



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 153 OF 2018

WEST KENYA SUGAR COMPANY LTD.....PETITIONER

VERSUS

AGRICULTURE AND FOOD AUTHORITY.....1ST RESPONDENT

HON ATTORNEY GENERAL.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY....3RD RESPONDENT

BUSIA SUGAR INDUSTRIES LIMITED.....4TH RESPONDENT

JUDGMENT

1. West Kenya Sugar Company Limited, the Petitioner, is a limited liability company and a licensed sugar Miller under section 2 of the Sugar Act, 2001. The 1st respondent is a State Corporation established under section 3 of the AFFA Act, the 2nd respondent is the Attorney General the chief legal advisor to the national government with mandate to represent the national government in civil proceedings in which the national government is a party and represents public interest and the rule of law. The 3rd respondent is the government agency responsible for the management of the environment and is established under EMCA, 1999 while the 4th respondent is a limited liability company and a potential Sugar Miller.

2. According to the petitioner it has had an interest in establishing a sugar factory in **Busia county** and the petitioner expressed that interest. When the Kenya Sugar Board invited bids for that purpose the petitioner submitted its bid so did **Africa Polysack Ltd** among others companies. The petitioner contends that after assessment of the bids, it was allowed to set up a sugar factory and so was **Cherry Sugar Company limited**. The application by **African Polysack Limited** was rejected. **African Polysack Limited** appealed to the Ministry despite there being no right of appeal and Kenya Sugar Board was directed to approve **Africa Polysack Limited's** application and have it registered which was done. **Africa Polysack Limited** then transferred its registration to **Busia Sugar Industries Ltd**, the 4th respondent, which commenced construction of a factory.

3. This led to filing of petition No 1 of 2014 **Joseph Owino Muchesa & Another v NEMA & 2 others** and the court found the impugned construction to be unlawful. In another petition **No 6 of 2016, West Kenya Sugar Company ltd v Busia Sugar Factories Ltd & 2 others**, the current petitioner challenged the 4th respondent's registration as a Sugar Miller which was successful and the certificate of registration was annulled.

4. The petitioner avers that despite the above facts, the 1st respondent issued **Gazette Notice No 2196** of 9th March 2018 proposing to grant the 4th respondent a licence in exercise of its powers under section 20 of the Crops Act unless objections were received. The petitioner further avers that the Gazette Notice was issued illegally and in contempt of the court's judgment in Bungoma petition No 6 of 2016 **West Kenya Sugar Company Ltd v Busia Sugar Industries Ltd & 2 Others** which cancelled the 4th respondent's registration certificate.

5. The petitioner therefore filed a petition dated 20th April 2018 and sought the following reliefs:-

a. That a declaration be issued to declare that unless and until the 4th Respondent obtained a certificate of registration as a sugar miller from the 1st respondent and an ELA Licence from the 3rd respondent – the National Environmental Management Authority – the 1st respondent had no power to propose to grant it a sugar milling licence on 10th April 2018 or any other date thereafter.

b. That a declaration be issued to declare that within the meaning of Articles 10, 27, 47 and 50 of the Constitution the decision of the first respondent to propose to grant a sugar milling licence to the 4th respondent herein is unfair, arbitrary, illegal and null and void ab initio.

c. That the Honourable court be pleased to issue an order of Certiorari to quash the Gazette Notice No 2196 by the 1st respondent inviting notice to grant a sugar milling licence to the 4th respondent on 30th April 2018.

d. That the Honourable court be pleased to issue an order of Certiorari for purpose of being quashed the decision of the Respondent to propose the grant of sugar milling licence to the 4th respondent on 30th April 2018.

e. That the Honourable court be pleased to uphold and protect the petitioner's rights under Articles 27, 28, 35, 40, 47 and 50 of the Constitution by issuing an order of prohibition to prohibit the 1st respondent from granting a sugar milling licence to the 4th respondent herein on 30th April 2018 or any date thereafter until the 4th respondent is registered as a miller by the 1st respondent and it obtains an EIA licence from the 3rd respondent, National Environmental management Authority as per section 58 of environmental management and Coordination Act.

f. That the Honourable Court be pleased to uphold and protect the petitioner's rights under Articles 27, 28, 40, 47 and 50 of the Constitution by issuing an order of mandamus to compel the 1st respondent to furnish the petitioner with copies of the application for a sugar milling licence by the 4th respondent plus supporting documents thereof and the minutes for the meeting of the 1st respondent that made the decision to propose the grant of a sugar milling licence to the 4th respondent on 30th April 2018.

g. That costs of this Petition be borne by the respondents.

1st Respondent's response

6. The 1st respondent filed a motion dated 27th April 2018 supported by the affidavit of *Solomon Odera* sworn on the same day and filed in court on 30th April 2018 seeking to set aside the conservatory orders earlier granted they considered opposition to the petition. It also filed further replying affidavits by Joseph Ngetich sworn on 23rd July 2018 and filed on 24th July 2018 and in furtherance of the deposition in the affidavit by *Mr Odera*.

7. It was deposed that the petitioner and 4th respondent had involved the 1st respondent in a number of litigation; that the two have substantial interests in the Sugar Sector in Western Kenya region and that this falls within the 1st respondent's regulatory mandate. It is their depositions that the 1st respondent has the functional mandate to issue licences on applications for establishment and operation of sugar mills and to set applicable conditions for grant of such licences.

8. The deponents further contend that grant of licence under the Crops Act is not dependent on prior registration and that under section 20(9) of the Act, issuance of a licence to an applicant should not unreasonably be withheld. It was stated that the 1st respondent operates only in accordance with the constitution and the law; that it is within the 1st respondent mandate to issue the impugned Gazette Notice No. 2190 of 9th March 2018 and that by that Gazette Notice, the 1st respondent acted pursuant to section 20(5) (7) and (8) of the Crops Act and that it would only grant a licence to the 4th respondent after receiving and considering any objection. In that regard, it was deposed that the petitioner submitted an objection dated 28th March 2018; that the 1st respondent constituted a committee to hear the objection and duly invited the petitioner for a hearing of the objection on 10th April 2018.

9. It is contended that the 1st respondent subsequently received a letter from the petitioner's counsel informing the 1st respondent that the petitioner would raise a preliminary issues before the hearing of the objection. According to *Mr. Odera's* deposition the objection was heard on 10th April 2018 but was adjourned to 27th April 2018 since the issues could not be finalized on that day. *Mr. Odera* deposed further that the petitioner's counsel wrote a letter on 12th April 2018 threatening the 1st respondent with contempt.

10. It was deposed that the judgment in constitution petition No 26 of 2014 (Kakamega) delivered on 21st June 2017 the petitioner's manufacturing licence was declared null and void and the 1st respondent was given 12 months to comply with the crops Act which the 1st respondent has done in respect with all application under consideration. It is therefore the 1st respondent's case that the petition is meant to give the petitioner exclusive rights in the sugar sector in Busia County hence the petition should be dismissed.

3rd Respondent's response

11. The 3rd respondent filed replying affidavit by *Prof Geoffrey Wakhungu* sworn on 19th June 2018 and filed in court on 20th June 2017 deposing that the 3rd respondent has not issued an Environmental Impact Assessment (EIA) to the 4th respondent; that the petition is premised on anxiety that the 4th respondent may be grant a milling licence in the absence of an EIA licence and that *Africa Polysack Ltd* applied for an EIA licence for construction of a sugar factory which licence was issued and later transferred to the 4th respondent as licence No 0020469 on 19th December 2013, but no EIA licence has been issued to the 4th respondent.

4th Respondent's response

12. The 4th respondent filed a notice of Preliminary objection dated 20th June 2018 and filed in court on the same day contending that the court has no jurisdiction to hear this matter as there is a valid court order made on 21st March 2017 in Kitale High Court Judicial Review case No 4 of 2016 and that the petitioner lacks locus standi to institute these proceedings. The 4th respondent further contended the court lacks jurisdiction to hear and determine the matter since there are adequate statutory remedies available to the petitioner/applicant.

Petitioner's submissions

13. **Mr. Kibe Mungai**, learned counsel for the petitioner, submitted highlighting their written submissions dated 7th August 2018 and filed in court on the same day, that the legality of Gazette Notice No 2196 of 9th March 2018 through which the 1st respondent proposed to give sugar milling licence to the 4th respondent is questionable. Learned counsel contended that the 4th respondent is not a registered sugar miller and it does not have an EIA licence for purposes of registration under the Crops Act. **Mr. Mungai** also challenged the legality of the objection proceedings commenced by the 1st respondent.

14. According to learned counsel, the petitioner requested for evidence that the 4th respondent had in the form of an EIA licence but the 1st respondent did not respond to that request although the 4th respondent, responded to the petitioner's request urging that the petitioner should not be given a copy of the EIA licence. **Mr. Mungai** submitted that at the hearing of the objection they raised the issue of documents which mandate objection to be adjourned to enable the respondents act on their request. He contended that before the issue could have addressed they were again summoned for the hearing of the objection necessitating the filing of the petition since the 1st respondent was intent on proceeding with the objection even through it had become apparent that the 4th respondent does not have an EIA licence.

15. Learned counsel contended that in view of that illegality, the proceedings before the 1st respondent should not be allowed. This, **Mr. Mungai** submitted, was because on 10th March 2017 the 4th respondent's EIA licence was revoked through **ELC No 6 of 2016 (Bungoma)**. He contended that the applicant for EIA licence under section 58 of (EMCA) was **African Polysack Ltd** yet the EIA licence had been given to the 4th respondent.

16. It was Mr Mungai's submission that the documents the 4th respondent intends to use include a transfer of the EIA licence No 0020469 dated 1st November 2017 from **African Polysack Ltd** to the 4th respondent which was issued on 19th December 2013. Learned counsel contended that the objection could not proceed to hearing before the issue of the EIA licence had been resolved. According to learned counsel, on the basis of the decision in **Bungoma ELC No 6 of 2016**, the 4th respondent does not have a Milling licence and for that reason they cannot apply for a manufacturing licence and relied on sections 16 and 20 of the Crops Act to support their submissions.

17. Regarding the contention that the petitioner had been barred from filing cases on violation of constitutional rights, he submitted that the petitioner is the respondent in the Kitale case and the proceedings are still pending. He urged that the petition be allowed.

1st Respondent's submissions

18. **Mr. Lubelellah**, learned counsel for the 1st respondent submitted that the 1st respondent is a statutory body established under the AFFA Act 2013, to implement among others, the Crops Act 2017; that the petitioner and 4th respondent are players in the sugar Industry and competitors and that the two have had several cases over the issue.

19. Learned counsel contended that the petitioner has submitted an objection against the 4th respondent's application for a milling licence and the 1st respondent is yet to make a decision on that application; that the objection is on the basis that the 4th respondent does not have a miller's registration certificate; that it does not have an EIA licence to operate a Sugar Factory; that there is no sufficient sugar cane in Busia County for two factories and that the matter for granting miller's licence is subjudice and the proposal to grant licence to the 4th respondent a licence is prejudicial to the petitioner.

20. Learned counsel submitted that the crux of the objection before the 1st respondent is the same as that in the petition. In learned counsel's view, the 1st respondent has been denied an opportunity to make a decision as required by section 20 of the Crops Act; that is to receive applications, invite, received, consider objections and render decisions. He contended that that once a decision is made it would be subject to the supervision of this court.

21. **Mr. Lubullellah** further submitted that the petitioner has not shown that the 1st respondent is incapable of making a decision or has refused to make one. He contended that section 20(6) of the Crops Act requires that the 1st respondent calls for objections once an application is received and that the purpose of the impugned Gazette Notice was to invite objections and that section 20(7) of the Crops Act requires the Notice to indicate the date such a licence is proposed to be issued unless objections are received. He argued that under section 20(9) the 1st respondent may grant a licence after hearing objections which is discretionary; but there is an obligation to consider an application and finally that under section 20(9), grant of a licence should not be delayed without reason.

22. In learned counsel's submissions when the 1st respondent receives an application, it is duty bound to call for objections and has an obligation to issue licences after hearing objections. He contended that the 1st respondent was acting in accordance with the law by inviting objections and urged the court to allow the 1st respondent to carry on with its mandate and make a decision on the objection and application, and if the petitioner will not be satisfied he will have recourse to court. He was of the view that the court can only interfere if there is a threat of breach of the constitution or statute. He relied on a number of authorities including; **Geoffrey Mwangi & another v Samuel Njuguna, Henry & 178 others [2015] eKLR** to support their case.

2nd Respondent's submission

23. **Miss Mwangi**, learned counsel for the 2nd respondent, submitted highlighting their written submissions dated 14th August 2018 and filed on 15th August 2018, that the 1st and 3rd respondents are public bodies with specific but different mandates and operate under different legal regimes and that the petitioner and 4th respondent are in Sugar business and require milling licences from the 1st respondent and an EIA licence from the 3rd respondent.

24. Learned counsel submitted that a milling licence is a requirement under the crops Act and an EIA licence under section 58 of EMCA. She contended that the court may not stop a public body from discharging its mandate unless there is clear abuse of process or violation of the law.

3rd respondent's submissions

25. **Mr. Gitonga**, learned counsel for the 3rd respondent, submitted relying on their replying affidavit sworn on 19th June 2018 and filed on the same day, that there is no EIA licence from the 3rd respondent to the 4th respondent and that the 3rd respondent is a live to the decision of the court in **Bungoma ELC No 6 of 2016** delivered on 10th March 2017 which quashed the 3rd respondent's decision to transfer an EIA licence No 0020469 issued on 19th December 2013 from **African Polysack Ltd** to the 4th respondent with effect from 16th October 2017 and dated 1st November 2017.

26. He submitted that after the decision in the Bungoma case, the 3rd respondent has not issued an EIA licence to the 4th respondent and urged the court to make a decision based on the law.

4th Respondent's submissions

27. **Mr. Madowo**, learned counsel for the petitioner, submitted relying on their preliminary objection dated 20th July 2018 and filed on the same day and submissions dated 13th August 2018 not filed on the same day, that the 4th respondent's factory has been constructed to completion and that at the material time sections 14 and 15 of the Sugar Act (repealed) required registration; that subsequently the crops Act took over governance of the sugar industry and that no registration of sugar millers is required.

28. Learned counsel contended that section 18 of the Act provides that a person shall not manufacture or process sugar for sale unless he/she has a licence; that the 4th respondent made an application pursuant to which the 1st respondent issued the impugned Gazette Notice which was done as required by law and that the process under section 20 of the Act has not been completed. According to learned counsel, an objection was received by the 1st respondent through letter dated 6th April 2018 also copied to the 4th respondent seeking information about the 4th respondent's commercial interest. He contended that the 1st respondent has not determined the issue of the information sought and whether or not to release it.

29. Regarding the EIA licence, learned counsel submitted that the 4th respondent has an EIA licence issued on 19th December 2013 to **African Polysack Ltd** and transferred to the 4th respondent on 11th October 2017 and dated 1st November 2017. He therefore contended that the 4th respondent has complied with EMCA and has the requisite EIA licence.

30. **Mr Madowo** further contended that the petitioner has been barred from filing suits that concern the 4th respondent or against it and for that reason he submitted, the petition is untenable. He contended that the petitioner has invoked jurisdiction of the court yet there is an objection before the 1st respondent who is yet to make a decision. He contended that this is an abuse of court process.

31. According to learned counsel, the petitioner filed a petition at Kisumu High Court on 19th April 2018, being JR NO. 6 of 2018 seeking orders to quash the impugned Gazette Notice but came to this court after they failed to obtain orders in that case.

Determination

32. I have considered this petition, the responses thereto; submissions and the authorities relied on. The question that arises for determination in this petition is whether this court can intervene in this dispute at this stage. The petitioner and the 4th respondents are active players in the sugar sector in the country and in western Kenya region in particular. They have been involved in a series of litigations over one issue or another but all relating to sugar milling or registration.

33. Regarding this petition, the 4th respondent applied for a sugar milling licence from the 1st respondent under the Crops Act. The 1st respondent then published Gazette Notice No 2196 of 9th March 2018 calling for objections why it should not issue a milling licence to the 4th respondent. The petitioner lodged an objection and the 1st respondent fixed the said objection for hearing as required by law.

34. Before the objection could be heard, the petitioner sought certain documents relating to the 4th respondent's application to wit an EIA licence. This forced the hearing of the objection which had been scheduled for 10th March 2018 to be adjourned. That objection is yet to be heard and therefore no decision has been made on it. The 1st respondent once again set the objection for hearing on 27th April 2018 but before that date, the petitioner moved this court and obtained conservatory orders suspending the hearing of the objection hence this judgment.

35. The petitioner has argued that the 1st respondent's action is illegal and will violate its rights since the 1st respondent is bound to grant a milling licence to the 4th respondent despite the fact that the 4th respondent has no registration certificate and an EIA licence. The respondents on their part have argued that the petition is not well founded and should be dismissed because the 1st respondent is acting within the law and that the petition is meant to curtail its powers and mandate. The 3rd respondent has on its part contended that it has not granted an EIA licence to the 4th respondent and that the EIA licence the 4th respondent purports to have was declared invalid by the court in **Bungoma ELC No 6 of 2016** and that the 4th respondent's application for a milling licence is pending for a decision before the 1st respondent.

36. The 1st respondent is a state corporation established under the AFFA Act. One of its mandates is to administer the Crops Act. Section 16 of the Act provides that every dealer in a scheduled crop shall register with the Authority and that a person shall not deal in a scheduled crop unless the person is registered in accordance with the Act. Section 20 grants the power of issuance of licences to the 1st respondent. Sub section (1) states that a licensing authority (1st respondent) shall issue licences to applicants subject to such lawful conditions as the authority may determine. Subsection (6) states that the authority should give a 30 days gazette notice of the proposed grant before granting the licence.

37. Section 20(7) provides that the notice referred to in subsection (6) shall—

“(a) specify the name or other particulars of the person or class of persons to whom the licence is to be granted; (b) state the purpose for the proposed licence and indicate the date such licence is proposed to be issued to the successful applicant; and (c) invite objections to the proposed grant of licence and direct that such objections be lodged with the Authority within fourteen days next following the date of the notice.”

38. Under section 20(8) the 1st respondent may consider any objections lodged and may grant the licence subject to such terms and conditions as it may specify. Section 20(9) states that issuance of a licence should not be withheld unreasonably.

39. It emerges clearly that section 20 of the Act provides an elaborate process for applying for licences and dealing with such application. The fact that the 1st respondent has mandate to receive and consider applications after hearing objections and may grant licence subject to conditions it deems fit is not in doubt.

40. From the facts of the petition, responses and submissions by parties, it is undeniable that the 4th respondent applied for a licence and the 1st respondent, applying the law, invited objections after issuing a gazette notice to that effect and as required by law. The petitioner not only filed an objection but its objection was also set down for hearing but could not be concluded because the petitioner itself filed this petition and obtained conservatory orders thus stalling the hearing of the objection.

41. In my respectful view, the 1st respondent was simply discharging her legal mandate when it set down the objection for hearing before it could make a decision on it and subsequently on the application, whether or not to issue the licence. It is the petitioner who stalled the process mid-stream thus disabling the 1st respondent from making a decision on the objection and the application for licence.

42. The petitioner's averments in the entire petition and depositions in the affidavits in support, have not identified a single legal fault it could lay at the 1st respondent's door step in so far as the process of receiving and processing applications for licences under the Crops Act is concerned. I have myself scanned the petition and submissions but could not trace a single legal miss- step stemming from section 20 of the Act which is at the centre of this dispute which is attributable to the 1st respondent. Parties alluded to a number of issues including whether or not the 4th respondent has or does not have an EIA licence. These issues were in my view unhelpful. This only tended to escalate a simple issue of discharge of duties and whether this was done in accordance with the law.

43. It is strite law that a person alleging contravention, infringement, or threat of violation of the constitution or fundamental rights and freedoms, must set out with precision the right(s) infringed or threatened; the particulars of such infringement or threat, the constitutional provisions alleged to be infringed and the jurisdictional basis for it. (See **Anarita Karimi Njeru v Republic** [1979] KLR 154, **Meme v Republic** [2004] eKLR).

44. That is to say it is a fundamental principle of constitutional litigation that there be accuracy in the identification of the provisions of the constitution that are said to have been infringed on the basis that the breach is inconsistent with the Constitution or fundamental freedoms. The constitutional challenge must be explicit, with due notice to all those affected in order to ensure that all interested parties have an opportunity to suitably respond to the allegations and lead relevant evidence, where necessary. (see **Saili v National Commissioner of South African Police Service & others** [2014] ZACC19), **Phillips & others v National Director of Public Prosecutions** [2005] ZACC 15; 2006(1) SA 505(CC),

45. The Supreme Court on its part stated in **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR, that the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

46. This court when moved under the Articles of the constitution will only act and or intervene where it is shown that the 1st respondent is violating the constitution and the law, or that there is a real threat or imminent danger to violate the constitution, the law or rights and fundamental freedoms of individuals. But as it is, the 1st respondent is only acting within its statutory confinement and as such, the court may not legally exercise its jurisdiction to intervene where there is no such real violation threat of violation or breach of the constitution, the law or rights and fundamental freedoms.

47. From the facts of this petition one need no authority to show that all that the petitioner has done is pick issues that do not arise from the 1st respondent's exercise of discretion under section 20 of the Act. The issues the petitioner has raised before this court can be raised before the 1st respondent who, after considering them, will make a decision. If dissatisfied, the petitioner may challenge that administrative decision in a court of law. This court will not intervene in situations that do not warrant such intervention whether couched as a constitutional petition or some other dispute.

48. Section 25 of the Act provides for procedure for appeal stating that an applicant for or holder of a licence who is aggrieved by a decision of the licensing authority on or in respect of (a) the grant, refusal, renewal, variation or revocation; or (b) the conditions imposed on the grant, renewal or variation, of a licence, may appeal to the Cabinet Secretary. And such appeal is to be lodged within thirty days from the date on which the person first receives notice of the decision.

49. In that regard, it is important to bear in mind that where a procedure is provided for doing something like in this case, that procedure should be followed to conclusion and parties should only resort to court after such the procedure has been complied with unless there is clear violation of the law. (See The Speaker of *The National Assembly v James Njenga Karume* [992] eKLR). The Supreme Court of India expressed the same view in the case of *Authorized Officer, State Bank of Travancore and another v Mathew K.C.* (Civil Appeal No. 1281 of 2018), that ***the normal rule is that a writ petition under Article 226 of the Constitution (our Article 22) ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well- defined exceptions.***

50. The 4th respondent's counsel also submitted that the petitioner had filed another suit in the form of a judicial Review application at the High Court in Kisumu challenging the same impugned Gazette Notice. He gave the case as Misc. Application No 6 of 2018. **Mr. Kibe Mungai** admitted this fact but contended that that application was withdrawn. Be that as it may, this points to a possible case of forum shopping on the part of the petitioner which cannot be countenanced by the courts.

51. Taking into account the totality of the facts of this case, considering the evidence, submissions and the law, the conclusion I come to is that this petition is plainly unmeritorious and cannot stand. For the above reasons, the petition dated 20th April 2018 is declined and dismissed with costs to the respondents.

Dated, Signed and Delivered at Nairobi this 9th day of November 2018

E C MWITA

JUDGE