



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others
(Petition 3 of 2017) [2024] KEHC 1099 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION 3 OF 2017
WM MUSYOKA, J
FEBRUARY 12, 2024**

BETWEEN

BUSIA SUGAR INDUSTRY LIMITED PETITIONER

AND

AGRICULTURE AND FOOD AUTHORITY 1ST RESPONDENT

WEST KENYA SUGAR COMPANY LIMITED 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

RULING

1. The petitioner and the 2nd respondent are companies in the sugar milling industry operating within Busia County. The petition herein revolves around the registration of the 2nd respondent, by the 1st respondent, as a sugar miller in Olepito village, within Busia County. The petitioner argues that that registration was contrary to a judgement that had been delivered on 2nd February 2017, in Busia HC Petition No. 2 of 2016. It is argued that the impugned registration has contravened *the Constitution*, the *Crops Act*, Cap 318, Laws of Kenya, and the judgement of 2nd February 2017 in Busia HC Petition No. 2 of 2016. The specific provisions alleged to have been contravened are Articles 35, 40, 47 and 60 of *the Constitution*, and section 20 of the *Crops Act*, with relation to the right to information, the right to own property, the right to fair administrative action, rights around use and management of land, and licensing of players in agrobusiness. Orders are sought for a declaration that the petitioner's fundamental rights under Articles 27(2), 35(1), 40 and 60 of *the Constitution* have been violated; a declaration that registration certificate number AFA/SD/MLIC-014/2017, issued on 14th February 2017, was illegal, null and void; a certiorari to quash the decision to license the 2nd respondent and to issue registration certificate number AFA/SD/MLIC-014/2017; a mandamus to command the 1st respondent to undertake the proper process of transferring registration license number KSB-MREF-0017, from Matayos to Olepito, in accordance with the *Crops Act* and the judgement of 2nd



February 2017; a permanent injunction to prohibit the 2nd respondent from carrying on operations at Olepito, prior to obtaining a lawful licence, in accordance with section 20 of the *Crops Act* and the judgement of 2nd February 2017; payment of compensation to the petitioner by the respondents, to the tune of Kshs. 6,000,000,000.00, prior to registration of the 2nd respondent, to operate from the Olepito site; and judicial review of the administrative actions of the 1st and 2nd respondents, leading up to the issuance of licence number AFA/SD/MLIC-014/2017, to the 2nd respondent by the 1st respondent. .

2. The affidavit in support was sworn by Mohammed Omar Bajaber. It presented the background to the matter. The petitioner had set up a sugar mill, upon being licensed by the 1st respondent, at Ebusibwabo Location, while the 2nd respondent was in the process of setting up a similar mill at Olepito, some 10 kilometres away from that by the petitioner, and was doing so without a registration from the 1st respondent. The petitioner went to court, through Kisumu HC Constitutional Petition No. 16 of 2016, which was later transferred to Busia, and became Busia HC Petition No. 2 of 2016. The matter was heard, and a judgement was delivered on 2nd February 2017, where it was found that the 2nd respondent was acting unlawfully, there was need for the views of the petitioner to be heard, it was mandatory that public participation be carried out, and the 2nd respondent was ordered to apply for a transfer of licence within 30 days, to be considered by the 1st respondent within 90 days. The 2nd respondent applied, on 7th February 2017, for an amendment of its current licence, KSB-MREF-0017, and on 14th February 2017, it was issued by the 1st respondent with licence number AFA/SD/MLIC-014/2017. The petitioner felt that the issuance of AFA/SD/MLIC-014/2017 was not proper, as it did not conform with the judgement of 2nd February 2017. It argues that section 20 of the *Crops Act* was not complied with, as the right procedures were not followed. It complains that it was not afforded opportunity to air its views, as the location of the mill by the 2nd respondent, at Olepito, was an encroachment on its cane catchment area, which was exposing it to loss, of over Kshs. 6,000,000,000.00. It further complains that the 1st respondent, contrary to the aforesaid judgement, issued the 2nd respondent with a new licence, instead of transferring the previous one. It is concerned that the registration process was rushed, and was completed within 7 days, instead of the 120 days contemplated under the *Crops Act*. The petitioner would like the respondents compelled to comply with the law, before the 2nd respondent is allowed to operate at Olepito.
3. Attached to the supporting affidavit are copies of the pleadings in Kisumu HC Constitutional Petition No. 16 of 2016/Busia HC Petition No. 2 of 2016; the judgement of 2nd February 2017; the application by the 2nd respondent for amendment of licence number KSB-MREF-0017; the certificate of registration, of the 2nd respondent, issued by the 1st respondent, on 14th February 2017, number AFA/SD/MLIC-014/2017; and the AFFA yearbook of statistics 2014.
4. The petition was filed simultaneously with a Motion, dated 27th March 2017, for a conservator order to bar the respondents from commissioning or operating the Olepito mill, pending hearing and determination of the Motion and the petition, and a temporary injunction to bar the respondents from dealing with or relying on certificate number AFA/SD/MLIC-014/2017, pending hearing of the Motion and the petition.
5. The 1st respondent filed a replying affidavit, on 17th June 2017, sworn on 14th July 2017, by Alfred Busolo Tabu, an official of the 1st respondent. It is not clear whether he was responding to the Motion or the petition, or both. He avers that the 1st respondent had licensed the petitioner to operate a mill at Busia, to a capacity of 3500, and not 4500. He asserts that the petitioner cannot constitute itself into a monopoly. He states that the petitioner had not applied for a licence under sections 18 and 19 of the *Crops Act*, adding that there was no guarantee that the licence would be issued, if applied for, for every application is subject to regulatory process and discretion by the 1st respondent. He describes the



suit, in Kisumu HC Constitutional Petition No. 16 of 2016, as one of the many between the petitioner and the 2nd respondent, as they fight for supremacy within the sugar industry in the western region of Kenya. He avers that the deponent of the affidavit, sworn in support, had no competence to interpret the judgment of 2nd February 2017. According to him, that judgement recognized the role of the 1st respondent as a regulatory authority, that it had done nothing that warranted damages being awarded against it, that the court could not usurp the role of the 1st respondent as a regulatory and licensing authority, among others. He avers that the court made 2 orders: gave the 2nd respondent 30 days to apply to the 1st respondent, for amendment of its licence number KSB-MREF-0017, to indicate its location as Olepito; and gave 90 days to the 1st respondent, from receipt of the application by the 2nd respondent, to make a decision of the same, and alert the petitioner and the 2nd respondent of it within 7 days. He asserts that the respondents complied with that judgement, for the 2nd respondent made the contemplated application for amendment of its certificate, and the 1st respondent issued to it an amended certificate, number AFA/SD/MLIC-014/2017. He states that it was inaccurate to state that the 2nd respondent was required to apply for a transfer of licence. He argues that the matters raised in the petition were res judicata, as they had been determined on 2nd February 2017, in Busia HC Petition No. 2 of 2016. He avers that certificate number AFA/SD/MLIC-014/2017 was issued pursuant to the court order, and not upon a new application. He further avers that the order did not attach any conditions, and that there was no requirement for public participation, and none was required for compliance with a court order. He states that it was issued as an amendment to show the actual location of the 2nd respondent's sugar mill at Olepito. He states that there is difference between registration of millers and issuance of licenses. He states that the petitioner had not applied for issuance of a licence to operate a sugar mill. He states that the petitioner and the 2nd respondent ought to co-exist, and cites section 44 of the *Agriculture and Food Authority Act*, Cap 317, Laws of Kenya, and section 23 of the *Competition Act*, Cap 504, Laws of Kenya, on the role of the 1st respondent in ensuring that there were no dominant undertakings, and, therefore, it was untenable for the petitioner and the 2nd respondent to press for exclusivity in access to cane or in sugar production. He asserts that the petitioner had no constitutional guarantee against competition by other sugar millers. He states that licences are issued annually, and that the order of certiorari may not be available with respect to such licences. He argues that the petitioner had not demanded information, and so Article 35 of *the Constitution* was not relevant; and that the 1st respondent had not deprived the petitioner of property or interfered with its sugar mill or contracted farmers, and so Article 40 of *the Constitution* was not relevant. He avers that the petitioner had no automatic right to cane grown by farmers, unless it had a contract with them. He states that the registration of the 2nd respondent as a sugar miller and its licensing was not legally detrimental to the petitioner, and the 1st respondent had no obligation of maintaining a position of preference for the petitioner or any other sugar miller. He also addresses himself to the claim for compensation, and argues that the same had not been properly articulated, and was not tenable for the petitioner did not hold a licence. The decision in *Republic vs. Agriculture Fisheries and Food Authority Act & 3 others ex parte West Kenya Sugar Company Limited* [2015] eKLR (Odunga, J) is cited.

6. The application, dated 27th March 2017, has never been disposed of, and interim orders, founded on it, have never been granted. It was initially placed before Mwita J, at Nairobi, who ordered transfer of the matter to Busia, without grant of further orders. It was placed before Kiarie J, on 29th May 2017, at Busia, who directed its service. It was mentioned before Kaniaru J, on 25th September 2017, who directed that it be mentioned on 25th October 2017. It is not clear what transpired on 25th October 2017, but the application, dated 27th March 2017, was allocated a date, on 7th November 2017, at the registry, for hearing on 9th May 2018. Before getting to 9th May 2018, the matter was allocated another



date, at the registry, on 7th December 2017, for mention on 30th January 2018. On 30th January 2018, it was allocated another date, again at the registry, for mention on 28th February 2018. On 28th February 2018, Kiarie J was informed that the parties were negotiating, and the matter was fixed for mention on 7th May 2018. Come 7th May 2018, it transpired that the parties were unable to agree, and petitioner espoused an intent to amend the petition, and an order was made for the filing of a formal application for amendment. On 13th June 2018, the registry fixed the matter for hearing on 6th November 2018. 13th June 2018 marks the last date when the issue of the application, dated 27th March 2017, came up, and it did not come up again, until Karanjah J mentioned its pendency in the rulings delivered on 18th May 2021 and 18th May 2022.

7. A new application came on board, dated 24th September 2018. It was first placed before Kiarie J on 1st October 2018, was certified urgent, and allocated a date for hearing on 6th November 2018. It was the application for amendment of the petition. It did not proceed on 6th November 2018, for the court was not sitting and it was allocated the 14th May 2019, for hearing. It was placed before Kiarie J on 14th May 2019, and the 2nd respondent sought to respond to it. Hearing was fixed for 7th October 2019. The hearing scheduled for 7th October 2019 did not happen, for a bill of costs had been filed on 10th July 2019, dated 6th March 2019, triggered by the removal of the 1st respondent from the proceedings on 11th December 2018, and there were proceedings relating to it, conducted before Hon. PY Kulecho, Deputy Registrar, on 17th May 2019, 10th July 2019, 26th July 2019, 21st August 2019, 27th September 2019, 9th October 2019, 20th November 2019, 4th December 2019 and 29th January 2020, effectively displacing attention to the application, dated 24th September 2018. The matter of the application, dated 24th September 2018, went quiet until 25th November 2020, when the petitioner sought orders on it as it was not opposed, then again asked for a mention date for a petition, dated 24th September 2018. The court did not deal with the application, dated 24th September 2018, instead it directed that some of the prayers, presumably in the petition, required formal proof, and allocated 8th February 2021, as the date for formal proof, presumably of the petition. The formal proof did not happen, as an application, dated 20th January 2021, had been lodged, seeking the setting aside of the order for formal proof. It was directed that that application be heard first, before the formal proof, which was held in abeyance. A ruling on the application, dated 20th January 2021, was delivered on 18th May 2021, which indicated that the application, dated 24th September 2018, was still pending, together with that dated 27th March 2017, and a preliminary objection, dated 19th March 2020. It was directed that the matter would be mentioned on 14th July 2021, for the way forward. On 14th July 2021, it was directed that the preliminary objection, dated 19th November 2020, would be disposed of first, by way of written submissions. A ruling on the preliminary objection was delivered on 18th May 2022, overruling and dismissing it. It had raised issues that the petition was res judicata another that was pending at Bungoma, that determination of the Bungoma suit had vitiated the petition, and the court would be sitting on appeal on the Bungoma matter, and it was determined that the petition herein and the Bungoma cause were unrelated, and the issue of res judicata could not arise.
8. The matter was fixed for mention on 30th June 2022, for directions on the 2 pending applications, dated 27th March 2017 and 24th September 2018. There was no mention of the matter on 30th June 2022. It came up next on 21st February 2023, before the Deputy Registrar, who allocated a hearing date for 20th April 2023. The issue of the application, dated 24th September 2018, went quiet until 20th September 2023, when the matter came up for hearing, and the 2nd respondent raised it, saying it had not been canvassed, and asking to file applications to strike out the petition. The petitioner conceded that the application, dated 24th September 2018, was still outstanding, together with others dated 27th March 2017 and 18th May 2023. It was pleaded that the court should go back to the directions of



7th May 2018, when leave was granted for filing of a formal application to amend the petition, and of 18th May 2022, when the court was to give directions on the disposal of the pending applications, including that dated 24th September 2018. In the end, an amended petition that the petitioner had filed, dated 26th September 2018, was withdrawn, and the 2nd respondent was granted time to respond to the application, dated 24th September 2018. While the said application was pending directions on 19th October 2023, the 2nd respondent filed a Motion on 12th October 2023, dated 9th October 2023, and I fixed it for mention on 19th October 2023, together with the application, dated 24th September 2018. The petitioner protested that there was an order, of 28th September 2018, against the filing of more applications. Directions were given, on 19th October 2023, for canvassing of both applications by written submissions.

9. I have given the detailed background of the matter so far, as a way of highlighting how we have gotten to where we are, in view of the counter-accusations on who is to blame for delaying finalisation of the matter.
10. What I am called upon to determine now is the applications, dated 24th September 2018 and 9th October 2023, going by the directions of 19th October 2023.
11. The application, dated 24th September 2018, seeks 3 principal orders, leave to enjoin the National Environment Management Authority as a 3rd respondent, leave to amend the petition, dated 27th March 2018, and the deeming of an amended petition filed together with the Motion as properly filed. The grounds on the face of the Motion are that there were suits elsewhere between the petitioner, the 2 respondents and the intended 3rd respondent, in which the intended 3rd respondent had allegedly failed to defend the licences issued to the petitioner. It is averred that the intended 3rd respondent had issued an EIA licence to the applicant, which led to the setting of the mill, the subject of the petition herein, and that the failure by the intended 3rd respondent to take a proper stance in the pending suits was to the detriment of the petitioner. It is averred that the amendment of the petition would enable the petitioner ventilate its grievances properly. It is averred that no prejudice would be suffered by the other parties.
12. The affidavit in support is sworn by Mohamed Omar Bajaber. He avers that in the petition, the petitioner seeks compensation of Kshs. 6,000,000,000.00, among other orders. He avers that an audit of the losses and anticipated losses, flowing from the acts of the 2 respondents and the intended 3rd respondent, had been audited, and need had arisen to amend the petition to reflect those figures. He further states that there was need to have the 3rd respondent admitted as such, as there was a claim against it similar to that against the other respondents. He avers that the 2nd respondent has filed numerous suits against the petitioner, and which also involved the 1st respondent and the intended 3rd respondent. He accuses the intended 3rd respondent of not defending, in one of those suits, a licence that it had issued in favour of the petitioner. It is averred that the setting up of the mill was on the strength of a licence that the 3rd respondent had issued to the petitioner, the failure by the 3rd respondent to take a proper stance in those suits was exposing the petitioner to grave loss. No documents are attached or annexed to the said affidavit.
13. There is a response to that application, by the 1st respondent, by way of grounds of opposition, dated 23rd October 2018. The application is said to be bad in law, the court lacked jurisdiction to hear and determine it, it had not been demonstrated that the proposed amendments were not within the knowledge of the petitioner at the time of filing suit, it a diversionary and a red herring, it was introducing a new cause of action, it would modify the cause beyond a constitutional petition, and the petitioner was guilty of laches.



14. The 2nd respondents reply to the application, dated 24th September 2018, was vide an affidavit sworn on 9th October 2023, by Jaswant Singh Rai. It is averred that the petitioner had withdrawn the petition against the 1st respondent, allegedly after the petitioner was granted a licence by the 1st respondent, in consideration for withdrawing the suits. It is averred that the application was defective for not annexing the draft amended petition. It is further averred that the proposed amendment of the petition and the joinder of the proposed 3rd respondent would change the content and substratum of the petition, for the instant petition is founded on the administrative action of the 1st respondent, under the Crops Act, while the allegations against the 3rd respondent, the basis for the proposed amendment and joinder, relate to the EIA licence that had been issued to the petitioner by the proposed 3rd respondent, and cancelled by the Environment and Land Court in the Bungoma case. It is argued that the application lacked merit. Thirdly, that, although a remedy is available for a constitutional tort, in the form of award of compensation in damages, that can only be granted against a public entity, otherwise the private entity can only pursue damages in an ordinary civil action, which is best tailored for litigation of that kind.
15. The application dated, 9th October 2023, seeks 1 principal order, the striking out of the petition. There are 14 grounds listed on the face of the petition. They could be collapsed into 5. The first point revolves around the withdrawal of the petition against the 1st respondent. It is averred that that action fatally wounded the petition, to the extent that the constitutional judicial review orders sought in the petition are directed at decisions of the 1st respondent, and so is the constitutional tort, and the same would not be available absent a private entity, such as the 2nd respondent, in the absence of the 1st respondent. It is averred that the petition is largely against the 1st respondent, and the withdrawal of the case against it meant that there was no case against the 2nd respondent, for a constitutional remedy is not available against a private entity. Secondly, it is argued that a constitutional petition should invite a court to interpret the Constitution, and not statute, and that the instant petition raised no constitutional issue that required interpretation of the Constitution, it rather raised issues for interpretation of the Crops Act and the judgement of the court in Busia HC Petition No. 2 of 2016. Thirdly, the application for amendment of the petition and joinder of the proposed 3rd respondent is intended to fill in the void left by the withdrawal of the case against the 1st respondent, yet that joinder would completely change the substratum of the current cause, by changing it from a claim under the Crops Act to a claim under Environment Management and Co-ordination Act, No. 8 of 1999. The Environment Management and Co-ordination Act and the 3rd respondent are all about the environment, the proposed joinder would push the petition out of the jurisdiction of the High Court. Fourthly, the issues raised in the instant petition are res judicata those raised in Busia HC Petition No. 2 of 2016, and which were determined by the court, in that cause on 2nd February 2017. Finally, the instant petition is said to be sub judice Nairobi HC Constitutional Petition No. 264 of 2019.
16. The substance of the affidavit in support, sworn by Jaswant Singh Rai, on 9th October 2023, is a replica of the grounds on the face of the Motion, and it largely regurgitates the material in those grounds. A number of documents are annexed to the said affidavit, as proof of the allegations made in the application and the affidavit. There is the notice of the withdrawal of the case against the 1st respondent, dated 3rd December 2018, and filed herein on 7th December 2018; a replying affidavit, sworn by Alfred Busolo Tabu, on 14th July 2017, in Busia ELC Petition No. 3 of 2017; an order of the Court of Appeal, of 27th March 2017, in Kisumu Civil Application No. 20 of 2017, withdrawing an application; a copy of the judgement of 2nd February 2017, in Busia HC Petition No. 2 of 2016; a copy of the petition filed in Nairobi HC Constitutional Petition No. 264 of 2019; there is a copy of the replying affidavit filed herein, sworn on 9th October 2023; a copy of the application, dated 7th February 2017, by the



- 2nd respondent, to the 1st respondent, in purported compliance with the judgement of 2nd February 2017, in Busia HC Petition No. 2 of 2016, a copy of the certificate, dated 20th July 2012, issued to the 2nd respondent, that was to be amended pursuant to the order of Busia HC Petition No. 2 of 2016, copies of EIA licenses issued by the proposed 3rd respondent, issued on 14th September 2015 and 1st September 2016, to the 2nd respondent; a certificate of registration of a workplace, undated, issued to the 2nd respondent; authorisation by the Water Resources Management Authority, dated 10th March 2015, issued to the 2nd respondent; the judgement in Bungoma ELC Petition No. 8 of 2016, involving the petitioner, the 2nd respondent and the proposed 3rd respondent, delivered on 10th March 2017.
17. The reply to the Motion, dated 9th October 2023, is vide an affidavit that Hussein Ali Ahmed Taib swore on 18th October 2023. He cites the order of Karanjah J, of 28th September 2021, to state that the 2nd respondent has filed an application, despite an express order barring the filing of further applications, and as it was filed just 6 days prior to the date fixed for directions on the disposal of the application, dated 24th September 2018, to argue that the 2nd respondent was keen on frustrating the petitioner. He avers that the application is part of the scheme to delay the matter. He avers that the withdrawal of the case against the 1st respondent was done long after the application to join the proposed 3rd respondent had been mooted, for the withdrawal was done on 11th December 2018, after the application for joinder had been filed on 26th September 2018. He avers that *the Constitution* of Kenya provides for both vertical and horizontal rights, protects individuals against both the State and the citizens, and that the claim by the petitioner should be seen in that context. He avers that the 2nd respondent has argued that the petition herein is similar to that in Busia HC Petition No. 2 of 2016 and Nairobi HC Constitutional Petition No. 264 of 2019, yet all the prayers in the said applications in the 2 petitions were not allowed. He avers that a judgement was entered against the 2nd respondent on 25th August 2020, and the matter was then listed for formal proof on 8th February 2021, forcing the 2nd respondent to set aside the judgement, as well as filing a preliminary objection against the continuation of the suit, and leave had to be granted to him to file response out of time, but the preliminary objection was dismissed. He asserts that the instant petition is not sub judice Nairobi HC Constitutional Petition No. 264 of 2019, for the latter was filed after the former, and both are yet to be determined. On the claim for compensation by way of damages, he avers that a constitutional petition can be determined by either reliance purely on affidavits and written submissions, and also on viva voce evidence where necessary, and that the petitioner intended to adduce dock evidence. He avers that most of the issues raised in the application were similar to those raised in the preliminary objection, which was dismissed. He argues that every time a new Judge takes over the matter, the 2nd respondent files an application. He avers that the deponent of some of the affidavits by the 1st respondent, Alfred Busolo Tabu, was partisan, in favour of the 2nd respondent, and whatever is deposed in his affidavits should be taken with a pinch of salt. He avers that the instant petition is not a re-litigation of Bungoma Petition No. 6 of 2016, for an appeal against the decision in that cause was withdrawn. He cites a case determined against the 2nd respondent, where it was litigating with Butali Sugar Mills Limited, where the court admonished the 2nd respondent for delaying tactics. He reiterates that the application dated 11th October 2023, is a replica of that dated 21st January 2021, and it should meet a similar fate.
18. Several documents are attached to the affidavit of 18th October 2023. There is a copy of the Motion, dated 24th September 2018; a copy of the preliminary objection filed herein by the 2nd respondent, dated 18th November 2020; a copy of the Motion, dated 20th January 2021; a copy of notice of withdrawal of appeal, dated 3rd December 2018, in Kisumu CA No. 35 of 2017; and a copy of the judgement in Nairobi HC Commercial CC No. 168 of 2007.



19. As indicated above, directions were given for disposal of the 2 applications by way of written submissions. I will discuss the written submissions filed in the 2 applications separately, starting with that dated 24th September 2018.
20. On the application, dated 24th September 2018, the submissions by the petitioner, who is the applicant in that application, are dated 20th November 2023. By way of background, the petitioner submits that the instant petition was premised on violation of its constitutional rights, more specifically the breach of its legitimate expectations. It is submitted that despite pendency of the suit, the respondent's continued the violations : with the 2nd respondent illegally applying for a license for a sugar mill at Olepito without complying with the law and the judgement delivered on 2nd February 2018 in Busia HC Petition No. 2 of 2016; challenging in court the issuance of licence to the petitioner, leading to cancelation of the licence; frustrating the petitioner through court cases with a view of denying the petitioner its right to economic prosperity; and illegal construction and operation of a sugar mill at Olepito. The proposed 3rd respondent is accused of having similarly violated the legitimate expectations of the petitioner by causing, in Bungoma Petition No. 6 of 2018 and Nairobi Petition No. 153 of 2018, to have its EIA licence cancelled. It is submitted that the application intends to have the proposed 3rd respondent brought into the suit, and to have the losses, which have piled up, properly quantified.
21. On the matter of joinder of the proposed 3rd respondent , the petitioner cites Order 1 rule 10(2) of the Civil Procedure Rules, and the decisions in Florence Nafula Ayodi & 5 others vs. Jonathan Ayodi Ligure vs. John Tabalya Mukite & another, Benson Girenge Kidiavai & 67 others [2021] eKLR (Nyagaka, J) and Carol Construction Engineers Limited & another vs. National Bank of Kenya [2020] eKLR (J. Ngugi, J), to submit around addition of parties, estoppel and a necessary party. It is submitted that once the proposed 3rd respondent issued an EIA licence, it incurred a duty to defend the issuance of that licence, by taking a proper stance at the challenge of such licence, and that the failure to do so went against the legitimate expectations of the petitioner from the proposed 3rd respondent. It is submitted that the issuance of the licence amounted to a promise, that was to be relied upon, and acted upon, and the proposed 3rd respondent could not legitimately act against its "own issued licence," by failing to take a stance to defend the licence, to the detriment of the petitioner. It is submitted that that made the proposed 3rd respondent a necessary party, who ought to be joined to these proceedings. It is further submitted that the proposed 3rd respondent had been party to numerous cases, where the petitioner and the 2nd respondent were parties. Some of the cases named being Bungoma ELC Petition No. 6 of 2016, Kisumu JR of 2018 and Petition 153 of 2018.
22. On amendment of the petition, the petitioner submits that when the petition was initially filed, in 2017, compensation had been calculated at Kshs. 6,000,000,000.00 as against the 1 and 2nd respondents. It is submitted that later on an audit was done, and it was established that the total loss, from the combined breaches and violations of the 1st and 2nd respondents, and the proposed 3rd respondent, was in excess of Kshs. 10,000,000,000.00, with further monthly losses in excess of Kshs. 113,000,000.00. It is these new figures that necessitated the proposed amendment of the petition. On the law on amendment of pleadings, the petitioner cites Eastern Bakeries vs. Castelino [1958] EA 461 (Sir Kenneth O'Connor P, Gould JA & Sir Owen Corrie Ag JA), Lewar Ventures Limited vs. Equity Bank (Kenya) Limited [2022] eKLR (Wendoh, J), Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Limited [2013] eKLR (Visram, Ouko & Sichale, JJA) and Caltex Oil (Kenya) Limited vs. Rono Limited [2016] eKLR (Koome, Warsame & Sichale, JJA), to make the point that amendment of pleadings could be done freely before hearing, to bring out the true facts, by tabulating the loss and special damages incurred.



23. The 2nd respondent, on its part, with respect to the application, dated 24th September 2018, filed its written submissions on 16th November 2023, dated 10th November 2023. By way of background, the 2nd respondent wonders whether the institution and successful prosecution of a suit gives rise to a cause of action to the unsuccessful party against the successful party. The 2nd respondent treats the entire application as one for amendment of pleadings, without focusing on the 2 prayers. It submits from 2 broad standpoints, that the proposed amendment was nondescript, and that it would, if allowed, substantially change the character of the action and the substratum of the petition.
24. On the first limb, the proposed amendment being nondescript, it is argued that a proposed or draft amended petition was not attached to the application, making it impossible to determine the purport, nature and extent of the proposed changes. It is submitted that that omission would be fatal, for denying the other side a chance to adequately respond to the proposed changes, and to challenge the proposed changes. It is submitted that *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, do not carry elaborate rules on amendment of pleadings filed under those Rules, and, therefore, recourse must be had to the Civil Procedure Rules. *Garley Enterprises Ltd vs. Agricultural Finance Corporation & another* [2018] eKLR (Nzioka, J) is cited, to support the argument that the failure to attach a draft of the proposed amendments, and thereby not intimating to the court and the parties the nature of the changes sought, was fatal.
25. Regarding the second limb, of the proposed amendment substantially changing the character of the action and the substratum of the petition, the 2nd respondent cites *Qabale Diba Badake & 2 others vs. Public Service Board Marsabit County & 3 others, National Gender and Equality Commission (Interested Party)* [2019] eKLR (wa Makau, J) and *Anders Bruel T/A Queenscross Aviation vs. Nyambura Musyimi & 2 others* [2017] eKLR (Nambuye, Kiage & Sichale, JJA), where points were made about amendments being allowed where they introduce a new case or a new ground of defence, but not where the amendments would whittle a defence, or change the action into one that is substantially different in character, and which should found basis for a fresh cause. It is submitted that the amendment is sought to bring in a proposed respondent, to have it held liable for failing to defend in court the EIA licence that it had issued to the petitioner, to its detriment, on the basis that that amounted to supporting the cases by the 2nd respondent in the courts, and led to a breach of the legitimate expectation of the petitioner. It is submitted that the petitioner is pleading that the proposed 3rd respondent owed it a duty of care to defend it in court regarding the EIA licence, and it is submitted that the petitioner is trying to give that alleged duty of care a constitutional colour, by citing legitimate expectation. It is submitted that the petitioner could not have expected the 2nd respondent to defend the issuance of that licence to the petitioner, and so no legitimate expectation arose as between the petitioner and the 2nd respondent, and no cause of action could arise as against the 2nd respondent with respect to that EIA licence.
26. It is submitted that the initial petition was based on an administrative action of the 1st respondent founded on the *Crops Act*, while the issue relating to the EIA licence is about the said licence being cancelled on the basis of a court order made by the Environment and Land Court at Bungoma. It is submitted that the substratum of the petition, as currently framed, is on how the 2nd respondent was registered by the 1st respondent to put up a sugar mill at Olepito, while the new issue, sought to be introduced through the proposed amendment, is about an EIA licence, in respect of which the High Court has no jurisdiction, and the amendment would have the effect of taking the matter out of the jurisdiction of the High Court. It is submitted that the proposed 3rd respondent has no obligation, or owes no duty to the petitioner to defend its interests, in an action in court, where it is proved that a licence was obtained irregularly, and whether the proposed 3rd respondent failed to defend the licence



it had issued to the petitioner, or whether that licence had been obtained properly to give rise to a duty of care, then only the Environment and Land Court could deal with those issues, and not the High Court. It is submitted that those issues were before the competent court at Bungoma, the parties were heard, the issues interrogated, and a determination was made, which upheld the position of the 2nd respondent and the proposed 3rd respondent. It is asserted that issues around the AIE licence are of an environmental nature, and Article 162(2) and 165(5) of *the Constitution* exclude the High Court from determining causes around them. It is submitted that the proposed amendment and joinder would bring in a new cause of action, in respect of which this court has no jurisdiction.

27. *Anders Bruel T/A Queenscross Aviation vs. Nyambura Musyimi & 2 others* [2017] eKLR (Nambuye, Kiage & Sichale, JJA) is cited, for the submissions that the amendment would raise issues that are res judicata. It is argued that the amendment would re-open issues that have been litigated on, determined and settled, including the suits mentioned by the petitioner, being Bungoma ELC Petition No. 6 of 2016, Kisumu JR of 2018 and Petition 153 of 2018. It is submitted that in Bungoma ELC Petition No. 6 of 2016 turned on the propriety of an EIA licence, the licence was contested on grounds of non-compliance with the Environment Management and Co-ordination Act and the *Crops Act*, the petitioner would seek to reopen the matter, yet it has withdrawn the case against the 1st respondent, who would have answered any issues relating to the aspect of compliance with the *Crops Act*. It is submitted that re-opening the issue of the EIA licence would amount to this court sitting on appeal, on the decision of a court of concurrent jurisdiction, in Bungoma ELC Petition No. 6 of 2016.
28. The other submission is that the claim against the proposed 3rd respondent is founded on a breach of an alleged duty of care, owed to the petitioner by that proposed party, which would make it a tort, and the right remedies and reliefs lie in an ordinary civil suit, and not a constitutional cause. *Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority & another* [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA), where it was pointed out that where other avenues for redress existed, the affected party ought to seek redress under those mechanisms, instead of trivializing constitutional litigation. Remarks were made about the principle of avoidance or constitutional avoidance, to effect that where it is possible to decide any case, without reaching a constitutional issue, then that ought to be the course to be followed. It is further submitted that the petitioner is seeking to circumvent the limitations relating to tortious claims, which would disadvantage the 2nd respondent, who is entitled to the defence of limitation of actions.
29. With regard to the application, dated 9th October 2023, the written submissions filed by the 2nd respondent, the applicant in that application, on 17th November 2023, dated 14th November 2023, start by giving a background that both the petitioner and the 2nd respondent had been registered in 2012, by the 1st respondent, to set up sugar mills within Busia County. Then the petitioner initiated the suit in Busia HC Petition No. 2 of 2016, to block the operations of the 2nd respondent at Olepito, and to be paid damages, as a measure of getting to start crushing cane ahead of the 2nd respondent. It is submitted that the petition in Busia HC Petition No. 2 of 2016 was dismissed on 2nd February 2017. It is submitted that the petitioner sought to forum-shop, by filing the instant petition at Nairobi, but the same was then transferred back to Busia. The written submissions are centred around 6 issues: that most allegations are made against and reliefs sought against the 1st respondent, who is no longer a party in the matter; that the petition raises no constitutional issue, instead it is about statutory interpretation and actions in civil suits; the petition is based on a constitutional tort, and seeks judicial review orders that can only be pursued against State agencies; that the amendments proposed to the petition seek institution of a new action and a new cause of action; that the petition is res judicata Busia HC Petition No. 2 of 2016; that the court was functus officio on account of Busia HC Petition No. 2 of 2016 and



the petitioner could only seek to execute or enforce the judgement of the court in that case; and that the petition was sub judice Nairobi Petition No. 264 of 2019.

30. On the first issue, that the case against the principal respondent was withdrawn, it is submitted that happened on 11th December 2018, and that all the claims in the petition are against the said 1st respondent, save for that for compensation, and that meant that the withdrawal of the case against the 1st respondent vitiated the petition entirely. It is submitted that it was a principle of law that a party could not be condemned unheard, and that no constitutional remedy lies against a private entity like the 2nd respondent. *David Oloo Onyango vs. Attorney-General* [1987] eKLR (Nyarangi, Platt & Gachuhi, JJA), *Kiai Mbaki & 2 others vs. Gichuhi Macharia & another* [2005] eKLR (Tunoi, O’Kubasu & Waki, JJA) and *Mutula Kilonzo Junior vs. The Independent Electoral and Boundaries Commission & 2 Others Nairobi Election Petition Appeal No. E002 of 2022* (Omondi, Laibuta & Ali-Aroni, JJA) are cited on the right to be heard, and on the point that a decision reached without affording affected parties audience would be inchoate and unfair, and it would amount to no decision. It is submitted that the instant petition lacks a foundational basis, as the principal party is no longer a party in the cause. It is submitted that the withdrawal of the case against the 1st respondent cleared it of any wrongdoing, with respect to execution of the orders in the judgement of 2nd February 2017, in *Busia HC Petition No. 2 of 2016*, and that meant that no liability could attach on the 2nd respondent. Rule 15 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is cited, to support the submission that there are 2 categories of respondents, one compulsory, being either the Attorney-General or the relevant State organ, and the other being any other person affected or interested. It is submitted that the 1st respondent was the State organ envisaged, and which had the obligations under Article 21 of *the Constitution*, and which, therefore, fell under the first category, while the 2nd respondent fell in the second category and was not under such obligations. It is submitted that without the 1st respondent, no constitutional obligation could be placed on the 2nd respondent. *Mwangi & another vs. Naivasha County Hotel t/a Sawela Lodges* [2022] KEHC 10975 (KLR)(GWN Macharia, J) is cited to buttress that point.
31. *Anarita Karimi Njeru vs. R* [1979] eKLR (Trevelyan & Hancox, JJ) and *Mumo Matemba vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR (Kihara Kariuki P, Ouko, Kiage, Kairu & Murgor, JJA) are cited with respect to the issues raised in the second band, that the petition does not raise any constitutional issues, and instead it addresses issues around interpretation and actions in civil suits. It is submitted that the principle in those 2 decisions is that the petition should set out with precision on exactly what the petitioner is complaining about, the provisions of *the Constitution* which it alleges have been infringed, and the manner in which it alleges that they have been infringed. It is submitted that the petition does not raise any constitutional issues, and what is raised is about legislation, to wit, the *Crops Act*, and implementation of the judgement of 2nd February 2017 in *Busia HC Petition No. 2 of 2016*, with regard to the manner in which the 1st respondent licensed the sugar mill at Olepito belonging to the 2nd respondent. It is further submitted that the proposed amendments to the petition seeks a remedy in tort, arising from a perceived duty of care by the proposed 3rd respondent, and a breach of an alleged duty of care is relieved through an ordinary civil suit, and not by constitutional action. *Mwangi & another vs. Naivasha County Hotel t/a Sawela Lodges* [2022] KEHC 10975 (KLR)(GWN Macharia, J) is cited to support that contention. It is submitted that the petition is about a dispute between 2 sugar companies, who are the only parties in it, after the withdrawal of the 1st respondent, and the only viable claim is for compensation, in tort, whose recourse is in an ordinary suit. *Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority & another* [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA) and *Kibos Distillers Limited & 4 others vs. Benson Ambuti & 3 others* [2020] eKLR (Asike-Makhandia, Kiage & Odek, JJA) are cited, for the point that where other



avenues for redress exist, constitutional litigation ought not be trivialised, and reliefs ought to be sought through those other avenues. Put differently, where alternative remedies through statute exist, then such statutory remedy should be pursued first, before recourse to constitutional action. It is submitted that the remedy of damages against the 2nd respondent can only be sought through civil action, upon the mounting of a full trial. *R. vs. Nairobi City Council & another ex parte Premier Food Industries Limited* [2016] eKLR (Odunga, J) is referred to, for the point that there would be stricter application of rules of procedure in a civil action, compared with a petition, where affidavit evidence is the usual mode of disposing of the matter.

32. The third issue is about the petition being based on a constitutional tort, and seeking judicial review orders, that could only be pursued against a State organ or entity. It is submitted that despite there being no State organ or entity sued as a respondent, the petitioner was pushing to proceed with the hearing of the matter against the private entity, the 2nd respondent, whereas the judicial review orders sought are only available against State entities, and therefore, the petition is untenable, in the absence of the 1st respondent. It is submitted that the remedy of constitutional tort is only available against a State entity, and since there is none in this cause, the claim based on the constitutional tort, worth Kshs. 6,000,000,000.00, is not sustainable against a private entity, the 2nd respondent herein. *Mwangi & another vs. Naivasha County Hotel t/a Sawela Lodges* [2022] KEHC 10975 (KLR)(GWN Macharia, J) and *Republic vs. The District Land Adjudication and Settlement Officer Maara Sub-County & 3 others Ex parte Applicant M’Nyiri Ragwa Njeru Kiririka (Interested Party)*[2021] eKLR (Yano, J) are cited in support of that contention, that an order of judicial review is only made against a public officer or authority, and not a private individual. Article 47(1) of *the Constitution* and *Judicial Service Commission vs. Mbalu Mutava & another* [2015] eKLR (Githinji, Nambuye, Karanja, Mwera & Ouko, JJA) are referred to, with respect to supervision of administrative action by the court being the basis for the making of judicial review orders against administrative action, under a constitutional petition, and such action is only available against administrative action, and not action by private individuals, for whom recourse lies in a normal civil cause. It is submitted, citing *John Atelu Omilia & another vs. Attorney-General & 4 others* [2017] eKLR (Mrima, J), that constitutional torts, such as the one under which the petition seeks compensation, can only be maintained against the government or a State agent, but not against a private person.
33. The fourth issue relates to the proposed amendment of the petition, to bring in the 3rd proposed respondent, and it is submitted that that amendment would introduce completely new issues to the petition, relating to the revocation of the EIA licence by the Environment and Land Court in Bungoma, previously issued to the petitioner. It is submitted that such action would change the substratum of the petition, from a claim under the *Crops Act*, to a claim under the Environment Management and Coordination Act, from a dispute about licensing under the *Crops Act*, to a licensing issue under Environment Management and Coordination Act, in respect of which the High Court has no jurisdiction. It is submitted that issues around the EIA licence are environmental in nature, and, by dint of Articles 162(2)(b) and 165(5) of *the Constitution*, the High Court is bereft of jurisdiction.
34. The petition is said to be res judicata Busia HC Petition No. 2 of 2016. It is submitted that the petition is solely and largely founded on Busia HC Petition No. 2 of 2016, and therefore, all the issues raised in the petition are res judicata, they cannot be re-litigated between the same parties, and this court would lack jurisdiction to entertain them. It is highlighted that the judgement in Busia HC Petition No. 2 of 2016 found that the mill at Olepito had not been registered by the 1st respondent, but the court held that the issue was not so much registration, but change of site, which could be remedied by an application for amendment of the existing certificate of registration, to refer to Olepito. On the transfer of the registration from Matayos to Olepito, the court stated that it was a case of amendment of the certificate of registration, and not a transfer. The court had found that there was no violation



of Article 40 of *the Constitution*, on the right to property, as the petitioner had not proved that the failure to have the Olepito mill registered by the predecessor of the 1st respondent violated the property rights of the petitioner. On the right to information, it was found that there was no violation, for the petitioner had not demonstrated that it had sought information from the 1st respondent, which had been rejected by the 1st respondent. On the Kshs. 6,000,000,000.00 claim for compensation, it was ruled that the same had not been proved against the respondents, the claim was not specifically pleaded, and the claim was speculative. It is submitted that the judgement of 2nd February 2017 was never appealed against, and it is, therefore, subsisting and binding. *Musankishny Kalala Paulin vs. Director of Criminal Investigations & 4 others* [2022] eKLR (Mrima, J) is cited, to set out the principles relating to *res judicata*. *John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & others* [2021] KESC 39 (KLR)(Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SSJJ) is not mentioned in the submissions, but it is in the list of cases, and it turns of *res judicata*.

35. On the court being *functus officio* with relation to Busia HC Petition No. 2 of 2016, it is submitted that the issues raised in the instant petition, having been raised in Busia HC Petition No. 2 of 2016, and other suits, and determined by courts of concurrent jurisdiction, this court has become *functus officio*, and it would be sitting as an appellate court over these same issues, if it ventures to determine the instant petition. It is submitted that the petition was seeking to re-open issues that had already been determined by the same court. *Menginya Salim Murgani vs. Kenya Revenue Authority* [2014] eKLR (Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) and *Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani vs. Kenya Power & Lighting Company Ltd* [2018] eKLR (Koome, Sichale & J. Mohammed JJA) are referred to, on the principle of *functus officio*. It is submitted that the remedies available for non-compliance with the judgement of 2nd February 2017 in Busia HC Petition No. 2 of 2016 lay with contempt proceedings, within the said cause, Busia HC Petition No. 2 of 2016, and not through a constitutional petition.
36. The last issue is about the petition being *sub judice* Nairobi Petition 264 of 2019, where the petitioner and the 2nd respondent are parties, and where violations of Articles 40 and 47 of *the Constitution* are alleged, and where it is alleged that the 2nd respondent has habitually abused the court process by filing multiple suits, with an intent to frustrate the operations of the petitioner. *Kenya National Commission on Human Rights vs. Attorney General Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ) is cited on the principle of *sub judice*.
37. The petitioner's written submissions on the application, dated 9th October 2023, are dated 20th November 2023, and were filed herein on 21st November 2023. The petitioner addresses several themes, being: the application, dated 9th October 2023, was filed in contravention of existing court orders; the said application replicates previous similar filings by the 2nd respondent; the 2nd respondent has a habit of filing multiple suits and applications against its competitors; there has been inordinate delay in the prosecution and determination of the matter; and disputes having to be determined on merits. On the first issue, of the application being filed contrary to existing orders, the petitioner is pointing at 2 incidences. The first is an order that Karanjah J had allegedly made previously, barring the filing of further applications. The second relates to the application being filed after the court had given directions for filing of a response by the 2nd respondent, within 14 days, to the application by the petitioner, dated 24th September 2018. It is argued that the 2nd respondent did not file its reply to the application, dated 24th September 2018, within the timelines given by the court, and on top of that it came up with its application, dated 9th October 2023.



38. On the second issue, the said application being a replica of previous applications, it is submitted that the issues raised in it had been raised in previous filings. The preliminary objection, dated 19th November 2020, is cited as an example, on the issues raised on res judicata, and the effect of the determination in Bungoma ELC Constitutional Petition No. 6 of 2016 on the instant petition. The application, dated 21st January 2021, is also cited, as raising issues similar to those raised in the instant application. A recent decision of the High Court, in respect of a dispute between the 2nd respondent and another business rival, is cited to illustrate the manner in which the 2nd respondent has been using the court process to frustrate business rivals. The third issue is about inordinate delay in the finalisation of the matter, despite the matter coming up in court every now and then. Article 48 of *the Constitution*, section 1A of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and *Teachers Service Commission vs. Simon P. Kamau & 19 others* [2015] eKLR (Rawal DCJ&VP, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ), *Kivanga Estates Limited vs. National Bank of Kenya Limited* [2017] eKLR (Makhandia, Ouko & M’Inoti, JJA), *Abdirahman Abdi vs. Safi Petroleum Products Ltd & 6 others* [2011] eKLR (Omolo, Bosire & Nyamu, JJA) and *Njoroge vs. Kimani* [2022] KECA 1188 (KLR)(Mativo, J), have been cited on matters relating to access to justice, substantive justice, the overriding objective and the inherent powers of the court, to underscore the importance of expeditious disposal of court business. It is submitted that the 2nd respondent has filed multiple applications and other filings in the matter, as a device to delay the finalisation of the matter, and to expose the petitioner to frustration. There is also the decision in *Republic vs. National Government Constituency Development Fund Board & another* [2017] eKLR (Marete, J).
39. I have 2 applications for determination, one filed in 2018 and the other in 2023. One seeks joinder of a party and amendment of pleadings, while the other seeks striking out of the cause. The usual procedure is to determine the applications on a first-in-first out basis, but it is also logical to determine the application for striking out first, for, if granted, it would completely dispose of the matter, and thereby obviating the necessity of determining whether to allow joinder of other parties, or to order amendment of the pleadings. However, allowing amendments and joinder of parties could cure the petition, by strengthening whatever weaknesses it may have, and removing it from the threshold of striking out. As the application, dated 24th September 2018, was filed first, and considering that allowing it could, one way or the other, address the concerns raised in the striking out application, I shall determine that application first.
40. I have recited the purport of that application, dated 24th September 2018, at paragraph 11 hereabove. It seeks 3 principal orders: joinder of the proposed 3rd respondent; amendment of the petition, dated 27th March 2018; and the deeming of an amended petition filed together with the Motion, dated 27th March 2018. I shall address each of the 3 in turn.
41. The prayer for joinder of the proposed 3rd respondent was not neatly done, for it seeks leave to “enjoin” rather than “join” the proposed 3rd respondent. I note that the application, dated 24th September 2018, is premised on Order 8 Rule 3 and Order 51 of the Civil Procedure Rules, and sections 1A, 1B and 3A of the *Civil Procedure Act*. Order 8 rule 3 is about amendment of pleadings. Order 51 is about interlocutory proceedings in general. Sections 1A, 1B and 3A are about substantive justice and the inherent powers of the court. None of these provisions empower the court to “enjoin” parties to a cause. Joinder of parties is provided for in Order 1 of the Civil Procedure Rules, and it provides for parties being “joined” rather than “enjoined.”
42. I am not quite sure why the application was premised on the *Civil Procedure Act* and the Civil Procedure Rules, yet the petition herein was presumably filed under Article 22 of *the Constitution*, alleging contravention of various provisions of *the Constitution*. The proceedings herein, are, therefore,



not civil in nature, to be governed by the Civil Procedure Act and the Civil Procedure Rules, but of a constitutional nature, to be governed by the law and rules of procedure set out in the Constitution and the rules of procedure made under the Constitution, that is to say the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Constitution is above the Civil Procedure Act, and court proceedings under the Constitution are not subordinated to the civil process governed by the Civil Procedure Act, for the Constitution has rules of procedure of its own. Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, there is provision for joinder and addition of parties. The language used in Rule 5, is of “join”, “joinder” and “addition” of parties. Rule 5(d) allows the court to order joinder, or addition, or substitution, of parties, either on application or on own motion. The application, dated 24th September 2018, ought to have been premised or brought under Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and the provisions of the Civil Procedure Act and the Civil Procedure Rules should not have been cited, for they are of no application. Anyhow, that is beside the point. The language of Article 159 of the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is very permissive, and the anchoring of the application, dated 24th September 2018, on the Civil Procedure Act and the Civil Procedure Rules rather than on the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, is neither here nor there, for the court ought to focus on doing substantive justice rather than compliance with the prerequisites of procedure.

43. My concern is with the prayer to “enjoin” instead of “join.” The 2 words do not mean the same thing, and the party who prays that a party be “enjoined” would not be asking the same thing with another who seeks that such a party be “joined.” I have had occasion to address that in *In re Estate of Barasa Kanenje Manyi (Deceased)* [2020] KEHC 1 (KLR)(Musyoka, J). “Join” means the addition of a party to a cause. Enjoin”, in a legal context, means to injunct or restrain a party, and, in ordinary parlance, to urge. The 2 words cannot and should not be used interchangeably, and a prayer that a party be “enjoined” is ideally a plea that such party be restrained or injuncted. As it is, going by the ordinary everyday meaning of “enjoined,” the petitioner is inviting me, through prayer 2 of the Motion, dated 24th September 2018, to grant it leave to restrain or injunct the proposed 3rd respondent, making that prayer wholly meaningless. I am, however, cognisant of the fact that that word, “enjoin,” is currently widely used in legal and judicial circles in Kenya, right up to the Supreme Court, to mean “join” or “add” a party. Its usage, in that sense, is contrary to the legislation that provides for joinder and addition of parties, and the ordinary meaning of it. See Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Order 2 rule 15 of the Civil Procedure Rules. However, given that the Kenyan legal fraternity appears to have assigned that word a new meaning, it would only be fair to presume that the prayer sought in the application, dated 24th September 2018, is for leave to join or add the proposed 3rd respondent as such to these proceedings. I shall entertain the application, that slip notwithstanding.
44. Is there merit for joinder of the proposed 3rd respondent as such? As indicated above, these are constitutional proceedings, governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The question would be what that law provides on joinder of parties. Whether there would be merit in the said prayer will depend on whether it falls within the parameters of the legislation.
45. Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides as follows:



“5.

Addition, joinder, substitution and striking out of parties

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a)	Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
(b)	A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
(c)	Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings,



if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d)

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined,



		<p>or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.</p>
	<p>(e)</p>	<p>Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”</p>

46. The addition or joinder of a respondent to a constitutional cause, under Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, is governed by Rule 5(a), which enables a petitioner, when in doubt as to the persons from who redress is sought, to join 2 or more respondents so that the question as to which of the respondent is liable, and to what extent, may be determined as between all the parties. The petitioner may then apply, under Rule 5(d)(ii), to have any person that it feels ought to have been joined to be joined or added, so that



the court can determine all the issues between all the parties joined. Is that the context within which this application is brought? I do not think so. I have gone through the supporting affidavit, and I have noted that it does not raise the issue that the proposed 3rd respondent is a party who ought to have been joined at inception as a respondent. The issue is that the petitioner had litigated with the proposed 3rd respondent over an EIA licence that it had issued to the petitioner, and in those suits the proposed 3rd respondent, including Bungoma ELC Petition No. 6 of 2016, did not, according to the petitioner, defend the said licences, to the detriment of the petitioner, and the petitioner feels that its constitutional rights were thereby violated, and it would like to bring that issue into this cause, instead of initiating another cause, which, according to it, could lead to multiplicity of suits. The case for the joinder of the proposed 3rd respondent has, therefore, nothing to do with the said party having been left out of the matter, yet he was a necessary party, for the purpose of enabling the court determine all the issues arising in the matter. Rather, it has something to do with there being a separate cause of action against the proposed 3rd respondent, which the petitioner would like to be lumped up with the instant cause, to avoid filing multiple suits. It is in respect of the said new cause of action that the petitioner seeks amendment of the petition, whose effect would be the joinder of the proposed 3rd respondent as a respondent.

47. The joinder sought then has nothing to do with Rule 5(d)(ii) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and whether the said joinder is merited cannot be determined independently of determination of the prayer on the amendment of the petition, for if an order will be made to amend the petition to introduce the new cause of action, it would follow that the proposed 3rd respondent would be brought into the cause as a respondent, to respond to the issues raised in that new cause. The question as to whether the proposed 3rd respondent should be joined or added to the cause as a respondent would abide determination of the prayer on the amendment of the petition to introduce the new cause of action. It would stand or fall dependent on the determination of the matter of the amendment.
48. I am fortified, in coming to the above conclusion, by my perusal of the petition sought to be amended, dated 27th March 2017. The said petition is anchored on the judgement of W. Korir J, of 2nd February 2017, in Busia Petition No. 2 of 2016, specifically relating to the way the 1st and 2nd respondents went about implementing the orders made in that judgement. The case by the petitioner, as presented in the petition, is that the implementation of the judgement in Busia Petition No. 2 of 2016 did not conform with the provisions of the *Crops Act*, and contravened the terms of the judgement itself, and that that implementation resulted in its constitutional rights, as envisaged in Articles 35, 40, 47 and 67 of *the Constitution*, being breached, or contravened or violated. I have scrupulously perused through the petition, dated 29th March 2017, and I have not come across any reference to or mention of an EIA licence, or of the proposed 3rd respondent, or the suit in Bungoma ELC Petition No. 6 of 2016 where the said 3rd respondent featured, and which is the basis for the new cause of action sought to be introduced to the instant cause. I have equally scrupulously perused the affidavit sworn in support of the petition, on 23rd March 2017, and there is nothing in there, which refers to or mentions an EIA licence, the proposed 3rd respondent, or the suit in Bungoma ELC Petition No. 6 of 2016. I have equally perused through the judgement of 2nd February 2017, in Busia Petition No. 2 of 2016, and noted that the proposed 3rd respondent was not a party to that suit, and the decision of the court turned only on issues that concerned the petitioner and the 1st and 2nd respondents, and not the proposed 3rd respondent. The issues that arise in the petition lodged herein, dated 27th March 2017, therefore, do not touch on the proposed 3rd respondent, and would not affect that entity, hence it is not a necessary party that the petitioner should have added to the petition, dated 27th March 2017, to warrant joinder under Rule 5(d)(ii) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms)



Practice and Procedure Rules, 2013, and the cause, as against the 1st and 2nd respondents, can quite comfortably be determined in the absence of the proposed 3rd respondent.

49. That then brings me to the proposed amendments to the petition, dated 27th March 2017. The grounds on the face of the said Motion relate to the EIA licence issued by the proposed 3rd respondent to the petitioner. It is explained in ground G, that upon the issuance of the said EIA licence, the petitioner relied on the said licence to invest heavily in putting up a sugar mill, on the expectation that the proposed 3rd respondent would protect and defend the authenticity of the EIA licence, which it did not, and thereby breached the legitimate expectations of the petitioner. Ground H avers that the legitimate expectation of the petitioner is enshrined in the Constitution, and to avoid multiplicity of suits, it is necessary for the proposed amendment to be allowed, so that it can ventilate its case properly. The affidavit, sworn in support, replicates the averments stated in the grounds on the face of the application. So, the amendment sought by the petitioner, in the said application, is for the purpose of introducing a new cause of action, which is primarily directed at the proposed 3rd respondent. The said affidavit in support has no annexures.
50. Is the amendment on these grounds merited? That should take us back to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, with respect to what it provides on amendment of petitions and other pleadings filed in constitutional causes. The relevant provision is in Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which states that:

"18.	Amendment of pleadings A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court."
------	--------------------------------------------------------------------------------------------------------------------------------------------------

51. That provision is in very simple and permissive terms. It appears to convey the position that the parties to a constitutional cause have a right to seek to amend their pleadings at any stage of the proceedings, the only caveat being that that amendment has to be with the leave of the court. It does not indicate the parameters within which that has to be done, and that would give the court discretion, and would mean that the court would have to revert to caselaw, to be guided by previous court decisions on the subject, made with respect to civil proceedings, where there is ample caselaw.
52. The issue of amendment of pleadings, in a constitutional cause, confronted the court in *Humphrey Nyaga Thomas & 25 others vs. Kenyatta University* [2020] eKLR (Mbaru, J), where *Eastern Bakery vs. Castelino* [1958] EA 461 (Sir Kenneth O'Connor P, Gould JA & Sir Owen Corrie Ag JA) was cited, where it had been stated to effect that amendments to pleadings should be freely allowed, unless they cause injustice to the other side, in a manner which cannot be compensated by way of costs. Regarding Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, it was stated that the court has discretion to allow or reject amendment of pleadings in a constitutional cause, to ensure substantive justice, and meet the ends of justice. Regarding amendments that introduce new causes of action, the court cited *St. Patrick's Hill School Limited vs. Bank of Kenya Limited* [2018] eKLR (Nyakundi, J), where an amendment of a plaint was approved, although it raised a new cause of action, for the new cause of action was not different in character from, or was foreign to, or inconsistent with, the original cause of action, as the 2 causes of action stemmed from the same transaction. The court, in *Joseph Ochieng & 2 others Trading as Aquiline Agencies vs. First National Bank of Chicago* [1995] eKLR (Shah, JA), set out the principles



- upon which leave to amend pleadings may be granted, and they include: the power of the court to allow amendments, being designed to ensure that there is a determination of the true substantive merits of the case; the amendments are sought in a timely manner; the power to amend can be exercised at any stage of the proceedings; the amendments should be sought in good faith and costs could be awarded to compensate the other side; and the amendments should not be used to re-frame the case.
53. In *Tetra Pak Limited vs. Kenya Revenue Authority* [2020] eKLR (W. Korir, J), the court, while discussing Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, noted that the principles that apply to amendment of pleadings in civil cases also apply with respect to constitutional causes. The decision in *Merry Beach Limited vs. Barclays Bank of Kenya Limited & another* [2018] eKLR (W. Korir, J), was cited, where it had been said that an amendment of pleadings ought to be allowed where it would assist the court in determining the real questions in controversy; such amendments ought not introduce new or inconsistent causes of action; and the amendment should not occasion injustice or prejudice to the opposing party, unless the prejudice can be compensated in costs. The amendment sought, in *Tetra Pak Limited vs. Kenya Revenue Authority* [2020] eKLR (W. Korir, J), was for the purpose of introducing a new respondent, and the court accepted the application, on grounds that the same did not introduce a new cause of action, but the proposed respondent was a necessary party, to respond to allegations of fraud made in the response by the other respondent to the petition.
54. The petitioner, herein, in support of its motion for amendment, argues that the case against the 1st and 2nd respondents was similar to that in the proposed amendments, both were founded on the principle of legitimate expectations. It is also argued that the proposed amendments are about computation of the losses, for it adds more details to the compensation claim. The 2nd respondent opposes the proposed amendment, on grounds that it would change the content and substratum of the petition, dated 27th March 2017, which is founded on an administrative action, under the *Crops Act*, while the proposed amendments relate to an EIA licence, that had been issued by the proposed 3rd respondent, but was cancelled by the Environment and Land Court at Bungoma. The other argument is that the proposed changes are in pursuit of compensation against the proposed 3rd respondent, which, the 2nd respondent argues, ought to be sought in an ordinary civil action. In its written submissions, it is argued that there would be change of character of the action and substratum of the petition. It is further argued that the amendment would introduce matters that were *res judicata*, and it would re-open issues resolved in other suits, such as the Bungoma cause.
55. So what do I make of it? Is the amendment proposed feasible? I have already addressed aspects of this question in the foregoing paragraphs of this ruling. I have stated, in paragraph 46, that the proposed respondent was not a necessary party for the purposes of the petition, dated 27th March 2017, to the extent that the said petition, inclusive of the affidavit in support of it, makes no allegations against the proposed 3rd respondent, in respect of which the proposed 3rd respondent could be called upon to respond. The proposed 3rd respondent could not, therefore, be brought into the cause, at inception, and even at this stage, as a necessary party. I have stated in paragraphs 47 and 48, hereabove, that, in my understanding of the application and the supporting affidavit, the proposed amendment introduces a new cause of action, which requires introduction of a new respondent, against whom allegations are made in the new cause of action, and reliefs sought, and who is expected to respond or answer to those allegations. I have reviewed, at paragraph 49, the grounds on the face of the Motion for amendment, and the affidavit in support, and concluded that they all address the matter of the new cause of action, and the need to bring in the proposed 3rd respondent to deal with the new cause. I have also noted that the petitioner has explained that it has decided against filing a separate cause, to avoid multiple causes, and has opted to bring in the new cause into this case.



56. Should the amendment to bring in a new cause of action and a new respondent be allowed? The statutory provisions and the caselaw, that I have reviewed above, clearly point to the fact that it is within the rights of any party to a court action to move the court, at any stage of the proceedings, to amend its pleadings. The law on this is very permissive. Indeed, amendments are allowed as a matter of course, in most cases. It is permissible to amend pleadings in a manner that introduces new parties and new causes of action. If any such changes cause hardship to the parties in the matter, there would be relief, in terms of costs. However, there are limitations to circumstances under which an amendment, introducing a new cause of action, would be permitted. By dint of *St. Patrick's Hill School Limited vs. Bank of Kenya Limited* [2018] eKLR (Nyakundi, J), an amendment would be feasible, if it raises a new cause of action, which is not different in character from, or foreign to, or inconsistent with the original cause of action, to the extent that they stem from the same transaction. See also *Anders Bruel T/A Queenscross Aviation vs. Nyambura Musyimi & 2 others* [2017] eKLR (Nambuye, Kiage & Sichale, JJA) and *Qabale Diba Badake & 2 others vs. Public Service Board Marsabit County & 3 others, National Gender and Equality Commission (Interested Party)* [2019] eKLR (wa Makau, J).
57. What is the case here? The petition, dated 27th March 2017, is founded exclusively on implementation of orders that were made on 2nd February 2017, in Busia Petition No. 2 of 2016. What provoked the filing of the said petition was the manner in which the 1st and 2nd respondents went about implementing or carrying into effect of those orders, in purported compliance with them. The petitioner argues that the purported implementation did not comply with the orders of 2nd February 2017, and contravened the provisions of the *Crops Act*, and by so doing its constitutional rights, under the Articles cited in the petition, were contravened, or violated, or breached. The new cause, sought to be introduced under the proposed amendments, has nothing to do with Busia Petition No. 2 of 2016, neither with the judgement of 2nd February 2017, nor the implementation of that judgement. It centres around a new character, the proposed 3rd respondent, with respect to cases that the said proposed 3rd respondent had with the petitioner, over the EIA licence it had issued to the petitioner. The cause of action, sought to be introduced, is solely against the 3rd respondent, that it issued an EIA licence to the petitioner, which it did not defend in the Bungoma suit. The cause of action proposed does not stem from the same transaction as that in the petition, dated 27th March 2017. It was foreign to and inconsistent with the cause of action articulated in the petition of 27th March 2017. The only connection, that the petitioner has sought to bring out, between the 2 causes of action, is that it is founding them on its legitimate expectations, with respect to what it expected of the 1st respondent and the proposed 3rd respondent, regarding execution of their respective administrative mandates and duties. As fate would have it, the 1st respondent was removed as a party to the cause, by the petitioner, on 11th December 2018, and the case of the legitimate expectation of the petitioner, with regard to the 1st respondent, must have gone with the 1st respondent, severing the only nexus that is purported to exist between the 2 causes of action.
58. Whereas the petitioner is entitled to have its petition amended, to introduce a new party and a new cause of action, the new cause of action to be introduced ought to be closely linked or connected to the cause of action in the petition. It is my finding that there is no nexus between the cause of action in the petition, dated 27th March 2017, and the cause of action proposed to be introduced. The petitioner ought to initiate separate proceedings, with respect to the same.
59. The other issue relates to the fact that the EIA licence is issued by the proposed 3rd respondent, under Environment Management and Co-ordination Act. It relates to environmental assessment, and by dint of Articles 162(2) and 165(5) of *the Constitution*, the High Court has no jurisdiction with regard to matters relating to the environment. That jurisdiction lies with the Environment and Land Court. The suit, that gave rise to the alleged cause of action that the petitioner seeks to introduce to this



matter, by way of amendments , Bungoma ELC Petition No. 6 of 2016, had been filed before the Environment and Land Court, and was determined by that court. It was a constitutional cause, filed at the Environment and Land Court, as that was the court with jurisdiction. Any derivative suit or cause of action should, in equal measure, be filed at the same court. The High Court would have no jurisdiction to handle disputes around issues related to the environment. The denial of an EIA licence, to the petitioner, by the proposed 3rd respondent, would be a matter beyond the jurisdiction of the High Court. In addition, the High Court should not handle a matter where the decision of an Environment and Land Court Judge is being obliquely contested, as appears to be the case here. Allowing an amendment which joins a party to the cause who executes mandates, under a statute in respect of which the High Court has no jurisdiction, and introducing a cause of action which revolves around issues that the High Court has no jurisdiction over, and which have been handled by the court with the requisite jurisdiction, would take the matter way out of the jurisdiction of the High Court.

60. Perhaps I need to say more about Bungoma ELC Petition No. 6 of 2016, where the dispute relating to the EIA licence was handled, to illustrate how the decision of the court is obliquely being challenged. The judgement in Bungoma ELC Petition No. 6 of 2016 was delivered on 10th March 2017. The petition, in that matter, was in respect to a challenge, by the 2nd respondent, to issuance of an EIA licence to the petitioner. The scenario was that the said EIA licence had been issued to another company, called African Polysack Sugar Company Limited, which applied for a change of names in that licence to the name of the petitioner. An EIA licence was issued to the petitioner by way of change of name. The court, in Bungoma ELC Petition No. 6 of 2016, found that that change did not accord with the law, for there was no proof that the petitioner and the other company were actually one, and only a change of name had been effected. Secondly, the 2, being different entities in law, what ought to have been done was transfer of the licence, which was allowed under the *Environmental Management and Co-ordination Act*, but which was not done in that case. Thirdly, the changed EIA licence covered areas or lands in respect of which environmental assessment had not been done. The petitioner was, no doubt, unhappy with the outcome in Bungoma ELC Petition No. 6 of 2016, but rather than finding fault with the court, and appealing the decision, it blames the proposed 3rd respondent for its predicament, and seeks to have that issue re-visited in these proceedings, to interrogate the proceedings in Bungoma ELC Petition No. 6 of 2016, to have the proposed 3rd respondent answer for the outcome of that case. The judgement in Bungoma ELC Petition No. 6 of 2016 was clear, that the EIA licence, issued by the proposed 3rd respondent to the petitioner, was not granted properly, for the concrete reasons given. The court, in Bungoma ELC Petition No. 6 of 2016, cancelled the EIA licence, and directed the petitioner to apply afresh for another EIA licence. The court, in Bungoma ELC Petition No. 6 of 2016, found and held that the EIA licence was not properly issued and cancelled it, and the petitioner appears to hold on to the notion that the said EIA licence had been properly issued, except that the proposed 3rd respondent did not defend it in Bungoma ELC Petition No. 6 of 2016. Yet, the court conducted an inquiry into the matter, and came to concrete findings, that the process of granting the EIA licence was not proper, for it did not involve a transfer of the licence from the petitioner to its sister company, and it covered areas where an environmental assessment was not done. Handling, in these proceedings, the aspect of the EIA licence, which was the subject of the judgement in Bungoma ELC Petition No. 6 of 2016, would amount to sitting on appeal on a judgement of a court of equal status with the High Court, and, therefore, of more or less concurrent jurisdiction. If the petitioner was aggrieved by the judgement in Bungoma ELC Petition No. 6 of 2016, then it should have moved to the Court of Appeal.
61. The submissions by the petitioner, about the proposed amendments being about computation of the losses, for it adds more details to the compensation claim, are not aligned to the application itself. None of the grounds on the face of the application, dated 24th September 2018, make any reference



to the proposed amendments being about computation of the losses, and adding more details to the compensation claim. The affidavit, sworn in support of that application, does, in 1 paragraph, number 4, talk about the anticipated losses, and intimates to amending the petition to include the proper figures, based on an audit that had allegedly been done. No documents are attached to that affidavit, to justify the figures mentioned, and a draft amended petition is not attached to that affidavit. I would have no basis to decide whether or not to allow the amendment. However, I note that that material was, instead, put in the amended petition, dated 26th September 2018, which was filed simultaneously with the application, without leave, and which the petitioner subsequently withdrew.

62. The third principal prayer in the application, dated 24th September 2018, is that the amended petition filed herein, relating to that joinder and amendment of the petition, dated 27th March 2017, be deemed as duly filed. The instant application was filed on 26th September 2018, simultaneously with a pleading titled amended petition, dated 26th September 2018. This document proposes the changes in the amended petition, being the addition of a proposed respondent and introduction of a new cause of action. It also carries material that supports computation of the losses anticipated by the petitioner. The amended petition, dated 26th September 2018, was not filed as part of the Motion of 24th September 2018, as it is not an annexure to the affidavit sworn in support of the Motion. It appears to have been filed as an independent document. It is the document that is sought, in the Motion, to be deemed as duly filed.
63. The 2nd respondent pleads that the Motion of 24th September 2018 was not filed with an annexed draft amended petition, and, for that reason, the Motion should fail, for the court, and the parties, have no way of knowing the changes proposed, so as to evaluate whether the amendment sought should be allowed or not. Ideally, where an amendment of pleadings is sought, a draft of the pleading sought to be amended, showing the proposed amendments, should be filed. Such a draft pleading should be placed on the court record as an annexure to the affidavit in support of the application. It is meant to be a draft, to apprise the court, and the other parties, of the changes proposed, and, therefore, it should not be filed independently of the application, as a separate distinct pleading. It should only be filed as such after leave, or approval, for its filing, has been granted by the court. Leave may be denied where the draft pleading, in respect of which leave is sought, is not exhibited. See *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Ibrahim & Wanjala, SCJJ), *Garley Enterprises Ltd vs. Agricultural Finance Corporation & another* [2018] eKLR (Nzioka, J) and *Flamingo Towers Ltd & another vs. Homeland Media Group Ltd* [2021] eKLR (Mogeni, J).
64. Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides for annexures to an affidavit filed in a constitutional cause. It provides as follows:



<p>“11.</p>	<p>Documents to be annexed to affidavit or petition</p> <table border="1" data-bbox="858 309 1386 875"> <tr> <td data-bbox="858 309 1034 607">(1)</td> <td data-bbox="1034 309 1386 607">The petition filed under these rules may be supported by an affidavit.</td> </tr> <tr> <td data-bbox="858 607 1034 875">(2)</td> <td data-bbox="1034 607 1386 875">If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”</td> </tr> </table>	(1)	The petition filed under these rules may be supported by an affidavit.	(2)	If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”
(1)	The petition filed under these rules may be supported by an affidavit.				
(2)	If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”				

65. Rule 11 requires that a document that a party wishes to rely on be annexed to an affidavit, and where there is no affidavit, the said document be attached to the petition. The document that the petitioner wishes to rely on, for the purpose of having the court exercise discretion in its favour, by allowing the amendment, is the amended petition. An affidavit was sworn in support of the application for amendment. No petition was filed at this stage, as the application sought to amend an existing petition. What was filed was an application, supported by an affidavit. The document that the petitioner wishes to rely on could only be annexed to the affidavit in support, given that a petition had been filed earlier. The petition, referred to in Rule 11, would be one that is filed regularly. The amended petition, herein, was not filed regularly, for it could only be so filed regularly upon the application, which seeks amendment of the initial petition, being allowed.
66. Was the omission to annex the draft amended petition fatal to the Motion, dated 24th September 2018? Going by the decisions in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Ibrahim & Wanjala, SCJJ), *Garley Enterprises Ltd vs. Agricultural Finance Corporation & another* [2018] eKLR (Nzioka, J) and *Flamingo Towers Ltd & another vs. Homeland Media Group Ltd* [2021] eKLR (Mogeni, J), and Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, it would appear to be so. Indeed, the document filed together with the Motion was not even a draft, but the amended petition itself. It would appear that upon its service, as an amended petition, it was replied to by the other parties. The 2nd respondent filed a response, to the amended petition, dated 26th September 2018, dated 3rd November 2020, and filed herein on 19th November 2020. Together with the response, the 2nd respondent also filed a notice of preliminary objection, dated 3rd November 2022, filed herein on 19th November 2020, ostensibly reacting to the issues raised in that amended petition, even though the preliminary objection was framed as if it was a reaction to the initial petition. The proposed 3rd respondent also filed a response, on 21st February 2023, dated 17th February 2023. The amended petition, dated 26th February 2018, had been filed without leave of court, for leave to amend the petition, and to have the draft amended petition deemed as duly filed, had not been granted, for the



application, dated 24th September 2018, where the leave is sought, had not been heard, and the order sought granted. That was contrary to Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which states that amendments must be filed with leave. It was found in *Humphrey Nyaga Thomas & 25 others vs. Kenyatta University* [2020] eKLR (Mbaru, J) that Rule 18 had not been complied with, in that case, where an amended petition was filed after pleadings had closed, and without leave of court, but it was held that that omission was not fatal, as the filing of the amended pleading, and its service, were done before the hearing date, which had given the respondent a fair chance to see the amendments made, the court went on to admit the said amended petition on record. It would appear that the situation herein is not a replica of *Humphrey Nyaga Thomas & 25 others vs. Kenyatta University* [2020] eKLR (Mbaru, J), in view of what I have found and held in the preceding paragraphs. In any event, the said amended petition was withdrawn on 20th September 2023, by the Advocate for the petitioner.

67. Let me now turn to the application for striking out of the petition, dated 9th October 2023. The petitioner complains that the said application was filed despite directions that had been given on 28th September 2021, barring the filing of fresh applications, and at a time when the 2nd respondent was only meant to file replies to the application, dated 24th September 2018. The suggestion is that the said application was filed in abuse of process. I have perused the record, the minutes of 28th September 2021 record Karanjah J as having written “ ... As a word of caution and in keeping with the overriding objectives and avoid further delay in this matter parties ought to avoid filing new or fresh applications...” My understanding of that is that Karanjah J did not order or direct the parties not to file new applications, instead the court sounded a caution, that the parties ought to refrain from filing new applications. That caution was not taken by the 2nd respondent, who filed the instant application. However, as there was no bar to the filing, I shall consider the application on its merits. Parties should, however, take such cautions from the court seriously, for whereas it is within their rights to file such applications as they believe advance their interests, in the spirit of access to justice and the right to be heard, parties should be alive to the fact that the filing of multiple applications, within a cause, often causes confusion, delaying the matter, and possibly even derailing it from its course, as happened in this case. Focus should be on the main battle, rather than on minor skirmishes, which only serve to delay the matter, by creating unnecessary diversions.
68. The other issue raised by the petitioner is that the application was filed after directions were given to the 2nd respondent to file its response to the application, dated 24th September 2018. Instead of just filing responses, the 2nd respondent filed both the response to the application, and the application to strike out. Of course, parties have a right to file whatever applications that they may wish to file. However, that has to be looked at in the prevailing context. In this case, Karanjah J had cautioned against filing fresh applications, given that there were some applications pending, and the filing of fresh applications would have the effect of delaying finalisation of the petition. To that extent, the petitioner is entitled to complain about lack of goodwill to have the matter disposed of. However, since the application was filed, and it is on record, and the parties have responded to it, I shall have to determine it on its merits.
69. One other issue raised is that the joinder of the proposed 3rd respondent is designed to fill in the void left by the removal of the 1st respondent from the matter. The point advanced is that the 1st respondent was the principal respondent to the petition, for it was its act of registration of the 2nd respondent, on 14th February 2017, that triggered the petition. The petition is anchored on an alleged legitimate expectation, by the petitioner, that the application by the 2nd respondent was to be considered by the 1st respondent upon due process, and upon the petitioner being granted audience. The decision or discretion to register belonged to the 1st respondent, which made the 2nd respondent a lesser or secondary respondent, and that any challenge to that registration must, of necessity, involve the 1st



respondent, hence the decision by the petitioner to name it as the principal respondent. However, according to the 2nd respondent, the decision to remove the 1st respondent, as such, has left the petition weakened, hence the desire to bring in the proposed respondent, to be the anchor. Article 21 of [the Constitution](#) is cited to support the contention. The petitioner counters that by stating that the application, dated 24th September 2018, was mooted long before the removal of the 1st respondent from the proceedings.

70. So, what is the position? The application, dated 24th September 2018, was lodged herein on 26th September 2018, principally seeking joinder of the proposed 3rd respondent, and I have extensively discussed the context and content of that application in the foregoing paragraphs. The 1st respondent was removed from the proceedings, by a notice that was filed in court on 11th December 2018, dated 3rd December 2018. Therefore, the removal of the 1st respondent did not precede the lodge herein of the application, dated 24th September 2018; neither was it filed simultaneously with it; nor was it filed shortly thereafter. The removal came in 2 or so months thereafter, and there is, in my view, therefore, nothing to connect the filing of the application, dated 24th September 2018, and the removal of the 1st respondent as a party, by the notice, dated 3rd December 2018. I cannot, therefore, tell, and I am not prepared to be drawn into concluding that the removal of the 1st respondent, as a party, informed the filing of the application, dated 24th September 2018.
71. What, perhaps, may be more critical is the effect of the said removal of the 1st respondent as a party. It has been submitted that that removal weakened the case by the petitioner against the 2nd respondent, in the terms that I have discussed above, that is the fact that the petition is founded on allegations about the 1st respondent, and the principal prayers are also sought against the 1st respondent, and that the 2nd respondent is really a peripheral party, hence the said removal, to a large extent, undermined the viability of the cause. Whether that is the case can only be gauged from the contents of the petition. In the petition, the case against the respondents is articulated in paragraph 25, to effect that “The Registration of the 2nd Respondent by the 1st Respondent was therefore ultra vires and any other consequential licences issued thereafter null and void.” Section D of the petition sets out the alleged contraventions of [the Constitution](#), with respect to the registration of 14th February 2017. Paragraph 28 avers that by the non-disclosure of the impending decision, and the making of the decision without involving the petitioner, the 1st respondent exposed or pre-disposed the petitioner to a loss in the region of Kshs. 6,000,000,000.00. Paragraph 20 avers that the registration of the 2nd respondent had the effect of denying the petitioner the right to optimise the utility of its mill, by allowing the 2nd respondent to encroach on the petitioner’s catchment area. Paragraph 33 accuses the 1st respondent of refusing or neglecting or failing to enforce the law, by asking the 2nd respondent to re-apply for registration under the new location. Paragraph 35 accuses the 1st respondent of failing to involve the petitioner in the process of the re-registration of the 2nd respondent, and thereby prejudiced the position of the petitioner. There are allegations relating to violation or contravention of the [Crops Act](#). At paragraph 38, the 1st respondent is accused of registering the 2nd respondent in a manner that contravened the judgement of the court in Busia HC Petition No. 2 of 2016, and section 20 of the [Crops Act](#). The principal allegations, of breach and contravention of [the Constitution](#), are made against the 1st respondent, and the only allegation against the 2nd respondent is that it did not re-apply for a licence, in the manner ordered by the court, and, therefore, the right procedure was not followed, in the manner the registration was applied for by the 2nd respondent, and considered by the 1st respondent.
72. The petition seeks a total of 11 principal orders or reliefs against the respondents. The principal relief is a declaration that the rights and freedoms under [the Constitution](#) have been contravened and infringed by the respondents, in the manner the registration of the 2nd respondent was handled. The next relief



relates to a declaration that the failure to abide by the terms of the judgement, in Busia HC Petition No. 2 of 2016, amounted to an infringement of the rights of the petitioner by the respondents. It is sought that the registration certificate issued on 14th February 2017 be declared illegal, null and void. A certiorari is sought to quash the decision to licence the 2nd respondent under that certificate; and another to quash the decision to licence the 2nd respondent to operate the mill at Olepito. 2 mandamus orders are sought against the 1st respondent, to direct it to undertake the registration of the 2nd respondent as a sugar miller in accordance with the law. Conservatory orders are sought against the 2nd respondent, to prevent it from operating at Olepito, until it is properly registered and licenced by the 1st respondent. Compensation is sought against both respondents, to a tune of Kshs, 6,000,000.00, to be paid prior to registration and licensing of the 2nd respondent to operate from Olepito. The final order is for judicial review of the administrative actions of the 1st and 2nd respondents, with respect to the registration certificate issued on 14th February 2017.

73. The principal prayers are sought against the 1st respondent, as the decision maker with respect to the registration and issuance of the certificate in contention, on 14th the. The 2nd respondent merely made an application, the decision to register and issue a certificate lay with and was made by the 1st respondent. The cause of action, if there is one, arose from that decision, to change the particulars in the registration certificate, and not from the application itself, for the amendment of the registration particulars. If the application was not acted upon, there would have been no registration certificate to talk about, and, the matter would have ended there. Therefore, the actions which provide basis for these proceedings were by the 1st respondent. It would follow that any contraventions or infringements of the constitutional rights of the petitioner, in relation to that registration, if at all, must have been made by the party who decided to register and issue a certificate, and not the party who merely made an application. The certiorari orders can only be available to quash the decision of the administrative body, and that would only be the decision-maker with respect to the impugned registration certificate, and that was the 1st respondent. The 2nd respondent did not register itself, nor issue itself with a certificate. The mandamus order, likewise, is only available against the duty-bearer, who, in this case, was the 1st respondent, to cause registrations and issue certificates. A mandamus order cannot issue against the 2nd respondent. The conservatory orders, to prevent the coming to effect of the registration and certificate, would only be available consequent upon the registration and certification being rendered illegal, null and void, and then quashed vide the certiorari order. The declaration of an illegality or nullity of the registration and certificate, and the subsequent quashing of the same, can only be on a case mounted against the 1st respondent, who is the entity responsible for and answerable with respect to the said registration and certification. I reiterate, that the 2nd respondent could not register itself, and issue to itself a certificate of such registration, and, it cannot, therefore, answer for the said registration and certification. The judicial review order sought against the 2 respondents is pegged on their administrative actions. These administrative actions can only be with respect to registration and certification. Judicial review is only available against quasi-judicial or administrative bodies. Of the 2 parties named in the petition, only the 1st respondent is an administrative body, capable of exercising quasi-judicial powers. The 2nd respondent is not such an administrative body, it has no quasi-judicial powers, and judicial review orders cannot be made against it. The administrative actions complained of, in the context of this matter, are the registration of the 2nd respondent and the issuance of a certificate of registration to it. These administrative actions could only be taken by the 1st respondent, and not the 2nd respondent, and no judicial review orders can be directed against the 2nd respondent with respect to them.

74. Going by what I have discussed above, it would follow that the 1st respondent could not be removed from the cause without damaging the foundation or basis of the cause. The impugned registration



cannot be invalidated in the absence of the 1st respondent, the person who caused the registration in the first place, as a party. The certificate of registration cannot be declared illegal, null and void in proceedings where the issuer is not a party. The decision to register and certify the 2nd respondent cannot be removed to the court for quashing, and cannot be quashed, in proceedings where the party, that did the registration and issued the certificate, is not a party to the proceedings, for it is that party who should account to the court for the registration and certification. The 2nd respondent has no power, under the Crops Act, to register itself and to issue a certificate to itself. It cannot, therefore, account for exercise of a power that it does not have. The same case applies to the mandamus orders. Mandamus issues where there is a duty to act. Under the Crops Act, the duty to act lies with the 1st respondent, that is to register and issue certificates, and that is the only entity that the court can compel to act in the manner required under the Crops Act. The 2nd respondent has no duty to register and to certify anyone, and, therefore, mandamus cannot issue against it. Regarding the conservatory orders, to prevent the 2nd respondent from utilising the registration and certification, can only issue where a case can be made out for the nullification and quashing of the registration and certification. As indicated above, the registration and certification were by the 1st respondent, and, as such, it is only the 1st respondent who can be called upon to account or answer for that registration and certification. Where the 1st respondent is not a party to the proceedings, as is the case here, there would be no basis or foundation or platform for calling upon it, the 1st respondent, to account for the same, and, in the absence of that there would be no foundation or basis for grant of the conservatory orders sought. The decision to remove the 1st respondent from these proceedings was not strategic, for it left the cause herein incredibly weak, for the bulk of the orders sought in the petition are no longer feasible, in the absence of the 1st respondent.

75. I have deliberately left out the issue of compensation in my discussion above. The 2nd respondent argues that the remedy of compensation is the only prayer available to the petitioner against the 2nd respondent, under the petition, after the removal of the 1st respondent as a party, but goes on to argue, even then, that the same would not be for granting, as a constitutional tort, in respect of which damages would be available, is only feasible against public entities. It asserts that a private entity, like itself, the 2nd respondent, cannot possibly commit a constitutional tort, and another private entity, such as the petitioner, cannot pursue compensation on a constitutional tort against another private entity in constitutional proceedings or through constitutional litigation. To that argument, the petitioner submits that constitutional rights are both vertical and horizontal, for they are enforceable against both public entities and private entities, that are alleged to have contravened the Constitution or infringed on the rights of a private entity. If the argument by the 2nd respondent were to be the correct one, it would mean that no compensation can be obtained against a private entity, in constitutional litigation, where a public entity is not jointly sued with the private entity in question. It would then mean that with the removal of the 1st respondent from these proceedings, the case by the petitioner for compensation would not be tenable. If, however, the argument by the petitioner holds water, that is that compensation can be sought and obtained by a private entity against another private entity, in constitutional proceedings, founded on a constitutional tort, then the prayer for compensation, in the instant petition, would be maintainable, even in the absence of a public entity as a party.
76. So, what is the law on this? The 2nd respondent has cited a number of decisions of the High Court and the Court of Appeal, which favour its position, but the petitioner did not cite any. Historically, prior to 2010, the position was, as articulated in *Kenya Bus Service Limited and 2 others vs. Attorney General & 2 others* [2005] eKLR (Nyamu, J), that fundamental rights, as contained in the Constitution, are principally against the State, because the main function of the Constitution is to define what constitutes Government. With regard to the individual rights of the governed, as between themselves,



their interests would be taken care of within the province of private law. However, the ground began to shift, and in *Mwangi Stephen Mureithi vs. Daniel arap Moi* [2011] eKLR (Gacheche, J), no doubt in the wake of the promulgation of the new Constitution, in 2010, it was observed that private individuals rights also need protection from constitutional breaches by other private individuals or entities. It was noted that the application of fundamental rights horizontally was novel, then, but it was asserted that fundamental rights were applicable both vertically and horizontally, but the application horizontally was not as a rule, but exception, and the same was to apply on a case to case basis. *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited* [2013] eKLR (Lenaola, J) followed *Kenya Bus Service Limited and 2 others vs. Attorney General & 2 others* [2005] eKLR (Nyamu, J), that the rights and freedoms, enshrined under the Bill of Rights, were, as between private persons, not enforceable by way of a constitutional cause, but through an action under private law. The court applied Article 21 of *the Constitution*, to effect that the obligation to observe protect and promote and fulfil the rights and freedoms under the Bill of Rights was imposed on the State, and not private persons. It was ruled that the claim, before the court, bordered on defamation, and that it was not serious enough to warrant constitutional sanction, and should have been pursued in the ordinary courts. *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited* [2013] eKLR (Lenaola, J) was followed in *Mike Rubia & another vs. Moses Mwangi & 2 others* [2014] eKLR (Lenaola, J), in a case similarly founded on defamation, and it was asserted that *the Constitution* was not a substitute for redress of all injuries, especially where another remedy is available in law. It was, though, noted that there was nothing in *the Constitution*, that made a distinction between vertical and horizontal applications of the Bill of Rights, and it was asserted that the Bill of Rights applies to all persons and binds everybody. It was asserted, in *Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & others* [2013] KEHC 6003 (KLR) (Lenaola, J), that the Bill of Rights is not limited to a State organ. See also *Rose Wangui Mambo & 2 others vs. Limuru Country Club & 17 others* [2014] eKLR (Lenaola, M. Ngugi & Majanja, JJ).

77. In *Isaac Ngugi vs. Nairobi Hospital & 3 others* [2013] eKLR (Majanja, J), it was stated that the argument, that a constitutional petition cannot be lodged as between 2 private entities or persons, can no longer hold under *the Constitution* of Kenya, 2010, and *Kenya Bus Service Limited and 2 others vs. Attorney General & 2 others* [2005] eKLR (Nyamu, J), was treated as no longer tenable. It was pointed out that, under Article 3(1) of *the Constitution*, every person has an obligation to respect, uphold and defend *the Constitution*, and, under Article 19(1) of *the Constitution*, the Bill of Rights applies to all laws and binds all State organs and all persons. It was asserted that whether the Bill of Rights applies horizontally or vertically is beyond peradventure, and that the only issue is the extent to which it should apply to private relationships. It was observed that it would depend on the nature of the right and freedom, and the circumstances of the case. It was noted that the court would be reluctant to apply *the Constitution* directly to horizontal relationships, where specific legislation exists to regulate the personal or private relationships in question, but where mechanisms for enforcement are inadequate, the court may proceed to apply the provisions of *the Constitution* directly. The court cautioned against making hard and fast rules, given the history of the country, and the transformative nature of *the Constitution* of Kenya 2010. On the mode of litigation, with respect to horizontal relationships, the court cited *Sonia Kwamboka Rasugu vs. Sandalwood Hotel and Resort Limited & others* [2013] eKLR (Majanja, J), where the court should go ahead and receive evidence from the parties, before determining the matter one way or the other. It was noted that the procedure for enforcement of fundamental rights and freedoms is intended to be flexible, yet vigorous enough to allow for a proper forensic examination of the facts, and that the court should consider a petition on its merits, rather than striking it out.



78. The 2nd respondent raises the question of a constitutional tort, and argues that the same is only available against the State. The constitutional tort is a fairly new concept in Kenya, and the world in general. It was defined and discussed in *John Atelu Omilia & another vs. Attorney-General & 4 others* [2017] eKLR (Mativo, J), to mean a private civil suit brought to redress a constitutional violation, and such a tort was described as a violation of a constitutional right by a State agent. The litigation, in that matter, arose from a criminal prosecution, which ended in an acquittal, and a constitutional cause was mounted for a declaration that the prosecution was without foundation, there was a duty to disclose the evidence to the petitioners and the prosecution was without a factual basis. The court agreed with the petitioner, and made the declarations sought, and awarded compensation, in the form of constitutional damages. *John Atelu Omilia & another vs. Attorney-General & 4 others* [2017] eKLR (Mativo, J) was followed in *Francis Mulomba Nguyo vs. Nation Media Group Limited vs. 2 others* [2021] eKLR (W. Korir, J), where the Bill of Rights in *the Constitution* was applied horizontally, to compensate for a breach of the constitutional right to privacy, on grounds that the right could be enforced against private persons, as it was a right that could be abused by both the State and private persons. It was about a media advertisement without consent, which was alleged to be defamatory. The use of the image of the petitioner, in *Mutuku Ndambuki Matingi vs. Rafiki Microfinance Bank Limited* [2021] eKLR (Odunga, J), for advertising or promotional purposes, without the consent of the petitioner, was said to amount to a constitutional violation, being a breach of the right to dignity, and damages were awarded.
79. The prevailing jurisprudence does not appear to accord with the position taken by the 2nd respondent, that the constitutional tort can only be committed by the State or its agents, and compensation can only be awarded against the State or its agents. A constitutional tort can be committed by both private persons and public entities, and compensation would be available in favour of private persons, in constitutional causes initiated by private persons or entities. It is a claim that the petitioner can maintain against the 2nd respondent.
80. What is the compensation in respect of a constitutional tort for? Is it to compensate for the material loss actually suffered by the petitioner? Or is it just for breach of the right, without having to establish any actual loss or any financial loss? None of the parties addressed me on this, and I have not come across caselaw which clearly addresses the issue. In *John Atelu Omilia & another vs. Attorney-General & 4 others* [2017] eKLR (Mativo, J), *Francis Mulomba Nguyo vs. Nation Media Group Limited vs. 2 others* [2021] eKLR (W. Korir, J) and *Mutuku Ndambuki Matingi vs. Rafiki Microfinance Bank Limited* [2021] eKLR (Odunga, J) the awards were in the form of general damages, for the constitutional breach or violation. If the petitioner herein were to be entitled to compensation herein, would it be for a liquidated claim or general damages?
81. Of course, there is the issue as to whether there is a cause of action, herein, upon which the petitioner can claim compensation, given that it removed the principal respondent, against whom it claims that there was legitimate expectation. Indeed, the suit against the respondents is founded on the alleged legitimate expectation by the petitioner, that the 1st respondent would act in accordance with the *Crops Act* and the judgement of the court of 2nd February 2017, as read together with Article 21 of *the Constitution*, among others. That legitimate expectation can only relate to the 1st respondent, with regard to its power to register and certify operators of sugar mills. Such expectation cannot accrue to the persons, like the 2nd respondent, who themselves hold similar expectations with the petitioner, that upon applying for registration and certification, or even licencing, the 1st respondent would act as expected of it by the *Crops Act* and *the Constitution*, in determining whether or not to register the 2nd respondent, and to issue to it a certificate. It would similarly be its expectation that the 1st respondent would consider its application in line with the judgement rendered on 2nd February 2017. Was it likely



that the petitioner had any sort of legitimate expectation with respect to the 2nd respondent, which, if not met amounted to a violation or contravention of its fundamental or constitutional rights and freedoms?

82. What is legitimate expectation? The courts, in *Republic vs. Kenya Revenue Authority Ex Parte Cooper K-Brands Limited* [2016] eKLR (Odunga, J) and *Republic vs. Council of Legal Education & 2 others Ex Parte Michelle Njeri Thiongo Nduati* [2019] eKLR (Mativo, J), had occasion to grapple with its definition, scope and contours. In *Republic vs. Kenya Revenue Authority Ex Parte Cooper K-Brands Limited* [2016] eKLR (Odunga, J), the court cited from de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 6th edition, Sweet & Maxwell; *South Bucks District Council vs. Flanagan* [2002] EWCA Civ. 690 [2002] WLR 2601 and *Republic vs. Attorney General & Another Ex Parte Waswa & 2 others* [2005] 1 KLR 280 (Nyamu & Ibrahim, JJ), where it was said that a legitimate expectation arises where a person responsible for making a decision, induces in another a reasonable expectation that he would receive or retain a benefit or advantage. It was said to be a basic principle of fairness, that legitimate expectations ought not be thwarted, and that the protection of legitimate expectation was rooted in the constitutional principle of the rule of law, which requires regularity, predictability and certainty in Government dealings with the public. It is about trusts and confidences that must be honoured in public law, and it is not confined just to past advantage and benefits, it should extend to future promise or benefit yet to be enjoyed. Similar sentiments were expressed in *Republic vs. Council of Legal Education & 2 others Ex Parte Michelle Njeri Thiongo Nduati* [2019] eKLR (Mativo, J), where it was said that a procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure, in advance of a decision being taken. It was observed that the court, adjudicating legitimate expectation claims, must first consider whether the actions complained of created a reasonable expectation in the mind of the aggrieved party, and whether that expectation was legitimate, and should the answers to both be affirmative, then enforce the legitimate expectation. It was stated that it is about legal certainty, where individuals should be in a position to rely on Government actions and policies, to shape their plans and lives. The centrality of trust in the process, which is generated by such reliance, was emphasised, as a core to the concept of the rule of law.
83. From the language, in *Republic vs. Kenya Revenue Authority Ex Parte Cooper K-Brands Limited* [2016] eKLR (Odunga, J) and *Republic vs. Council of Legal Education & 2 others Ex Parte Michelle Njeri Thiongo Nduati* [2019] eKLR (Mativo, J), it is clear that a legitimate expectation can only arise with respect to actions and decisions of the Government or its agents. The court, in both cases, did not discuss whether the principle would be of application as between 2 private persons or entities, and the petitioner did not place any authority before me pointing to a contrary view. The sense I get is that its equivalent in private law would be trusts and confidences, and any redress, in that realm, ought to be through private actions, as between the 2 private persons or entities involved or affected. It would appear that a private entity or person cannot found its constitutional petition, against another private entity or person, on the principle of legitimate expectation.
84. One of the issues raised is that the petition does not meet the threshold for a constitutional petition, essentially, that the principle, in *Anarita Karimi Njeru vs. R* [1979] eKLR (Trevelyan & Hancox, JJ) and *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR (Kihara Kariuki P, Ouko, Kiage, Kairu & Murgor, JJA), has not been met. The principle stated in the 2 decisions is that the constitutional petition ought to set out with precision the complaint by the petitioner, the provisions of *the Constitution* allegedly contravened, and the manner it is alleged that they are infringed or likely to be infringed. These decisions are a little dated. *Anarita Karimi Njeru vs. R* [1979] eKLR (Trevelyan & Hancox, JJ) belongs to the era of *the Constitution* that was retired in 2010; while *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR (Kihara Kariuki P, Ouko, Kiage, Kairu & Murgor, JJA) was determined not so long after the



promulgation *the Constitution*, 2010. The current judicial thinking disfavors a strict approach to the manner of pleadings in constitutional causes. It was stated in Samuel Muihia Kariuki & 26,248 others vs. Attorney General & 4 others [2016] eKLR (Lenaola, J), that it does not matter that in the eyes of the respondent that the case by the petitioner is very weak, so long as the primary pleading discloses some cause of action, more so in the constitutional petition. It was stated that the mere fact that the case is weak, and not likely to succeed was not a ground for striking out the pleading, at an interlocutory stage. In Mwangi Stephen Mureithi vs. Daniel arap Moi [2011] eKLR (Gacheche, J), it was said that *the Constitution* allows a person who alleges that his fundamental rights have been infringed or contravened to seek redress at the High Court, and it would be a grave injustice to lock out such a person from filing his claim, merely because the respondent believes that his claim has no merit. It was stated that merit was a matter of substance, while filing the claim was procedural. There is a right to file a claim, the merits or substance of the matter is to be tried at the hearing. Isaac Ngugi vs. Nairobi Hospital & 3 others [2013] eKLR (Majanja, J) is to similar vein. It would appear that the principle, set in Anarita Karimi Njeru vs. R [1979] eKLR (Trevelyan & Hancox, JJ) and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (Kihara Kariuki P, Ouko, Kiage, Kairu & Murgor, JJA), is to be applied or tested at the hearing of the petition, rather at inception or at the interlocutory stage. A petitioner ought to be heard on the merits of the matter, and it should be at that stage that it should be decided whether the petition reaches the threshold for grant of the orders or reliefs sought.

85. Samuel Muihia Kariuki & 26,248 others vs. Attorney General & 4 others [2016] eKLR (Lenaola, J) brings out the permissiveness in constitutional litigation. That has basis in *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 5(a), for example, on joinder of parties, grants latitude, where the petitioner is in doubt on who should be the proper person to join as respondent, to join as many persons as respondents, as it may permit determination of questions, as to which of them is liable and to what extent. Rule 5(b) states that no petition is to be defeated for misjoinder or non-joinder of parties, and the court may, in every proceeding, deal with the matters in dispute, that notwithstanding. See Rose Wangui Mambo & 2 others vs. Limuru Country Club & 17 others [2014] eKLR (Lenaola, M. Ngugi & Majanja, JJ). Rule 5(c)(d), should be read together with Rule 5(a), it gives room to the court to order addition or substitution of parties, as need arises. Rule 5 gives very wide discretion to the court with respect to joinder of parties. Rule 6 is also relevant, it permits the court to allow persons with some expertise, in the area in contention, to participate as friends of the court. The flexibility of it is that such persons can move the court orally. The same applies to interested parties, under Rule 7, they can apply orally to appear as such. In both cases, the court, on its own motion, may require a person to appear either as a friend of the court or interested party. The form of the petition, under Rule 10, is another pointer to the flexibility and permissiveness. Under Rule 10, the usual procedure is to file a petition, but Rule 10(3) allows the court to “accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.” Rule 21(b) enables “... a party who wishes to file further information at any stage of the proceedings” to “do so with the leave of the Court.” Rule 24 allows oral applications and applications by informal documentation, for conservatory orders and other forms of interim relief.
86. Given the permissiveness and flexibility under *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, I doubt that the strictness prescribed in Anarita Karimi Njeru vs. R [1979] eKLR (Trevelyan & Hancox, JJ) and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (Kihara Kariuki P, Ouko, Kiage, Kairu & Murgor, JJA) would have much room for application, at the interlocutory stage, to permit striking out of constitutional petitions, without affording the petitioner the benefit of a hearing. The underlying



emphasis, in *the Constitution* and *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, is access to justice, fair hearing and expeditious disposal of matters. A system that allows parties to approach the court with ease is what is envisaged. To now impose the strict standards in *Anarita Karimi Njeru vs. R* [1979] eKLR (Trevelyan & Hancox, JJ) and *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR (Kihara Kariuki P, Ouko, Kiage, Kairu & Murgor, JJA), at the interlocutory stage, is to undermine the spirit of *the Constitution* and *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The spirit that emerges is that parties who appear to have a case with some constitutional question, which is capable being ventilated, should be allowed their day in court. The strength or otherwise of their case would be irrelevant. The permissiveness and flexibility in display is not anywhere near the strictness in the process governed by the *Civil Procedure Act* and the Civil Procedure Rules, which permits striking out of pleadings at interlocutory stage. See *R. vs. Nairobi City Council & another ex parte Premier Food Industries Limited* [2016] eKLR (Odunga, J).

87. I believe the court, in *Isaac Ngugi vs. Nairobi Hospital & 3 others* [2013] eKLR (Majanja, J), captured the essence of what ought to be the spirit in constitutional litigation, when it said:

“I take the positions that the from the history of country and the events leading up to the promulgation of *the Constitution* leave no doubt that it was intended to be a transformative document. I would be hesitant to adopt a hard and fast position that would prevent the principles and values of *the Constitution* being infused into the lives of ordinary Kenyans through application of the Bill of Rights ...”

88. It is that same permissiveness that explains *John Atelu Omilia & another vs. Attorney-General & 4 others* [2017] eKLR (Mativo, J), *Francis Mulomba Nguyo vs. Nation Media Group Limited vs. 2 others* [2021] eKLR (W. Korir, J) and *Mutuku Ndambuki Matingi vs. Rafiki Microfinance Bank Limited* [2021] eKLR (Odunga, J), where the courts had no hesitation in applying the Bill of Rights to horizontal relationships, and moved away from the pre-2010 position, where such was unheard of.

89. I have recited the provisions of Rule 5 of *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, hereabove, and I hereby recite the relevant provisions of Rules 10 and 24 of *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, for ease of reference and emphasis. They provide as follows:



“10.

Form of petition

1. An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a)	the petitioner's name and address;
-----	------------------------------------

(b)	the facts relied upon;
-----	------------------------

(c)	the constitutional provision violated;
-----	----------------------------------------

(d)	the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of
-----	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



	persons or community,
(e)	details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
(f)	the petition shall be signed by the petitioner or the advocate of the petitioner; and
(g)	the relief sought by the petitioner.
(3)	Subject to rules 9 and 10, the Court may



	<p>accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.</p>				
	<p>(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”</p>				
<p>“24.</p>	<p>Application under rule 21</p> <table border="1" data-bbox="667 1288 1388 1702"> <tr> <td data-bbox="667 1288 909 1438">(1)</td> <td data-bbox="909 1288 1388 1438"> <p>An application under rule 23 may be made by way of notice of motion or by informal documentation.</p> </td> </tr> <tr> <td data-bbox="667 1438 909 1702">(2)</td> <td data-bbox="909 1438 1388 1702"> <p>Where an oral application is made under rule 23, the Court shall reduce it in writing.”</p> </td> </tr> </table>	(1)	<p>An application under rule 23 may be made by way of notice of motion or by informal documentation.</p>	(2)	<p>Where an oral application is made under rule 23, the Court shall reduce it in writing.”</p>
(1)	<p>An application under rule 23 may be made by way of notice of motion or by informal documentation.</p>				
(2)	<p>Where an oral application is made under rule 23, the Court shall reduce it in writing.”</p>				

90. Rule 10(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, sets out the particulars that ought to be disclosed in the petition. To my mind, a petition that complies with Rule 10(2), by making the disclosures or giving the particulars required there, would be adequate. What would remain ought to be whether the prayers sought in it



would be available, given the content and substance of the pleadings, and the arguments made at the hearing. The ultimate decision, on the fate of the petition, should be made after hearing the parties.

91. It is notable that *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, do not make provision for striking out of pleadings on any ground. The only provision relating to striking out is in Rule 5, but that is limited to striking out of parties, not pleadings or the cause. *The Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, has no equivalent to Order 2 Rule 15 of the Civil Procedure Rules, relating to striking out of pleadings. The Motion, dated 9th October 2023, is premised on Rules 3 and 16 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, yet these provisions do not provide for striking out of pleadings. Rule 3 is about the scope and objectives of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The provision is in broad and general terms, which cannot provide basis for striking out pleadings. Rule 16 provides for what should happen where a respondent fails to reply or answer to the petition within the stipulated time. The court may proceed to hear and determine the petition in the absence of the respondent, and any orders made thereafter are liable to setting aside by the court, on its own motion or on application by the respondent. There is nothing there which can be a basis for striking out pleadings. Articles 48, 50 and 159 of *the Constitution* are also cited. None of these provisions provide for striking out of pleadings in constitutional litigation, neither can they be deployed for that purpose. Article 48 is about access to justice, and striking out pleadings does not ensure access to justice. Article 50 states the fair trial principles, and striking out pleadings is an anti-thesis to fair trial. Article 159 is about judicial authority, and covers such themes as where that authority is derived from, to whom it vests, and the manner of its exercise. The provision is in very general terms, which cannot provide any basis for exercise of the drastic power of striking out pleadings. The long and short of it is that *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, does not provide for striking out of pleadings, and the temptation to strike out pleadings, filed in a constitutional cause, should be avoided as much as possible.
92. The 2nd respondent, in an argument related to that about compensation not being available for private parties against each other in constitutional litigation, submits that the doctrine of exhaustion applies here, so that the petitioner herein should have pursued its compensation claim against the 2nd respondent in ordinary proceedings. I have dealt with aspects of that above, when I addressed constitutional torts and compensation as between private persons. The doctrine of exhaustion applies where alternative mechanisms for dispute resolution are available, and the principle is that such mechanisms ought to be exhausted before the jurisdiction of the court is invoked. It presumes mechanisms of dispute resolution existing outside of the court system. The court in such a scenario would be the last resort. See Geoffrey Muthinja & another vs. Samuel Muguria Henry & 1756 others [2015] eKLR (Waki, Nambuye & Kiage, JJA). The concept and doctrine of exhaustion was discussed fairly comprehensively, in Jeremiah Memba Ocharo vs. Evangeline Njoka & 3 others [2022] eKLR (Mrima, J), along similar lines. The doctrine applies only where there are alternative dispute resolution mechanisms outside of the court system. That does not appear to be the case here. No such alternative systems have been alleged here. The argument, as I understand it, is that the claim articulated by the petitioner against the 2nd respondent should be dealt with through an ordinary suit. That would not be an alternative mechanism existing outside of the court system. It would be a mechanism within the court system.
93. What the 2nd respondent has in mind, in my view, is the principle of avoidance, which is somewhat related to the doctrine of exhaustion, to the extent of existence of alternative legal remedies. The departure is that, whereas the doctrine of exhaustion is limited to alternative mechanisms outside of the



court system, the principle of avoidance includes the courts as part of the alternative processes for the purpose of legal redress. The principle of avoidance is also referred to as the principle of constitutional avoidance. It was mentioned in *Council of Governors vs. Attorney General & 12 others* [2018] eKLR (Mwita, J), to the effect that a court would not determine a constitutional issue, when the matter could properly be decided on another basis, either through alternative mechanisms outside of court, or by court action through ordinary suit. It was discussed at length in *KKB vs. SCM & 5 others* [2022] KEHC 289 (KLR)(Mativo, J), where it was said that the doctrine shuns to deal with a constitutional issue where there exists another legal course, which can give the litigant the relief they seek. In that case, the court was of the view that the matter placed before it, as a constitutional issue, could quite properly be handled by a family court, as the dispute turned on validity of a marriage. It was said that the courts abhor the constitutionalisation of every dispute. See also *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited* [2013] eKLR (Lenaola, J), *Mike Rubia & another vs. Moses Mwangi & 2 others* [2014] eKLR (Lenaola, J) and *Edarus Salim Hussein & 8 others vs. Shariffia Binti Salim & 3 others* [2022] eKLR (Odeny, J)

94. Should that doctrine be invoked here? The argument is that the dispute between the petitioner and the 2nd respondent is around compensation. The 2nd respondent argues that that is not a constitutional issue, and it is a matter that can quite properly be handled through an ordinary suit. The petitioner has not quite sought to answer that submissions. Instead, it has sought to demonstrate that the 2nd respondent has been filing multiple suits against it with an intention to vex it. The petitioner has mentioned actions it has commenced against the 2nd respondent, to have it declared a vexatious litigant. It has also cited a recent decision, in *Nairobi HCCC (Commercial & Tax Division) No. 168 of 2007*, between *Butali Sugar Mills Limited*, the 2nd respondent and the predecessor of the 1st respondent, where the 2nd respondent was allegedly said to have had a habit of filing multiple suits against its competitor, which suits, from the orders obtained, delayed the onset of the competitor into the market, hence exposing it to losses, which it proved, and an award of damages, or compensation was made against the 2nd respondent. A copy of that judgement is attached to the affidavit sworn in response to the instant application. By this response, the petitioner is somewhat conceding to the fact that an alternative relief would be available by ordinary suit, alternative to the instant constitutional cause. I say so as the arguments articulated in this cause, by the petitioner, are similar to what I read from the judgement in *Nairobi HCCC (Commercial & Tax Division) No. 168 of 2007*. That would suggest that the doctrine of constitutional avoidance could be invoked here.
95. It appears to me that the principle of constitutional avoidance has been cited and applied in Kenya mainly with respect to cases where the dispute is between private entities. I hold the view that this principle does not sit well with the application of the Bill of Rights horizontally. The horizontal application of the Bill of Rights enables the court, seized of a constitutional cause, to determine disputes that would have also been quite properly handled in ordinary suits. In *John Atelu Omilia & another vs. Attorney-General & 4 others* [2017] eKLR (Mativo, J), for example, the constitutional cause arose from a failed criminal prosecution, and the petitioners complained of violation of their rights, and sought compensation. There exist remedies in civil law for compensation for false imprisonment and malicious prosecution, and constitutional violations through botched criminal prosecutions, and related actions, can be redressed through the ordinary civil process. The petitioners, in that matter, had the option of seeking and obtaining equivalent relief through ordinary litigation, and the court had the option of avoiding determining the constitutional questions, and granting the reliefs sought, by referring the petitioners to the ordinary civil court. The principle of constitutional avoidance was not invoked, and the court proceeded to determine the constitutional questions, and to award compensation. *Francis Mulomba Nguyo vs. Nation Media Group Limited vs. 2 others* [2021] eKLR (W. Korir, J) is the other example. The cause was about breach of privacy, by a private entity,



which could attract damages in tort for breach of privacy. That was also a constitutional violation or infringement. The court did not invoke the principle of constitutional avoidance, but entertained the claim, and awarded damages for violation of right to dignity and privacy. Perhaps, as a country, to avoid inconsistency, there could be a case to be made for embracing only one of these principles, and avoiding the other, for one negates the other.

96. The 2nd respondent also seeks dismissal of the petition on grounds of res judicata, on the basis that the issues raised in the instant petition were the same issues in Busia HC Petition No. 2 of 2016, which was heard and determined, and that those issues ought not be revisited in this cause.
97. So, what is res judicata? In *John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR)(Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, J), it was said that res judicata is based on the principle of finality of courts' decisions and court matters, and it is a matter of public policy, to ensure that litigation is brought to a close, to prevent multiplicity of suits and facilitate the verdict being translated into a fruit by the successful party. It was stated that it applied to constitutional litigation. The court identified elements of it: a former judgement or order which was final, the judgement or order was on merit, the court pronouncing the judgement or order had jurisdiction over the subject-matter and the parties, and the parties in both the former suit and the current suit or cause being the same litigating over the same subject-matter and cause of action. In *Mumira vs. Attorney General* [2021] KEHC 271 (KLR) (Mativo, J), it was said:

“Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief is different. In assessing whether the matter raises the same cause of action, the question is whether the previous judgement involved determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.”

98. The principle is raised in this matter with respect to the proceedings that were conducted in Busia HC Petition No. 2 of 2016. The parties in that constitutional cause were the petitioner herein as petitioner, together with a director of the petitioner; and 1st respondent herein as 1st respondent, and the 2nd respondent herein as 2nd respondent. There was a final judgement, delivered on 2nd February 2017. The court that handled the cause had jurisdiction, for the issue of jurisdiction did not arise, and the decision was never appealed. The case that was before the court in that cause, from what I read from the petition, dated 9th May 2016, and the judgement delivered on 2nd February 2017, is that the petitioner was aggrieved that the 2nd respondent was constructing and test-running a sugar mill at Olepito, that the construction was illegal for that sugar mill had not been registered nor licensed, for the registration on record was meant to be at Matayos, there were court orders that had stopped it, and the 1st respondent had called a stakeholders meeting with a view to legitimise that illegality. In its judgement, the court found that the change of construction site by the 2nd respondent from Matayos to Olepito was contrary to the existing registration, and construction works at Olepito were contrary to the law. Regarding the 1st respondent, it was found and held that it had not yet made a decision on the said sugar mill, and noted that 1st respondent had indicated the options open to it, with respect to the sugar mill, one of them being validating the works by registration of a new mill, and the other being amending the certificate of registration to legalise the mill. There was a claim for compensation, based on grounds that the actions and omissions of the 1st and 2nd respondents had exposed the petitioner to loss. On compensation, the court found that the claim failed, on 3 accounts: wrongdoing on the part of the 1st respondent was not established for it was yet to bless the sugar mill; the loss was not specifically pleaded and proved; and the loss was speculative in nature. In the end, the court decided to



direct regularisation of the sugar mill, by way of amendment of the registration certificate, previously issued to the 2nd respondent, to ground it on Olepito. The 2nd respondent was directed to make an application to the 1st respondent for that amendment within 30 days, failure to which there would be a declaration that that sugar mill had been established contrary to the law; while the 1st respondent was given 90 days to make a decision, upon receipt of the application from the 2nd respondent, and that decision was to be relayed to the petitioner and the 2nd respondent within 7 days.

99. As indicated above, the initiation of the instant cause was prompted by the implementation of the decree in Busia HC Petition No. 2 of 2016. The 2nd respondent applied for the amendment of the certificate of registration, on 7th February 2017, and the 1st respondent issued an amended certificate of registration on 14th February 2017. The petition herein, dated 27th March 2017, alleges that the application and amendment of the registration certificate did not accord with the judgement of 2nd February 2017 and the law governing such registration, and that it was rushed, hence its rights were violated, and it was entitled to compensation. The parties to the instant cause are the same as those in Busia HC Petition No. 2 of 2016. The principal driver of the instant cause is different, for the previous cause targeted construction of a mill without the requisite authorisation, while the instant cause is about the authorisation being given in a manner that did not accord with the judgement that ordered it and the relevant legislation. The causes of action are different, although the parties are the same. The instant petition rests on events that followed after the making of the orders of 2nd February 2017, and rests on the implementation of that judgement. The prayers relate to implementation of that judgement and issuance of the amended certificate of registration, dated 14th February 2017. The prayers for injunction and are also pegged on the judgement.
100. The court, in the judgement, of 2nd February 2017, in Busia HC Petition No. 2 of 2016, made a determination on compensation. The 2nd respondent argues that the issue of compensation is now res judicata, having been addressed by the court in Busia HC Petition No. 2 of 2016, and a determination being made on it. The court, in Busia HC Petition No. 2 of 2016, made definitive findings about the claim for compensation, to the tune of Kshs. 6,000,000,000.00. The foundation for the claim was the same as that made here, that the actions or omissions of the respondents exposed the petitioner to a loss to that tune. The court found the claim to be speculative, as no loss had been proved to have been suffered. It was dismissed. The petitioner is apparently bringing the same claim, only this time claiming to have some evidence. There are aspects of the judgement of 2nd February 2017, on compensation, which estop the petitioner pursuing the issue in the instant cause, or completely render it otiose. I am persuaded that the claim for compensation would be res judicata, given that the court in Busia HC Petition No. 2 of 2016 made comprehensive findings and holdings about it, and the same cannot now be re-litigated in another cause.
101. The other argument relates to this court being functus officio with relation to Busia HC Petition No. 2 of 2016. The purport of the principle was discussed in *Raila Odinga & 2 others vs. Independent Electoral & Boundaries Commission & 3 others* [2013] KESC 8 (KLR (Mutunga CJ&P, Rawal DCJ&VP, Tunoi, Ibrahim, Ojwang, Wanjala & Ndungu, SCJJ)), in terms of giving expression to the principle of finality with respect to judgements. A person with adjudicative and decision-making powers decides only once in relation to the subject-matter, and once a decision is made, subject to appeal or review, it would be final and conclusive, and cannot, thereafter, be revoked and varied by its maker. It was pointed out that a court only becomes functus after it has performed or discharged all its duties in a particular case, but that does not stop the court from correcting clerical errors. Once finally concluded, the decision cannot be reviewed or altered, except by a higher court on appeal. In *Telkom Kenya Limited vs. John Ochanda* (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited [2014] eKLR (Githinji, Karanja & Kiage JJA)), it was stated that the doctrine



of *functus officio* does not allow for a merit-based decisional re-examination of a final judgment, once a decree has been issued. See also *Geoffrey M. Asanyo & 3 others vs. Attorney-General* [2020] eKLR (Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ) and *Okiya Omtata Okoiti vs. National Transport and Safety Authority & another* [2021] eKLR (Mativo, J).

102. The question is, does the principle of *functus officio* apply here? I do not think does. Usually, *functus officio* would arise in the cause where the final judgement was pronounced. So that once a judgement is rendered in the matter, no subsequent proceedings can be conducted on the same matter, with a view to interfere with the judgement, except where review or correction of clerical errors are concerned. It cannot be re-visited by the same court, even if differently constituted. A merit-based evaluation of it cannot be carried out by the same court. The only way to have it re-looked at is by way of appeal by a higher court. In an ideal situation, the issue of *functus officio* should not arise here. The judgement in question was rendered in Busia HC Petition No. 2 of 2016. These proceedings are not being conducted in Busia HC Petition No. 2 of 2016, but in a separate cause. I understand the 2nd respondent to be saying that the instant cause is founded on the judgement in Busia HC Petition No. 2 of 2016, and that there was a risk that this court may re-open the issues that were the subject of Busia HC Petition No. 2 of 2016, and could be called upon to sort of sit on appeal on the judgement in that matter. It is true, as indicated elsewhere, that the instant cause is founded wholly on the judgement in Busia HC Petition No. 2 of 2016. However, the petition herein, dated 27th March 2017, does not challenge the decision in Busia HC Petition No. 2 of 2016. It does not question it. It does not invite this court to re-consider that judgement. The review sought in these proceedings is not of the judgement of W. Korir J, but of the decision of the 1st respondent in execution of that judgement. The petition is not concerned about the merits of that judgement, but about how that decision was implemented or carried into effect by the 1st respondent. The implementation was not by the court. The much that this court can do, with respect to that judgement, is to interpret it, with a view to determine whether there was compliance with it, or whether it was properly executed or implemented. The principle of *functus officio* would not apply to prevent me from interpreting the judgement in question.
103. Obliquely related to that is the argument that the instant cause raises issues that ought to have been raised through an application in Busia HC Petition No. 2 of 2016. That may be so. However, that scenario does not call for the application of the principle of *functus officio*.
104. The other principle cited, and upon which I am invited to strike out the petition herein, is *sub-judice*. The concept was explained in *Kenya National Commission on Human Rights vs. Attorney General Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ), as follows:

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts



of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

105. The elements highlighted above are: that there must be more than one suit or cause pending; that the suits or causes must be over the same subject-matter; one of the suits or causes must have been initiated before the other or others; that all the suits or causes are pending before courts of competent jurisdiction; and that all the said suits or causes are between the same parties or their representatives. These are the parameters within which it has to be gauged whether a suit is sub judice another. See *Kings Millennium Management Ltd vs. Olago & others (being sued on behalf of members of the Imara Daima Youth Hustlers Shopping Centre) & 2 others* [2023] KEELC 22491 (KLR)(Mboya, J).
106. The instant cause is said to be sub judice Nairobi HC Constitutional Petition No. 264 of 2019. So, what is Nairobi HC Constitutional Petition No. 264 of 2019 about, and who are the parties in it? A copy of the petition in Nairobi HC Constitutional Petition No. 264 of 2019 was placed on record on 11th October 2023, by the 2nd respondent. It is a suit at the instance of the petitioner herein, and it is against the 2nd respondent herein, and the Attorney General. It is dated 4th July 2019, and was filed in court on 5th July 2019. The principal complaint is that the 2nd respondent herein has filed multiple suits against the petitioner, at the various stations of the High Court, to wit Busia, Nairobi and Kisumu, several others at the Environment and Land Courts at Bungoma, Busia and Kisumu, and there are appeals pending between the parties at the Court of Appeal at Kisumu. It is contended that the filing of these multiple suits was intended to frustrate the petitioner, and its business operations. It is argued that the 2nd respondent had become a vexatious litigant, who ought to be declared so by the court, hence the joinder of the Attorney General in the proceedings as a respondent. It is averred that the conduct of the respondents has violated or infringed on or contravened the constitutional rights of the petitioner. The prayers sought are a declaration that certain provisions of the *Vexatious Proceedings Act*, Cap 46 of 1958 are unconstitutional; a declaration that the rights of the petitioner, under the cited provisions of *the Constitution*, have been violated; leave to file an application to declare the 2nd respondent a vexatious litigant; and a conservatory order against the 2nd respondent, barring it from filing any suit against the petitioner, without leave of the court.
107. So, is the instant cause sub judice Nairobi HC Constitutional Petition No. 264 of 2019? No, it is not. Whereas the 2 causes have the petitioner and the 2nd respondent as parties, and are pending before courts with jurisdiction, that is the farthest it goes, in terms of meeting the parameters for sub judice, as defined in *Kenya National Commission on Human Rights vs. Attorney General Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ). Firstly, the suit that should be sub judice the other should be the latter cause, not the first to be filed. The latter cause, in this context, is Nairobi HC Constitutional Petition No. 264 of 2019. It was filed on 5th July 2019, the instant cause, Busia HC Petition No. 3 of 2017, was filed herein on 27th March 2017. Busia HC Petition No. 3 of 2017 was the first in time, and, therefore, it is Nairobi HC Constitutional Petition No. 264 of 2019 which should be sub judice Busia HC Petition No. 3 of 2017. If the application of the sub judice principle should result in the striking out of a suit or cause, then the cause to strike out would be Nairobi HC Constitutional Petition No. 264 of 2019, and not Busia HC Petition No. 3 of 2017. Secondly, the subject-matter or substance of the 2 causes, is different. Busia HC Petition No. 3 of 2017 hinges on the judgement in Busia HC Petition No. 2 of 2016, and seeks orders around how that judgement was implemented by the respondents, and the theme is to have the amendment of the certificate of registration involved quashed, and the process undertaken afresh, in accordance with the terms of the judgement, and the applicable law. That is not the subject of Nairobi HC Constitutional Petition No. 264 of 2019, where the complaint is about the multiple suits that the 2nd respondent has been filing



against the petitioner, and the theme there is to have the 2nd respondent declared a vexatious litigant, and restricted from filing further suits against the petitioner, without leave of court. The issue of sub judice does not arise here. Even if it arose, which is not the case, its incidence would not be the striking of the suit or cause breaching that principle, rather the offending cause would be stayed, to await the outcome of the suit or cause initiated earlier. The other outcome would be the consolidation of the affected suits or causes.

108. The issue of the filing of multiple suits, by the 2nd respondent against the petitioner, was raised by the petitioner in its submissions. The cause in Busia HC Petition No. 3 of 2017 is not about multiple suits. It is confined to the amendment of the certificate of registration of the 2nd respondent, and it questions whether that process was undertaken in accordance with the terms of the judgement in Busia HC Petition No. 2 of 2016. The petition on record does not raise the issue of multiple suits, and that is a matter which is the subject of another cause, Nairobi HC Constitutional Petition No. 264 of 2019, as discussed above. So, whether the 2nd respondent has been filing multiple suits against the petitioner, for one reason or another, is not an issue before me, in these proceedings. I am reluctant to address it given that it is before the court in Nairobi HC Constitutional Petition No. 264 of 2019, and, therefore, it is sub judice, in the sense of it being a live issue in another suit or cause, pending before another court.
109. A related issue raised by the petitioner in submissions, is that the application for striking out is a replica of previous applications. The 2 processes that the petitioner mentioned were the preliminary objection, dated 19th November 2020, and the application, dated 21st January 2021. It was submitted that the rulings on those 2 processes render the application for striking out res judicata, as the issues raised in those processes mirror those raised in the instant application.
110. Let me start with the preliminary objection. It is dated 18th November 2020, and was filed in court on 19th November 2020. It should of some consequence that it was filed simultaneously with the 2nd respondent's response to the amended petition, dated 26th September 2018. The preliminary objection turned on 3 grounds: that the amended petition was res judicata Bungoma ELC Constitutional Petition No. 6 of 2016; that the petitioner lacked a cause of action, as the same had been vitiated by the decision in Bungoma ELC Constitutional Petition No.6 of 2016; and that entertaining the cause herein would amount to sitting on appeal on the decision in Bungoma ELC Constitutional Petition No. 6 of 2016.
111. Some background is necessary. The preliminary objection was framed as an objection to the petition. At the time the response to the amended petition, dated 26th September 2018, and the preliminary objection to the petition were being filed, on 19th November 2018, the only legitimate pleading on record was the petition, dated 27th March 2017. The petitioner had filed an amended petition, dated 26th September 2018, simultaneously with the application for joinder and amendment, dated 24th September 2018. As I indicated above, the said amended petition ought to have been an annexure to the affidavit sworn in support of the joinder and amendment application, however, it was filed separately. That meant that it was filed as a substantive pleading. However, as it was filed without leave, it was not available for responding to, before leave was granted on the application dated 24th September 2018, for joinder and amendment of the initial petition, dated 27th March 2017, or before the court admitted it on record as a substantive pleading by deeming it as duly filed. The 2nd respondent, therefore, responded to a filing that had been placed in the court file without leave of court, and which had not been deemed by the court as properly filed, and part of the court record. It transpired that that amended petition, dated 26th September 2018, is the one that sought to introduce the cause in Bungoma ELC Constitutional Petition No. 6 of 2016. The initial petition, dated 27th March 2017, made no reference whatsoever to Bungoma ELC Constitutional Petition No. 6 of 2016. The preliminary objection,



- having been filed simultaneously with the response to the amended petition, addressed the issue of Bungoma ELC Constitutional Petition No. 6 of 2016, however, it expressed itself as an objection to the petition, rather than the amended petition,. That meant that it was an objection to the petition, dated 27th March 2017, which had no references to Bungoma ELC Constitutional Petition No. 6 of 2016.
112. The parties canvassed that preliminary objection before Karanjah J, who delivered a ruling on 18th May 2022. The court ruled that the preliminary objection was properly before it. On the substance, the court found and held that there was a misconception, relating to the pleadings and other filings on record. It was held that the parties in the instant cause and in Bungoma ELC Constitutional Petition No. 6 of 2016 were different, and so were the issues, and it was ruled that *res judicata* did not apply, and the preliminary objection was dismissed. Given the mix-up that I have alluded to above, the said preliminary objection stood no chance of success.
113. The issue of *res judicata* was raised with respect to both Bungoma ELC Constitutional Petition No. 6 of 2016 and Busia HC Petition No. 2 of 2016. Regarding Bungoma ELC Constitutional Petition No. 6 of 2016, Karanjah J pronounced himself on the matter, and found that *res judicata* did not apply, and the same should not have been raised in the application for striking out.. In any event, the matter of Bungoma ELC Constitutional Petition No. 6 of 2016 is now irrelevant, in view of the discussions that I had hereabove, and the conclusions that I came to with respect to it. Regarding Busia HC Petition No. 2 of 2016, Karanjah J found that the preliminary objection did not refer to that cause, and so the same was irrelevant for the purposes of the preliminary objection. Karanjah J, therefore, did not pronounce on whether the principle of *res judicata* applied with respect to Busia HC Petition No. 2 of 2016, and the 2nd respondent was not in the wrong in raising it in its application for striking out.
114. Let me now turn to the application, dated 21st January 2021. It seeks 2 principal prayers. The first is about setting aside orders that had been made on 25th November 2020, for formal proof. The second prayer was for deeming that the response by the 2nd respondent to the petition and the preliminary objection, both dated 3rd November 2020, were properly on record. There was a background to that. On 14th May 2019, the Advocate for the petitioner had informed the court that the petitioner had filed an amended petition, and served it, and that the other parties were yet to reply. The respondents were given 14 days to file replies. On 25th November 2020, when the matter came up for directions, the court was informed that despite the directions of 14th May 2019, no responses had been filed. The Advocate for the petitioner asked that the petition, dated 24th September 2018, be allowed as prayed. The court ruled that some of the prayers, presumably that on compensation, required formal proof, and the matter was fixed for formal proof on 8th February 2021. In the intervening period, the 2nd respondent filed the application, dated 21st January 2021, essentially to put its house in order, by having its responses to the amended petition being deemed as properly on record. Karanjah J delivered a ruling, on that application, on 18th May 2021. The court allowed both prayers. The court was of the view that there was either misinformation or lack of proper information from the petitioner to the court, as the respondents were absent, with regard to the directions of 25th November 2020, which the court described as mistaken, for the matter was not ripe for hearing, as the application, dated 24th September 2018, for joinder and amendment, was still pending hearing and determination. The court expressed sadness over the misinformation, and stated that the confusion created had been precipitated by the petitioner.
115. The minutes of what transpired in court on 14th May 2019 say as follows:

“ 14/5/19

Before Hon. Justice Kiarie W. Kiarie J



C/A Doreen

Inter: Eng/Kisw

Mr. Ipapu and Mr Hassan for petitioner

Ms. Simiyu for Mr. Olendo for 1st respondent

Mr. petitioner has filed an amended petition and served all parties. We are yet to receive a response.

Ms. Simiyu: Mr. Olendo is requesting for two weeks to respond.

Mr Hassan : The application is objected to.

Order: Hg on 7.10.2019. Respondents given 14 days to file and serve their response. ”

116. The minutes for 25th November 2020 reflect the following as what transpired:

“ 25/11/2020

Before Hon. Justice Kiarie W. Kiarie J

C/A Etyang

Mr Hassan for petitioner

Ongenjo Olendo for 1st respondent absent

N/A for the respondent

Mr. Hassan: The respondents have not filed responses 14.5.2019 when they were given 14 days to do so. May the order the application as prayed. This is the petition of 24th September 2018.

Ct: Some prayers require formal proof.

Order: Formal proof on 8.2.2021. ”

117. The application, dated 21st January 2021, was premised on Rule 16 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013, which deals with failure to respond to the process in constitutional causes within the stipulated period. The court may proceed, ex parte, to hear the petition, in the absence of the respondent. Where the court proceeds ex parte, and makes orders disposing of the matter, the respondent may apply for setting aside of the ex parte orders, and the orders may be set aside by the court. Indeed, the court can even set aside the ex parte orders on its own motion. Of course, in this cause, the court did not proceed ex parte to hear and dispose of the matter. Only directions had been taken ex parte, although eventually the matter was to proceed ex parte, as no responses had been filed to the purported amended petition. However, the ex parte directions were taken with a view to proceed to hearing ex parte, and Rule 16(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, was relevant. Karanjah J noted that the ex parte directions were taken in an environment where the 2nd respondent had not been notified of the appearance before the Judge on that date, whether for mention for directions or for hearing.

118. The said provision states:



<p>“16.</p>	<p>Failure to respond within stipulated time</p> <table border="1" data-bbox="858 271 1385 1025"> <tr> <td data-bbox="858 271 1123 645">(1)</td> <td data-bbox="1123 271 1385 645">If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent’s absence.</td> </tr> <tr> <td data-bbox="858 645 1123 1025">(2)</td> <td data-bbox="1123 645 1385 1025">The Court may set aside an order made under subrule (1) on its own motion or upon the application of the respondent or a party affected by the order.”</td> </tr> </table>	(1)	If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent’s absence.	(2)	The Court may set aside an order made under subrule (1) on its own motion or upon the application of the respondent or a party affected by the order.”
(1)	If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent’s absence.				
(2)	The Court may set aside an order made under subrule (1) on its own motion or upon the application of the respondent or a party affected by the order.”				

119. I would agree with the petitioner, that an aspect of the striking out application was a replica of the preliminary objection. However, there is nothing in the application, dated 21st January 2021, which is related in any way to the prayers sought in that application for striking out of the petition. The events that triggered the filing of the application, dated 21st January 2021, were caused by the petitioner, as noted by Karanjah J, in the ruling of 18th May 2021. Further to that, I note that the 2nd respondent filed only 1 interlocutory application, dated 21st January 2021, which was necessitated by the misinformation that had been fed to the court by the petitioner, and, it was, therefore, a necessary application, to remedy the mess created by the petitioner. The other filing was the preliminary objection. The preliminary objection was part of the response by the 2nd respondent to the purported amended petition. The filing of those responses was triggered by the petitioner, on the representation that it made to the court on 14th May 2019, that it had filed an amended petition, which was misleading, for that alleged amended petition was a draft, that had been filed in court without leave of the court, and which was not ripe for responding to, for its filing had not been allowed, and after it was filed it was not deemed as properly on record. So, the 2nd respondent was prompted to respond to a false pleading, which led to the court wasting time hearing a preliminary objection, which could not have been filed, were it not for the misrepresentations made to court on 14th May 2019. It cannot, therefore, be the case that these filings were meant to delay the matter, when the mess relating to them was created by the petitioner.
120. The last issue that I will address is the blame placed on the 2nd respondent by the petitioner, with respect to the handling of the matter generally, and, to an extent on the court, as discernible from the written submissions by the petitioner. I am not persuaded that the 2nd respondent is solely to blame for the delay. There has been delay alright in the disposal of the matter. A constitutional petition should be



disposed of within 6 months, and, for a less busy station like Busia, within 3 months. Litigation, in an adversarial system, like that applied in Kenya, is driven by the parties, and not the court. The case belongs to the parties, not the court. The initiator of the proceedings should be the prime mover of the matter. Where the initiator takes a laidback position, the matter stalls. That is what happened here. The party who initiated this matter, and who should have driven it, sat back, and took little initiative in advancing the matter to its final conclusion, and that allowed others to take over. The party also approached the matter with some measure of lack of strategy, which led to confusion. It would not be fair for that party to now turn around and blame the others of causing delay, when it took little initiative to drive its cause. As noted by Karanjah J, in the ruling of 18th May 2021, this cause has never been ripe for hearing, in view of the pending application for joinder and amendment. As it was never ripe for hearing, there is no possibility that the 2nd respondent, or any other party, could have caused delay of its hearing. Why was it never ripe for hearing? There are interlocutory applications, filed by the petitioner, in 2017 and 2018, which are still pending. The 2018 application, for joinder and amendment of pleadings, is the most critical, for it would impact on how the matter would go forward. The matter cannot be heard on the merits of the petition, when there is an application pending, that could introduce new parties and a new cause of action.

121. Let me consider these interlocutory applications, dated 27th March 2017 and 24th September 2018. Both remain pending, 7 and 6 years, respectively, after they were filed. Why have they not been disposed of? The petitioner blames the 2nd respondent, for filing multiple applications, which hindered the disposal of these 2, and, by extension, the petition itself. It was incumbent on the petitioner to ensure that they were disposed of, to pave way for disposal of the main business, the petition. I have given a detailed history of the first application, which was for conservatory orders, in paragraph 6 of this ruling. The 2nd respondent never replied or responded to it. The only response on record is by the 1st respondent, and I presume the 2nd respondent did not see the need to file a response, as the allegations made in it, and in the petition, largely target the 1st respondent. It was filed in Nairobi on 27th March 2017. The matter was then transferred to Busia. It was mentioned at Busia on 29th May 2017, and thereafter came up before the Judge, for either mention or hearing, several times, on 25th September 2017, 30th January 2018, 28th February 2018 and 7th May 2018. The last time it was before a Judge was on 7th May 2018. It has never been heard, and the petitioner has not, since 7th May 2018, given an indication as to what it intended to do with it, despite directions that were given by Karanjah J on it in rulings that were delivered on 18th May 2021 and 18th May 2022. There is nothing to show that the 2nd respondent has anything to do with the delay with regard to this application. As indicated above, the 2nd respondent did not reply to it, and it had not filed any application, or other process, by 7th May 2018, when that application was last in court.
122. The second application, dated 24th September 2018, is the subject of discussion in paragraph 7 of this ruling. It is the filing of this application which took away attention from that dated 27th March 2017. It was first placed before the Judge on 1st October 2018. It came up twice before the Judge, for mention or hearing, on 14th May 2019 and 25th November 2020. 2 critical matters derailed its disposal which I believe had nothing to do with the 2nd respondent.
123. The first was the filing of a bill of costs by the 1st respondent. It transpired that during the pendency of the application, dated 24th September 2018, the petitioner removed the 1st respondent from the proceedings, vide a notice that was filed in court on 11th December 2018. Upon being removed from the matter, the 1st respondent filed a bill of costs, dated 6th March 2019, on 10th July 2019. Proceedings were conducted in respect of that bill of costs, which suspended, or caused to be held in abeyance, proceedings relating to the application, dated 24th September 2018, and the petition. The matter



relating to that bill of costs was before the Deputy Registrar 9 times, on 17th May 2019, 20th July 2019, 26th July 2019, 21st August 2019, 27th September 2019, 9th October 2019, 20th November 2019, 4th December 2019 and 29th January 2020. 29th January 2020 is when a ruling was delivered, striking out the bill of costs, for being irregular. Between 17th May 2019 and 29th January 2020, the matter was being handled exclusively by the Deputy Registrar, with respect to the bill of costs. The file was not placed before the Judge at any time between the 2 dates. Yet, the issue of the costs, of the party removed from the proceedings, was peripheral to the hearing of the petition, and the pending application to amend it. It would appear that the 1st respondent was eager and passionate about its case, and was able to wrestle initiative from the petitioner, and to have its agenda, to recover its costs, a peripheral matter, take the centre stage over the petition and the application to amend it. It would appear that the 1st respondent was more proactive over its matter, compared with the petitioner. If the petitioner had employed and deployed similar zeal for its application, dated 24th September 2018, and the petition, no doubt, the 2 would have been resolved by the end of 2019. Rather than admit that it lacked the zeal to drive its agenda, the petitioner blames the 2nd respondent, yet between 17th May 2019 and 29th January 2020, the 2nd respondent had not filed any process at all in the matter, which would have derailed the prosecution of the said application, dated 24th September 2018, and the petition.

124. The second was the 2 processes that the 2nd respondent filed in 2020 and 2021. It is these 2 processes that the petitioner argues were filed with an intent to delay and derail the hearing of its petition. One was the preliminary objection, dated 19th March 2020, and the other the application, dated 20th January 2021. These 2 processes were filed after the matter of the bill of costs was disposed of by the Deputy Registrar, on 29th January 2020, for the matter went back to the Judge, on 20th November 2020, after a hiatus of inaction of 10 months, when directions were taken which prompted the filing of the preliminary objection and the said application. The background was that the petitioner had informed the court, on 14th May 2019, that it had filed an amended petition, and served it on the other parties, who had not filed their responses to it. The court then gave the parties 14 days to file responses. That issue went underground, as on 17th March 2019, the bill of costs was filed, and everything about the application, dated 24th September 2018, and the petition, were forgotten, as narrated above. After the bill of costs was done away with, on 29th January 2020, when the matter was mentioned next before the Judge, on 25th November 2020, the petitioner reminded the Judge about the directions of 14th May 2019, and pointed out that no responses had been filed to the amended petition, and sought orders as per the petition. Whereupon the Judge pointed out that some of the prayers could not be dealt with in a summary manna, and some form of hearing was necessary, and then fixed a date for that formal hearing. Those directions were taken in the absence of the 2nd respondent, who thereafter filed a response, on 19th November 2020, to the purported amended petition, which was dated 3rd November 2020, and the preliminary objection, dated 19th November 2020. The 2 processes were filed without leave of court, hence the 2nd respondent filed the application, dated 20th January 2021, to have the 2 deemed as properly on record, and to have the date allocated for formal hearing vacated, ostensibly to pave way for the said 2 processes.
125. As indicated above, Karanjah J heard the application dated 20th January 2021, and allowed it, which paved way for the hearing of the preliminary objection, dated 19th November 2020, which Karanjah J also heard thereafter, and dismissed it. At the end of it, Karanjah J concluded that the court had been misled on 14th May 2019, resulting in the directions of that 14th May 2019, and 25th November 2020. I agree, as Kiarie J was led to believe that the purported amended petition, that the 2nd respondent had allegedly not responded to, was properly on record, and the directions given were in that belief. The said amended petition was not properly on record, the court had not deemed it properly on record, and it could not be responded to before it was regularised by an order of the court, which the



petitioner never asked for, and which the court never gave. It was in that regard that Karanjah J had ruled that the petition was not ripe for hearing, for the application, dated 24th September 2018, was still pending, and that application could not have been pending if the amended petition had been deemed as properly filed. That then meant that the filing of the response to the amended petition and the preliminary objection, which was prompted by the petitioner, was completely needless, and so were the proceedings that Karanjah J had to undertake to determine the application, dated 20th January 2021, and the preliminary objection, dated 19th November 2020. Court or judicial time was wasted, and the party to blame for that was the party who misled the court, and that was the petitioner. The petitioner cannot now turnaround, and point at the 2nd respondent, accusing it of undertaking these 2 processes with an intention to delay the matter, when in fact it was the petitioner who created the unfortunate situation, where the 2nd respondent had to respond to a court filing that was improperly on record. If the petitioner had not misled the court, that scenario would not have played out, and Karanjah J would not have had to waste time hearing that application and the preliminary objection, and would have gone straight to deal with the petition itself.

126. For avoidance of doubt, Karanjah J wrote as follows, in the ruling that was delivered on 18th May 2021:

“(7) ... It is evident from the record that what was due for hearing on 25th November 2020 was the petitioner’s application for amendment of the petition and not the main petition as implied. That notwithstanding, no orders were granted in favour of the petitioner with regard to the application and indeed the petitions. Instead, the court ordered that there be a formal proof of some of the prayers on the 7th February 2021. In making the order, there was no indication from the petitioners to the court the respondents were served with the necessary hearing notice or even a mention notice. Even if a mention notice had been served upon the respondents, the petitioner ought not have proceeded as if the matter was for hearing of the application dated 24th September 2018, yet it is stated for mention for directions with regard to that application. In any event, there was no hearing notice to the respondents for the hearing of the application on that date.

(8) Therefore, the order by the court that the matter proceeds to formal proof would not have been made if the petitioner had provided necessary and vital information in regard to the absence of the respondents on that material date. This would have been achieved by proof of service of a hearing notice to both respondent’s rather than a mention notice as the petitioner had presented themselves in court not for mention of the matter for directions but for hearing of the application dated 24th September 2018. This explains why they asked the court to grant them the orders sought in the application rather than give them directions on the hearing of the application. Clearly, the order by the court for formal proof of the application and/or the petition was a mistake arising from misinformation or lack of proper information from the petitioners in the respondent’s absence on the material 25th November 2020. It must be noted that the petition is not ripe for hearing considering that the petitioner’s application for amendment of the same is pending hearing and determination. Further, if the matter were to be presented in court on 8th February 2021, it was for hearing of the application for amendment of the petition and not for hearing of the main petition. Sad to note; that all the confusion alluded hereabove was precipitated by the petitioner.



(9) ...”

127. The final order by Karanjah J, in that ruling of 18th May 2021, was to provide a way forward for the matter. Karanjah J allocated a date for mention for directions on the disposal of the applications, dated 27th March 2017 and 24th September 2018, and, the preliminary objection, dated 19th March 2020. That mention happened on 14th July 2021, when it was directed that the preliminary objection be determined first, and parties were given time to file written submissions. The ruling on the preliminary objection was delivered on 18th May 2022, dismissing the preliminary objection. The final order, in that ruling, was that the matter be given a mention date, for directions on the applications, dated 27th March 2017 and 24th September 2018. Interestingly, when the matter was placed before me, on 20th September 2023, the petitioner did not allude to the 2 pending applications, dated 27th March 2017 and 24th September 2018, nor of the rulings by Karanjah J, of 18th May 2021 and 18th May 2022, to the effect that the matter was not ripe for hearing, prior to those 2 applications being disposed of. The petitioner was instead raring to present its case on the petitions, and it fell upon the 2nd respondent to inform the court that those 2 applications were still pending, and the matter was not ripe for trial. I believe that it was due to the seeming lack of appetite, on the part of the petitioner, to proceed with disposing of the business of the matter, as directed by Karanjah J, that the 2nd respondent proposed that it would file an application to strike out the matter. As it were, on 20th September 2023, the petitioner was either not clear on what was coming up for me to deal with, between the applications, dated 27th March 2017 and 24th September 2018, and the petitions; or it wanted me to proceed to hear the petition on its merits, regardless of the earlier directions given by Karanjah J. The sense I got, on 20th September 2023, was that the petitioner wanted me to proceed with the matter against the orders made by Karanjah J, on 18th May 2021 and 18th May 2022.

128. For avoidance of doubt, Karanjah J directed as follows, in the ruling of 18th May 2021:

“(9) ... The matter be fixed for mention on the way forward with regard to the pending application, dated 27th March 2017 and 24th September 2018 as well as the notice of preliminary objection filed herein on 19th March 2020 by the second respondent.”

129. In the ruling of 18th May 2022, Karanjah J wrote:

“(22) ... The matter be given a mention date for directions with regard to the applications dated 27th March 2017 and 24th September 2018, respectively.”

130. Although the petitioner blames the other parties, and, impliedly, as can be gleaned from the written submissions, dated 20th November 2023, the court, for the delay in the prosecution of the matter to its finality, the material on record points to the contrary. The other parties and the court are blameless. What emerges is lack of strategy and commitment to finalisation of the matter by the petitioner. As indicated above, the other parties filed processes and followed them through. The 1st respondent filed a bill of costs, and pursued it until a ruling on it was delivered by the Deputy Registrar. The bill of costs was secondary to the petitions, and the petitioner should not have allowed it to be given prominence over its own applications and petitions. But, it let the 1st respondent have its way. Similarly, the 2nd respondent filed 2 processes, and pursued them to their final conclusion, by way of the 2 rulings by Karanjah J. Karanjah J gave the petitioner a way out to finalise the matter, but the petitioner did not take the cue, instead it dilly-dallied, pushing, instead, to have the petitions being heard, without complying with the express directives of the court.



131. What I find even more profound regards the purported amended petition, dated 24th September 2018. It was filed without leave of the court, and that made it an irregular filing, upon which no regular proceedings could be based. However, the irregularity was not necessarily fatal to the filing, it was curable. The filing could still be salvaged, and life breathed into it, by merely asking the court to treat or deem it as properly filed. An order by a court deeming it as properly filed, and regularly on record, would have given it legitimacy. It would have short-circuited the application, dated 24th September 2018, and rendered it useless and needless. However, the petitioner did not adopt that strategy. It did not ask the court to sanitise that filing by deeming it to be properly on record. Rather than doing so, the approach adopted had the effect of misleading the court, on 14th May 2019, and 25th November 2020, that that document had been properly filed, and had been served, but the other parties had failed to file responses to it. Even after the directions given by Karanjah J on the way forward, on disposal of the pending applications, the petitioner still stuck to insisting on proceeding with the hearing of the petition, without complying with the said directions, and without getting the purported amended petition regularised. When issues were raised on 20th September 2023, on the pendency of the 2 applications, and on the irregular filing of the purported amended petition, the petitioner opted to have the irregularly filed purported amended petition withdrawn, and the application, dated 24th September 2018, argued, instead of simply asking to have the said amended petition regularised, which would have obviated the need to have the said application heard.
132. Perhaps the biggest strategic failure was the removal of the 1st respondent as a party in these proceedings. The entire petition rests on the case against the 1st respondent. It was its decision, to amend the certificate of registration, issued to the 2nd respondent, that triggered the filing of the petition, which targets the acts, omissions and decisions of the 1st respondent. As stated earlier, the 2nd respondent is a lesser party, against whom no case, founded on the allegations in the petition, dated 27th March 2017, can lie without the presence of the 1st respondent. The removal of the 1st respondent from the petition effectively killed the cause, and the case against the 2nd respondent was left without a foundation or base.
133. I believe that I have comprehensively addressed all the issues raised by the parties in these proceedings.
134. I have already concluded that the application, dated 24th September 2018, is not available for granting, for the reasons given, and what I have to address now is whether the second application, dated 9th October 2023, for striking out of the petition, should be allowed. I have addressed issues above around striking out of pleadings, with respect to constitutional causes, and constitutional litigation in general, and the spirit, very clearly emerging from the relevant law, is that that is not feasible, for it would defeat the spirit of *the Constitution*, on access to justice, fair hearing and avoidance of technicalities of procedure. However, that does not take away the power and discretion of the court to strike out pleadings, in plain and obvious cases. I am persuaded that this is one such case. The petition herein is premised on implementation of the judgement of 2nd February 2017, in Busia HC Petition No. 2 of 2016. The party who was required to comply with that judgement was the 1st respondent, by considering amending the 2nd respondent's certificate of registration, and the petition herein is meant to have that party, the 1st respondent, comply fully, according to the petitioner, with the terms of that judgement. The 2nd respondent is a peripheral party in the matter. The petitioner removed the 1st respondent from the cause, as a respondent, which act effectively killed the cause herein, as against both respondents, for the case against the 2nd respondent was left completely without a foundation, in the absence of the case against the 1st respondent.



135. Consequently, the final orders are that the application, dated 24th September 2018, is hereby dismissed; while that dated 9th October 2023 is allowed as prayed. Usually, constitutional litigation does not attract costs, none were awarded to the 1st respondent, and I shall not award any herein. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED THROUGH E-MAIL AT BUSIA THIS 12TH DAY OF FEBRUARY 2024

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Hassan, instructed by HMS Advocates, for the petitioner.

Mr. Olendo, instructed by Olendo Orare & Samba LLP, Advocates for the 2nd respondent.

