



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT BUSIA**

**CONSTITUTIONAL PETITION NO.3 OF 2017**

**IN THE MATTER OF, CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 20,21, 22,23,24,35,40 AND 60(a), (c) AND (d) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CROPS ACT NO.16 OF 2013**

**AND**

**IN THE MATTER OF, THE AGRICULTURE FISHERIES AND FOOD AUTHORITY ACT No.13 OF 2013,**

**AND**

**IN THE MATTER OF, PROPOSED STAKEHOLDER MEETING SCHEDULED FOR 13<sup>TH</sup> MAY, 2016,**

**AND**

**IN THE MATTER OF, THE IMPLEMENTATION OF THE DIRECTIVES OF JUSTICE MR. KORIR IN THE JUDGMENT DELIVERED ON 2<sup>ND</sup> FEBRUARY, 2017 IN BUSIA PETITION NUMBER 2 OF 2016,**

**AND**

**IN THE MATTER OF, ILLEGAL AND UNPROCEDURAL GRANT OF REGISTRATION TO WEST KENYA SUGAR CO. LTD BY AGRICULTURE AND FOOD AUTHORITY,**

**AND**

**IN THE MATTER OF, THE DOCTRINE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**BUSIA SUGAR INDUSTRY LIMITED.....PETITIONER**

**AND**

**THE AGRICULTURE, FISHERIES AND FOOD AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**WEST KENYA SUGAR COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY...3<sup>RD</sup> RESPONDENT**

**RULING**

[1] The application dated 20<sup>th</sup> January, 2021 was filed by **WEST KENYA SUGAR CO. LTD (SECOND RESPONDENT)** on 22<sup>nd</sup> January 2021 through the firm of **OLENDO, ORARE & SAMBA LLP ADVOCATES** seeking orders that the orders of this Court made on 25<sup>th</sup> November 2020 fixing the petition for formal proof be set aside unconditionally and that respond to the petition and the preliminary objection dated 3<sup>rd</sup> November 2020 both by the applicant/second respondent be deemed to be proper on record.

The grounds in support of the application are set out in the appropriate notice of motion as fortified by the averments in the supporting affidavit deponed by **MILICENT LUKASILE** on 20<sup>th</sup> January 2021.

The petitioner, **BUSIA SUGAR INDUSTRY LTD**, opposed the application on the basis of the grounds contained in the replying affidavit deponed by **ALIBHAI HASSAN** on the 23<sup>rd</sup> April 2021. It is however erroneously indicated at the heading that the replying affidavit is in respect of an application dated 28<sup>th</sup> January 2021. No such application exists.

[2] Be that as it may, the application was canvassed by way of written submissions. In that regard, the applicant's submissions were filed herein on 24<sup>th</sup> February 2021, while those of the petitioner were filed on 23<sup>rd</sup> March 2021, through Messrs **HMS ADVOCATES LLP**.

This court having considered the application the basis of the supporting ground, and those in opposition thereto in the light of the rival submissions, holds the opinion that the solution to or the determination of the application inasmuch as it is based on issues of facts lies in the court record which clearly shows the pattern that the matter has taken to arrive at the stage where it is currently and which state has resulted in the application and the opposition thereto.

[3] In that regard, it is discernable from the record that the petition dated **25<sup>TH</sup> MARCH 2017**, was initially filed at the High Court in Nairobi on the 24<sup>th</sup> March 2017 but was on the same date transferred to this Court for hearing and determination. The petitioners, **BUSIA SUGAR INDUSTRY LTD**, prayed for declaratory, conservatory and compensatory orders against the first respondent **AGRICULTURE AND FOOD AUTHORITY** and the second respondent, **WEST KENYA SUGAR CO. LTD**. They also prayed for orders of mandamus to issue against the first respondent.

The cause of action was seemingly ignited by the judgment of this court, differently constituted, delivered on the 2<sup>nd</sup> February 2017 in **BUSIA PETITION No.29 OF 2017**.

A notice of motion dated **27<sup>TH</sup> MARCH 2017**, was filed together with the petition for conservatory orders and temporary injunction orders against the respondents.

[4] The motion was in the first instance fixed for hearing on 20<sup>th</sup> July 2017, but was severally adjourned for one or the other reasons. It would appear that the motion was cast aside to remain dormant indefinitely as on the 7<sup>th</sup> May 2018, the parties through their responsive advocates appeared in court and indicated that they were unable to agree on the matter. It was then that the petitioner applied for leave to amend the petition and was directed by the court to file a formal application. This resulted in the application dated **24<sup>TH</sup> SEPTEMBER 2018**, and filed herein by the petitioner on the 26<sup>th</sup> September 2018, seeking leave to amend the petition and to enjoin the **NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (N.E.M.A)** as the third respondent.

The application was fixed for hearing on 6<sup>th</sup> November 2018, but was on that day pushed forward to 12<sup>th</sup> February 2019, and then to 14<sup>th</sup> May 2019.

In the meantime, the petitioner withdrew the whole petition against the first respondent, Agricultural Food & Fisheries Board, vide the notice of withdrawal dated 3<sup>rd</sup> December 2018, filed herein on the 11<sup>th</sup> December 2018.

[5] On 14<sup>th</sup> May 2019 when the application dated 24<sup>th</sup> September 2018, was placed before the court for hearing, the respondents requested for a period of two weeks to file their responses to the application. The court indulged and gave them fourteen (14) days to do so. Matter was then pushed forward to 7<sup>th</sup> October 2019 but nothing happened on that day. The application therefore remained dormant. However, quite intriguing, between the 17<sup>th</sup> May 2019 to 29<sup>th</sup> January 2020, the matter was placed before the Deputy Registrar for purposes of taxation.

Subsequently, on the 7<sup>th</sup> February 2020 the petitioner obtained a date in the registry for the hearing of the main petition. This was the 3<sup>rd</sup> June 2020, but it was not until the 1<sup>st</sup> July 2020 that a mention date for directions was fixed. This was the 26<sup>th</sup> October 2020, but was on the same date pushed forward to 25<sup>th</sup> November 2020, at the instance of the petitioner.

[6] Come the 25<sup>th</sup> November 2020, the petitioners through that advocate, **MR. HASSAN**, appear in court in the absence of the respondents and informs the court that the respondent had not filed their responses from the time they were given fourteen (14) days to do so. It is instructive to note that the expected response were with regard to the application by the petitioner dated 24<sup>th</sup> September 2017 for amendment of the petition and the enjoinder of the intended third respondent notwithstanding the fact that the 25<sup>th</sup> November 2020, was the date fixed for hearing of the main petition and not the application thereby implying that the petitioner had decided to do away with the application and proceed with the hearing of the main petition filed herein on 27<sup>th</sup> March 2017. Be that as it may, on that 25<sup>th</sup> November 2020, the petitioner asked the court to grant that the prayers sought in the application in default of responses from the respondent. However, the court noted that some prayers required formal proof and ordered that the formal proof be conducted on 8<sup>th</sup> February 2021.

[7] In the meantime, on the 22<sup>nd</sup> January 2021, the present application was filed by the second respondent. It is dated **20<sup>TH</sup> JANUARY 2021**, seeking orders that this court's orders of the 25<sup>th</sup> November 2020 fixing the matter for formal proof be set aside unconditionally and that the second respondent's response to the petition and the preliminary objection dated 3<sup>rd</sup> November 2020, filed herein on 19<sup>th</sup> November 2020, be deemed to be proper on record. It is evident from the record that what was due for hearing on 25<sup>th</sup> 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 7<sup>th</sup> February 2021. In making the order, there was no indication from the petitioners to the court that 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 24<sup>th</sup> 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 24<sup>th</sup> 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 25<sup>th</sup> November 2020.

It must be noted that the petition is nor 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 8<sup>th</sup> 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 hereinabove was precipitated by the petitioner.

[9] For all the foregoing reasons and for justice to be done to all the parties the application dated 20<sup>th</sup> January 2021 is granted in terms of prayers (2) and (3) of the appropriate notice of motion.

The matter be fixed for mention on the way forward with regard to the pending application, dated 27<sup>th</sup> November 2017 and 24<sup>th</sup> September 2018 as well as the notice of preliminary objection filed herein on 19<sup>th</sup> March 2020 by the second respondent.

It is accordingly ordered and matter be mentioned on the way forward on **14<sup>TH</sup> JULY 2021**.

**J.R KARANJA**

**J U D G E**

**READ AND SIGNED THIS 18TH DAY OF MAY 2021]**