuable under the repealed Acts shall, unless the Authority otherwise directs, be deemed to have been repealed;***
>
> ***(c) revocation of a license, permit or registration under this Act shall not indemnify the licensee from any liabilities to which the person may have become liable under the repealed law;***
>
> ***(d) fees, levies and all other charges imposed under the repealed laws shall cease to be chargeable upon the expiration of a period of six months from the date of commencement of this Act;***
>
> ***(e) subsidiary legislation issued under the repealed law shall continue to apply up to the thirtieth June, 2013.*** (emphasis added).

105. The effect of **Section 42(2)(b)** above in respect to the matters before us mean that all and any permits, licenses and/or statutory instruments which had been issued by the Board under the repealed Sugar Act stood repealed as at 1st August 2014 when the Crops Act came into force. That therefore meant that all the then players in the sugar sector, by dint of the said section of the law, were brought to a level playing ground and were all required to begin the process of complying with the new law afresh. There was however a saving grace to that position which rested with "**the Authority**" (that is the Agriculture, Fisheries and Food Authority) as established under the **Agricultural, Fisheries and Food Authority Act, 2013** (hereinafter referred to as ***"the AFFA Act"*****).** That Authority, which is the successor of the Board, could change the resultant new position by issuing appropriate directions. The Authority is the first Respondent in the both the Petition and the Cross-Petition. That being the case, it is worth to ascertain if the Authority issued any directions in respect to the licenses and/or the statutory instruments which were then in existence under the repealed Sugar Act.

106. We have carefully perused the record and especially the two Replying Affidavits sworn by one **ALFRED BUSOLO TABU** on **26th January 2015** and **7th January 2016** respectively. The said Alfred Busolo Tabu is the ***Interim Director General of the Authority***. Having done so, we are unable to ascertain whether the Authority issued any such directions and if so, how and to whom. We are only confronted with the averments in **paragraph 16** of the **Replying Affidavit of the**

said Alfred Busolo Tabu sworn on 07/01/2016 when he depones :-

> ***"16. <u>THAT</u> on the 5th August 2014 the 1st Respondent issued mill licenses to all sugar millers that had applied to the now defunct Kenya Sugar Board, including the 3rd Respondent."***

107. However a closer look at the averment reveals that the Authority only dealt with the issuance of the milling licenses to the millers which had applied to the Board. Given that **Section 42(2)(b) of the Crops Act** had repealed all licenses, permits and statutory instruments and noting that the Authority issued mill licenses to all millers including the Petitioner and the Cross-Petitioner, the question which now begs an answer is this: What is the legal position of the milling licenses? It is also not clear to us whether the Authority was properly constituted as at 5th August 2015 when it issued the licenses to the Petitioner and Cross-Petitioner.
108. Based on the foregone inadequacy of the information before us now or the lack of it, the best we can do is to place both the Petitioner and the Cross-Petitioner on the same level. Maybe that position will be put into the right perspective as the matter proceeds further.
109. In the circumstances and in view of the above legal guidance, we are not satisfied that the Petitioner as well as the Cross-Petitioner have satisfied the conditions for the grant of any of the interlocutory orders sought in their respective applications. Having already dismissed the Preliminary Objection, we also dismiss the Petitioner's Notice of Motion dated 4th December 2014 and the Cross-Petitioner's Notice of Motion 6th March 2015.

110. On the issue of costs, we order that each party do bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED AT KAKAMEGA this 23rd day of March 2016

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RUTH N. SITATI	**E. N. MAINA**	**A. C. MRIMA**
<u>J U D G E</u>	**<u>JUDGE</u>**	**<u>JUDGE</u>**