REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

PETITION NO. 6 OF 2016

WEST KENYA SUGAR COMPANY LIMITED ....PETITIONER

VERSUS

BUSIA SUGAR INDUSTRIES LIMITED ....1ST RESPONDENT

AGRICULTURAL FOOD AND FISHERIES BOARD....2ND RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY ....3RD RESPONDENT

R U L I N G

By a Judgment delivered on 10th March 2017 **MUKUNYA J** made the following orders in paragraphs 60 and 61 which are relevant for purposes of the application dated 20th December 2018 which is the subject of this ruling: -

> ***60 "One of the key objects in licencing is the requirement of having enough cane when a proponent is licenced by the Crops Act to set up a sugar factory. This is established by the proponent preparing an EIA which is used by EMCA under Section 58 to call stake holders and interested parties to attend a meeting to support or oppose the EIA. The 1st Respondent is building a factory without complying with the said law. The Petitioner, a sugar miller in the same area will be adversely affected should the factory start operating without complying with the legal requirements. The Petitioner and 1st Respondent now admit that there is not enough cane in Busia at the moment for the two sugar factories. The Constitutional rights of the Petitioner aforesaid has been therefore seriously infringed by the 1st Respondent as a result. His Petition is merited."***

> ***61 "Under Section 16(1) and (2) and Section (2) of the Section 8(2) (sic) of the Crops Act aforesaid, the 1st Respondent must obtain the necessary licenses. He shall comply with Section 58 of EMCA, AFFA and the Crops Act. The first Respondent shall therefore stop it's activities in the factory subject to this Petition forthwith and apply for the licences as required by law. The EMCA and Crops Act shall deal with all the issues of licensing raised herein by the Petitioner. Those authorities will decide the fate of the 1st Respondent. The Petitioner's Petition shall succeed to that extent. No damages to the Respondent were proved before me by the Petitioner. I will therefore not award any. The Petition against the 2nd and 3rd Respondents is dismissed with no orders as to costs. The costs of the Petition shall be to the Petitioner paid by the 1st Respondent."***

The 1st Respondent **(BUSIA SUGAR INDUSTRY LTD)** was aggrieved by that Judgment and filed at the **COURT OF APPEAL KISUMU, CIVIL APPEAL NO 35 OF 2017**.

When that appeal came up for hearing on 13th March 2018, the Court was informed that the Decree, as extracted, was disputed. The Court therefore directed that pursuant to **Order 21 Rule 8 (4) of the Civil Procedure Rules**, the parties should take appropriate action to resolve the dispute regarding the Decree within seven (7) days. The appeal was accordingly listed for haring in the next Court term. That appears not to have happened. Certainly, the parties have not availed any Judgment by the Court. Indeed, there is a notice of withdrawal of that appeal dated 3rd December 2018 and filed on 7th December 2018. However, an application by **BUSIA SUGAR INDUSTRIES LTD** (the Appellant in the appeal and the 1st Respondent in this Petition) to stay that Judgment was dismissed by the Court of Appeal in it's ruling dated 28th September 2017.

I now have before me an application by the Petitioner **(WEST KENYA SUGAR COMPANY LTD)** dated 20th December 2018 and premised under the provisions of **Sections, 3, 4, 5, 6, 24, 27, 28** and **29 of the contempt of Court Act NO 46 OF 2016** and seeking the following remedies against **BUSIA SUGAR INDUSTRIES LTD, AGRICULTURAL FOOD AND FISHERIES BOARD** and **NATIONAL ENVIRONMENT AND MANAGEMENT AUTHORITY (NEMA)** – the 1st, 2nd and 3rd Respondents respectively:-

1. **Spent**

2. **That the Directors of the 1st Respondent being ALI AHAMED TAIB and SAID SALIM AHMED TAIB be summoned before this Court to show cause why they should not be cited for contempt of Court.**

3. **That the Acting Director General of the 2nd Respondent be summoned before this Court to show cause why he should not be cited for contempt of Court for issuing the 1st Respondent with a manufacturing licence without them complying with the Court orders of 17th March 2018 which required them to procure a new EIA licence as per Section 58 of the Environment Management and Coordination Act.**

4. **Spent**

5. **That the 1st Respondent and it's Respondent and it's directors be found to be in contempt of Court order issued on 10th March 2017 and liable to be punished for contempt.**

6. **That the Director General of the 2nd Respondent be found to be in contempt of Court orders issued on 10th March 2017 and liable to be punished for contempt.**

7. **Spent**

8. **That this Court do grant further orders as may be necessary for the sake of safe guarding the dignity of this Honourable Court.**

9. **That costs be provided for to the Applicant herein.**

The application is premised on the grounds set out therein and is also supported by the affidavit of **TEJVEER SINGH RAI** the Applicant/Petitioner's Managing Director dated 20th December 2018.

The gist of the application is that on 30th June 2016, **MUKUNYA J** issued an order of prohibitory injunction restraining the 1st Respondent, their agents, employees and/or representatives from in any way continuing with the operations and/or construction of the Sugar Factory in **EBUSIBWABO LOCATION MATAYOS SUB COUNTY IN BUSIA COUNTY** pending the hearing and determination of this application and that on 10th March 2017, the Court delivered its Judgment where it cancelled the 1st Respondent's registration as a sugar miller and their **E.A** licence **NO 0020469** and they were further directed to stop any activities in their factory subject to this Petition and apply for a licence as required by law. However, and in total disregard of the Court Order and without procuring an **EIA** licence as directed by Court, the 1st Respondent applied to the 2nd Respondent to be issued with a manufacturing licence using **EIA** licence **NO 0020469** which had been cancelled. That the 3rd Respondent's Director General swore an affidavit on 19th June 2018 confirming that the 1st Respondent had not been issued with an **EIA** licence subsequent to this Court's Judgment of 10th March 2017. That the 2nd Respondent vide a letter dated 9th November 2018 confirmed that indeed it had issued the 1st Respondent with a manufacturing licence basically giving them the green light to start operations without them procuring an **EIA** licence as per **Section 58 of EMCA** and in flagrant breach of the Court Orders of 10th March 2017 which were clear and un – ambiguous and of which the 1st Respondent through its Directors had notice of. That the conduct of the 1st and 2nd Respondents are subverting the authority and dignity of the Court and must be dealt with firmly. Annexed to the supporting affidavit are copies of the orders of 30th June 2016, the Judgment delivered on 10th March 2017, a copy of the licence **NO 0020469**, copy of the letter dated 9th November 2018 and affidavit dated 19th June 2018, notice withdrawing the appeal **NO 35 OF 2017** and copy of cane availability survey for the year 2017 – 18 (see annextures **TSRI** to **TSR7**).

The application was opposed by the 1st and 2nd Respondents. The 3rd Respondent does not appear to have filed any response to the same.

In opposition to the application, the 1st Respondent filed both a Notice of Preliminary Objection dated 9th January 2018 (must have been 9th January 2019 because it is stamped 22nd January 2019) and a replying affidavit dated 20th February 2019 by it's Director **ALI AHMED TAIB**.

In it's Preliminary Objection, the 1st Respondent questioned this Court's jurisdiction to determine the application the same being res – judicata since the Court has already determined itself in the Judgment dated 10th March 2017. Further, that the Petitioners have not exhausted all the available avenues for resolution of the licencing dispute under the Crops Act and further, the **Contempt of Court Act** has been declared un – constitutional by the Judgment of **CHACHA MWITA J** delivered on 9th November 2018 in **PETITION NO 87 OF 2018 – KENYA HUMAN RIGHTS COMMISSION .V. ATTORNEY GENERAL & LAW SOCIETY OF KENYA**. That the application for contempt is premature since the Petitioner is yet to obtain a Decree from the Court and the parties are yet to ascertain the clear orders and directions of the Court pursuant to the said Judgment. Finally, that this application is an abuse of the Court process as well as being sub – judice since the Petitioner has failed to prosecute three other similar applications for contempt in **NAIROBI PETITION NO 153 OF 2018**, **JR NO 6 OF 2016** and **CIVIL APPEAL NO 35 OF 2017**.

In his replying affidavit **ALI AHMED TAIB** has deponed, inter alia, as follows: -

Ø **That although this Court cancelled the 1st Respondent's operational licence, it did not interfere with the EIA licence that was issued to AFRICA POLYSACK LTD which was the 1st Respondent's benefactor.**

Ø That the 2nd Respondent has issued the 1st Respondent with a milling licence as per its mandate.

Ø That pursuant to the Judgment of the three Judge Bench in KAKAMEGA PETITION NO 26 OF 2015 and the migration from the SUGAR ACT to the CROPS ACT, the requirement of registration has been done away with.

Ø That although the licence NO 0020469 was cancelled, the issue before the Court was how it was obtained and not the manner in which the study was conducted or how AFRICA POLYSACK LTD obtained it's EIA licence. Therefore, the 1st Respondent retraced it's steps with the 3rd Respondent and an EIA was issued to AFRICA POLYSACK LTD and then to the 1st Respondent which thereafter applied to the 2nd Respondent for a milling licence.

Ø The public was notified through a Kenya Gazette NO 2196 inviting objections and the Petitioner raised objections which were heard in the presence of both parties and a determination was made to issue a milling licence to the 1st Respondent.

Ø That to the knowledge of the 1st Respondent, the 2nd Respondent acted within the law by receiving the application by the 1st Respondent for a milling licence, scrutinizing it and seeking information from the 3rd Respondent, sought objections through the Kenya Gazette and made a determination to issue a licence to the 1st Respondent.

Ø That the orders sought are ultra vires and go against the spirit of the contempt of Court Act which provides for only a fine of not more than Kshs. 200,000/= or one-month imprisonment if one is found guilty.

Ø That this application is void because the contempt of Court Act was declared un – constitutional and in any case, the orders issued by MUKUNYA J on 30th June 2016 were compromised vide the 1st Respondent's application dated 26th September 2016 and the parties agreed to proceed with the hearing of the main suit.

Ø That by the Judgment dated 10th March 2017 which cancelled the 1st Respondent's licence, directions were given that the 1st Respondent makes good it's documentation which it did by applying for a licence and since the law had changed the 1st Respondent was not required to apply for a new registration and the EIA licence NO 0020469 issued to AFRICA POLYSACK LTD was procedurally transferred to the 1st Respondent.

Ø That the 1st Respondent applied for and was issued with a licence under Section 58 of the EMCA and therefore, there was full compliance with the Judgment dated 10th March 2017 whose terms were clear and un – ambiguous and the 2nd and 3rd Respondents were satisfied with the 1st Respondent's documentation which culminated in the issuance of a licence and at no point did the 1st Respondent give any undertaking.

Ø That the issues raised herein are only meant to scare and intimidate the 1st Respondent's Directors with fines and jail terms.

Ø That injunctions have been issued twice against the 1st Respondent first in NET NO 204 OF 2015 and secondly in this PETITION and the 1st Respondent complied with the first injunction for thirteen (13) months while the second injunction was issued in this PETITION long after the 1st Respondent had completed construction and was only awaiting the milling licence.

Ø That the 1st Respondent has complied with the direction issued by the Court in its Judgment dated 10th March 2017 and the issues raised herein have been ventilated and determined in several suits spanning six (6) years and this application is res – judicata and should be dismissed with costs.

In opposing the application, the 2nd Respondent, through its Head of Sugar Directorate **(SOLOMON ODERA)**, swore a replying affidavit dated 15th February 2019 and although at paragraph three (3) thereof it refers to the application dated 7th November 2019, it is also indicated at paragraph fifty (50) thereof that it is also in response to the application dated 28th December 2018 (he must have meant 20th December 2018) which is the subject of this ruling.

In the said replying affidavit, **SOLOMON ODERA** has deponed, inter alia, as follows: -

· **That the application is not only bad in law but is also irregular in that the Applicant has annexed an interim order which has since been superseded by this Court's Judgment.**

· **That the application does not demonstrate personal service nor cite the names of the persons to be held in contempt as the 2nd Respondent is a body corporate and incapable of being cited for contempt and the application offends Section 30 of the Contempt of Court Act.**

· **That the 2nd Respondent is the regulatory authority responsible for the promotion of compliance in the Sugar Industry including production, registration and licensing of dealers in the Sugar Industry.**

· **That the Petitioner successfully applied for and obtained sugar milling licences for it's two plants in KAKAMEGA and BUSIA COUNTY.**

· That the 1st Respondent applied to the 2nd Respondent for a sugar milling licence for it's factory on 7th March 2018 under the Crops Act upon which the 2nd Respondent issued a Gazette Notice NO 2196 in the Kenya Gazette of 9th March 2018 inviting objections to the said application.

· That contrary to the Petitioner's allegations that the said Gazette Notice NO 2196 of 9th March 2018 was issued illegally or in contempt of the Judgment in this petition, the said Judgment had acknowledged that the 1st Respondent (sic) ought to be allowed to exercise its mandate and competence in dealing with matters of licencing and regulating the sugar sub – sector.

· That the 2nd Respondent cannot be said to be acting in contempt of the said Judgment by doing what it is obligated to do in law.

· That unlike the Sugar Act NO 10 OF 2001, the Crops Act NO 13 OF 2013 does not specifically make provision for registration of Sugar Millers and neither does it make such registration a mandatory pre – condition for an entity to apply for a Sugar Milling Licence.

· To require applications for licences under Section 20 of the Crops Act 2013 to comply with the repealed Act NO 10 OF 2001 is to invoke a law that has been repealed.

· That the Petitioner has never been registered as a dealer under the Crops Act and the 1st Respondent is entitled to be treated in the same manner.

· That the Petitioner was the only entity that objected to the 1st Respondent's application for a licence (the affidavit wrongly refers to the applicant as the 2nd Respondent).

· That the 2nd Respondent upon receiving the Petitioner's objection, invited the Petitioner to a forum to highlight it's objections and so the Petitioner is estopped from questioning the propriety of the process.

· That on 10th April 2018, the Petitioner's representatives and it's lawyers attended the session for highlighting the Petitioner's objections at the 2nd Respondent's office. The sessions were adjourned to 27th April 2018 for a final determination but even before that date, the Petitioners moved to Court on 20th April 2018 and filed NAIROBI HIGH COURT CONSTITUTIONAL PETITION NO 153 OF 2018 – WEST KENYA SUGAR COMPANY LTD .V. AGRICULTURE & FOOD AUTHORITY & OTHERS where it obtained interim orders restraining the 2nd Respondent from finalizing the objection proceedings.

· That the said Petition was not filed in good faith but was meant for the collateral purpose of vexing and frustrating the Respondents by preventing the 2nd Respondent from considering the Petitioner's objection.

· That the said Petition NO 153 OF 2018 was dismissed with costs to the Respondents.

· That the 2nd Respondent issued a further notice dated 25th June 2018 inviting the Petitioner to a session to complete the Petitioner's objection proceedings against the 1st Respondent's application for a sugar milling licence but before this could be done, the Petitioner obtained a further order dated 29th June 2018 which however did not prohibit the 2nd Respondent from concluding the Petitioner's objection to the 1st Respondent's application.

· That on 9th November 2018, the Petitioner's objection to the 1st Respondent's application was heard and dismissed and the 2nd Respondent issued a sugar milling licence to the 1st Respondent having satisfied itself that the 3rd Respondent had issued the 1st Respondent with a bona fide licence.

· That it is only the 3rd Respondent which is competent to say whether it carried out an Environmental Impact Assessment (EIA) study in full compliance with the provisions of the Environment Management and Coordination Act (EMCA) with respect to the 1st Respondent's properties and the 2nd Respondent lacks any powers to challenge, ignore or rule on any EIA licence issued by the 3rd Respondent.

· That the 2nd Respondent cannot licence a sugar miller which is built without NEMA approval or recommendations and takes NEMA's advice, approval or disapproved seriously bearing in mind that NEMA is a statutory authority.

· That there is nothing in law that prevents the 2nd Respondent from approving or issuing any licence on condition that an EIA licence is obtained before commencement of manufacturing.

· That under the circumstances, the Petitioner was not denied any of its rights under Article 47(1) of the Constitution as it was given an opportunity to make it's objections both in written and oral.

· That since the Petitioner is currently in possession of a Certificate of Registration issued under Section 18 of the Crops Act 2013 without following the procedures under the repealed Sugar Act 2001, there is nothing that prevents the 2nd Respondent from extending similar treatment to the 1st Respondent. The Petitioner does not have a monopoly nor is it entitled in law to

be the dominant undertaking in the sugar sector to the exclusion of the other players nor does it have any exclusive zone.

· **That the sugar milling licence issued to the 2nd Respondent (must have meant the 1st Respondent) is valid and was issued legally.**

The application was canvassed by way of written submissions which were filed by the firms of **OGEJO, OLENDO & COMPANY ADVOCATES** for the Petitioner, **HMS ADVOCATES LTD** for the 1st Respondent and **LUBULELLAH & ASSOCIATES** for the 2nd Respondent.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.

I must start by observing that the application dated 20th December 2018 is premised under the provisions of **Sections 3**, **4**, **5**, **6**, **24**, **25**, **27**, **28** and **29 of the Contempt of Court Act 2016**. That Act, as conceded by Counsel for the Petitioner, was declared un – constitutional in **KENYA HUMAN RIGHTS COMMISSION .V. ATTORNEY GENERAL & ANOTHER CONSTITUTIONAL PETITION NO 87 OF 2017 NBI [2018 eKLR]** in which Judgment was delivered on 9th November 2018 a month before this application was filed. That decision, to my knowledge, has not been reversed on appeal. Once a law has been declared to be un – constitutional, it cannot be the basis upon which any claim can be founded. In **NUH NASSIR ABDI .V. ALI WARIO & OTHERS C.A CIVIL APPEAL NO 43 OF 2013** the Court stated thus: -

> ***"This Court, as a creation of the Constitution with a clear mandate to uphold the Constitution, cannot entertain a position that is founded on a provision of the law that has been declared by the highest Court in the land to be un - constitutional. That would amount to this Court perpetuating un – constitutional conduct."***

It is clear therefore that following the decision in **KENYA HUMAN RIGHTS COMMISSION .V. A – G & OTHERS** (supra), the **Contempt of Court Act** essentially ceased to exist and no remedy can be founded on it. However, I agree with counsel for the Petitioner that that lacuna is not fatal to this application.

Notwithstanding the fact that the **Contempt of Court Act** has been declared un – constitutional, this Court is not entirely helpless when faced with an application of this nature because, in the discharge of their duties, Courts will continue to issue orders which must be complied with in order to up – hold the dignity and authority of the judicial process. Only then will there be respect for the rule of law and public confidence in the Courts. Therefore, where a party is enjoined to perform or refrain from a particular act, the Court must retain the power to punish such persons for disobedience of the directions issued by the Court. This Court can therefore invoke its jurisdiction under the **Judicature Act** which provides in **Section 5 (1)** as follows: -

> ***"The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to up – holding the authority and dignity of subordinate Courts."***

Substances of the common law are still part of our law under **Article 2 of the Constitution**. Similarly, the inherent jurisdiction donated to this Court by **Section 3A of the Civil Procedure Act** empowers this Court to make orders for the ends of justice and also to prevent any abuse of it's process. Therefore, while I agree with the submissions by counsel for the 1st and 2nd Respondent that this application is founded on a law that has been declared un – constitutional, I do not share the view that this application is therefore incompetent. Indeed, **Order 51 Rule 10(1) of the Civil Procedure Rules** provides that no application shall be refused merely because of failure to state the provision under which it has been filed. This application is therefore for sustaining so that it can be considered on it's merits.

The record shows that although there were delays in having the Decree drawn, it was eventually issued on 29th January 2018 and signed by the Deputy Registrar. However, when the parties appeared before the Court of Appeal in **KISUMU COURT OF APPEAL CASE NO 35 OF 2017** on 13th March of 2018, the Judges found that the Decree was disputed and directed that pursuant to the provisions of **Order 21 Rule 8(4) of the Civil Procedure Rules**, the dispute be resolved within 7 days. From my perusal of the record, no new Decree was drawn. So, as matters stand now, there is a Judgment but no Decree because when the issue was placed before **MUKUNYA J** on 28th March 2018, the Judge directed that the parties comply with the provisions of **Order 21 Rule 8(4) of the Civil Procedure Rules** by filing a draft Decree and listing it before the Judge. This is how he put it in his ruling dated 28th March 2018: -

> ***6: "The requirement of Order 21 Rule 8(4) has not been complied with. The parties must file draft decrees marked as the law requires and the Registrar shall list them before a Judge as required by Order 21 Rule 8(4).***
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> ***7: "For avoidance of doubt, when the Petition was filed and heard, there were no agreed issues by the parties. The Court framed what it saw as the issues arising from the Petition (found in paragraph 37 of the Judgment) and proceeded going forward, to make findings on them. It is from these issues and findings therein that the decree should be extracted.***
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> ***Having said that, I need not say anymore on the issue since the law is clear on how a decree should be drawn and who should draw it and what happens in case of disagreement. The law does not mandate me to do anything else after Judgment is delivered."***

From the above chronology of events, the following issues clearly stand out: -

1. **The Judgment of the Court dated 10th March 2017.**

2. **A Decree issued on 29th January 2018 and signed by the Deputy Registrar.**

3. **An order by the Court of Appeal in KISUMU CIVIL APPEAL CASE NO 35 OF 2017 dated 13th March 2018 that the Decree is disputed and directing that the parties should take appropriate action to resolve the dispute within 7 days pursuant to the provision of Order 21 Rule 8(4) of the Civil Procedure Rule.**

4. **A ruling by the trial Judge dated 28th March 2018 directing that the provisions of Order 21 Rule 8(4) of the Civil Procedure Rules be complied with and a draft Decree be listed before him by the Registrar.**

There is no evidence that any draft Decree was ever placed before the Judge for his consideration. All that we have on the record is therefore the disputed Decree issued on 29th January 2018.

My view of all the above is that there is no Decree arising out of the Judgment dated 10th March 2017. It is that Judgment that forms the foundation of the application dated 20th December 2018. In the absence of a Decree, it is doubtful if there can be any basis for granting the orders sought in the said application. It is trite law that for a Judgment of a Court to be enforced or executed, there must be a Decree which has been extracted from the said Judgment. A Decree is defined in **Section 2 of the Civil Procedure Rules** as follows: -

> ***"decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91 ……………"***

In essence therefore, before a Judgment of the Court can be enforced, and contempt proceeding such as this one are one way of enforcing a Judgment, there must be a decree which has been settled, approved and signed by the Deputy Registrar of this Court. In the circumstances of this case, and given the fact that the disputed decree was never settled by the trial Court as directed by the Court of Appeal, it is my view that there would be no basis upon which proceedings of contempt can be founded. This issue was not addressed by counsel in their submissions but I think it is quite relevant and renders the application before me fatally incompetent. It must be remembered that in paragraph 5 and 6 of the Notice of Motion dated 20th December 2018, the basis of the contempt proceedings against the Directors of the 1st and 2nd Respondents is the Judgment of 10th March 2017. However, I will proceed to consider the prayers sought in the said application should I be wrong on my findings that there is no executable Decree herein.

At the commencement of this ruling, I referred to the concluding orders that were granted by the Court in the Judgment dated 10th March 2017. These are: -

1. **The Court found that the Constitutional rights of the Petitioner had been infringed by the 1st Respondent and allowed the Petition with Costs payable by the 1st Respondent.**

2. **The 1st Respondent was to stop it's activities in the factory and comply with Section 16(1) and 8(2) of the Crops Act and Section 58 of EMCA by obtaining the necessary licences.**

3. **The Petition against the 2nd and 3rd Respondents was dismissed with no orders as to costs.**

4. **The Court finally directed that EMCA and CROPS ACT shall deal with all the issues relating to licensing as raised by the Petitioner in this Petition. And most significantly, the Court made the following order: -**

> ***"Those authorities will decide the fate of the 1st Respondent. The Petitioner's Petition shall succeed to that extent."***

Notwithstanding the disputed Decree that followed, the above orders were captured in that Decree.

My understanding of those orders and the Decree, disputed as it is, is that although the Court allowed the Petition as against the 1st Respondent, it left all the issues regarding the 1st Respondent's licencing to be dealt with by the relevant authorities. Those authorities which are the 2nd and 3rd Respondents were to determine ***"the fate of the 1st Respondent."*** Basically therefore, the Court referred the issues regarding the 1st Respondent's licences and other related issues concerning it's factory to the 2nd and 3rd Respondents.

With regard to the prayer that the 1st Respondent and it's Directors be found in contempt of the Court orders issued on 10th March 2017, **ALI AHMED TAIB** the 1st Respondent's Managing Director has deponed in paragraphs 5(d) to (g) that following the Judgment dated 10th March 2017, the 3rd Respondent issued an **EIA** to **AFRICA POLYSACK LTD** and thereafter to the 1st Respondent. The 1st Respondent then applied for a milling licence and after the 3rd Respondent had confirmed that the **EIA** licence issued to the 1st Respondent was in order, it proceeded to notify the public via Gazette Notice **NO 2196** asking for objections to the issuance of a milling licence to the 1st Respondent. Objections were raised by the Petitioner and both parties were heard and a determination was made to issue the 1st Respondent with a milling licence.

The above has been confirmed by the 2nd Respondent through the replying affidavit of **SOLOMON ODERA** it's Head of Sugar Directorate who in his replying affidavit dated 15th February 2019 has deponed in paragraphs 10, 12, 13, 23, 34, and 42 that the 1st Respondent applied

for a milling licence for it's factory on 7th March 2018 and upon receipt of the said application, the 2nd Respondent issued a Gazette Notice **NO 2196** notifying all and sundry of its proposal to consider the 1st Respondent's application for a milling licence pursuant to **Section 20 of the Crops Act** and invited objections. That Gazette Notice was not issued illegally or in contempt of the Judgment herein. That upon receipt of the Petitioner's objections, a decision was made on 9th November 2018 to dismiss the same and a decision was made to issue a milling licence to the 1st Respondent. That the procedure applied by the 2nd Respondent in determining the Petitioner's objection and the 1st Respondent's application for a milling licence was open, transparent, in good faith and that the rules of natural justice were observed. The 2nd Respondent proceeds to add that in any case, when the Petitioner applied for and obtained it's registration on 20th July 2012, it was not in possession of an **EIA** licence for its **MATAYOS** site and there was nothing to prevent the 2nd Respondent from extending similar treatment to the 1st Respondent. That the licence issued to the 2nd Respondent is valid and legal and has not been obtained through fraud or abuse of Court process. That the 2nd Respondent acted within its powers and the law in issuing the milling licence to the 1st Respondent and was infact under a Constitutional obligation to do so.

What all the above means is that after the Court in its Judgment dated 10th March 2017 left ***"the fate of the 1st Respondent"*** to the 2nd and 3rd Respondents, it was the discretion of those two authorities to decide whether or not to grant the 1st Respondent a milling licence. No time limits were set in that Judgment and all that was required was for the 2nd and 3rd Respondents to exercise that discretion within the law having been satisfied that the **EIA** licence was bona fide and issued by the 3rd Respondent. In any event, the 2nd Respondent is not **NEMA**'s enforcement agent on matters environmental and takes **NEMA**'s approval or disapproval seriously.

Given the above chronology of events, it is difficult to see on what basis the 1st Respondent and it's Directors can be held to be in contempt of the Court orders issued on 10th March 2017 or any other orders.

And with regard to the prayers seeking that the Director General of the 2nd Respondent be found to be in contempt of the Court orders issued on 10th March 2017, this Court's Judgment is clear. It stated as follows with regard to the 2nd and 3rd Respondents: -

> ***"The Petition against the 2nd and 3rd Respondent is dismissed with no orders as to costs."***

Therefore, no culpability attached against the 2nd and 3rd Respondents and their Directors arising out of the allegations made against them in this Petition. How then can they be held to be in contempt of any orders issued on 10th March 2017 when the Petition against them was dismissed?

The decision whether or not to licence the 1st Respondent was bestowed upon them by the Court in its Judgment dated 10th March 2017. It therefore became the discretion of the 2nd and 3rd Respondent to make that administrative decision and if the Petitioner was aggrieved, it had the right to challenge that decision in a Court of law in the normal manner and I don't think that includes citing the Respondents for contempt.

Prayers No 2, 5 and 6 of the Petitioner's Notice of Motion dated 20th December 2018 must therefore be dismissed.

Prayer No 3 of the same application seeks orders that the Director General of the 2nd Respondent be summoned before this Court to show cause why he should not be cited for Contempt of Court for issuing the 1st Respondent with a manufacturing licence without them complying with the Court orders of 17th March 2018 which required them to procure a new **EIA** Licence as per **Section 58 of EMCA**. I have perused the record herein and as currently submitted by counsel for the 2nd Respondent, no orders were issued on 17th March 2018 and infact this Petition never came up on that date. The Petition only came up on 8th March 2018 whereby the Court made some orders with respect to the Petitioner's Notice of Motion dated 7th March 2018. That Notice of Motion sought several prayers but only the following four (4) were granted: -

1. **The application was certified urgent and to be heard on priority basis.**

2. **The Directors of the 1st Respondent were summoned to appear and show cause why they should not be cited for contempt of Court.**

3. **The Officer Commanding Busia Police Station was summoned to appear and show cause why he should not be cited for Contempt.**

4. **The 2nd and 3rd Respondents through their enforcement agencies were required to enforce this Court's Judgment of 10th March 2017 by ensuring that the 1st Respondent stops all activities within it's factory site at EBUSIBWABO until it obtains the requisite licence from both the Agricultural and Food Authority and the National Environmental Management Authority.**

The above orders were issued pending the hearing of the application on 5th April 2018 inter – parte. From the record, there was no inter – parte hearing on 5th April 2018 and the application was fixed for hearing on 7th June 2018. It was still not heard and it is clear from the record that the Petitioner abandoned it because, when the Petition was mentioned on 27th December 2018, counsel for the Petitioner informed the Court that what was coming up for hearing was the Petitioner's Notice of Motion dated 20th December 2018 and which is the subject of this ruling. No orders were therefore issued on 17th March 2018 and the orders issued on 8th March 2018 cannot be the basis upon which this application can be founded. Those orders infact sought to cite the 1st Respondent's Directors for Contempt and to compel the 2nd

and 3rd Respondents to enforce this Court's Judgment dated 10th March 2017. The application dated 7th March 2018 was eventually not canvassed inter – parte on 5th April 2018 or at all.

What is clear to this Court, therefore, is that other than the prayer to summon the Officer Commanding Busia Police Station to show cause why he should not be cited for Contempt of Court, this application is essentially a replica of the previous application dated 7th March 2018. A perusal of the application dated 7th March 2018 in so far as it seeks to cite the Officer Commanding Busia Police Station for Contempt of Court was really, in my view, a long shot. And although that application is not the subject of this ruling, it gave rise to the orders of 8th March 2018 which are relevant to this application because those are the orders that the Petitioner erroneously refers to as having been issued on 17th March 2018 and I therefore think it is proper that I refer to them and in particular, the order relating to the Officer Commanding Busia Police Station.

To begin with, the Officer Commanding Busia Police Station was not a party to this Petition. Secondly, there is no record of service upon him of the orders of 8th March 2018. Finally, the Judgment dated 10th March 2017 did not direct the Officer Commanding Busia Police Station to do anything with regard to the orders therein.

It is clear from the evidence that there would be no basis to warrant punishing the Respondents for Contempt.

Ultimately therefore and having considered all the issues herein, I find that the Petitioner's Notice of Motion dated 20th December 2018 is devoid of merit.

It is accordingly dismissed with costs to the 1st and 2nd Respondents.

Boaz N. Olao.

J U D G E

27th May 2020.

Ruling dated, delivered and signed at Bungoma this 27th day of May 2020.

Boaz N. Olao.

J U D G E

27th May 2020.

This Ruling was due on 4th June 2020. However, in view of the measures restricting Court operations due to the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23rd April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

Boaz N. Olao.

J U D G E

27th May 2020.