



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 426 OF 2014

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF THE AGRICULTURE, FISHERIES AND FOOD AUTHORITY ACT,
2013 AND IN THE MATTER OF THE CROPS ACT, 2013**

AND

**IN THE MATTER OF THE IMPLEMENTATION AND ADMINISTRATION OF THE
AGRICULTURE, FISHERIES AND FOOD AUTHORITY ACT, 2012 AND CROPS ACT, 2013
AND THE ESTABLISHMENT OF THE BOARD OF THE AGRICULTURE FISHERIES AND
FOOD AUTHORITY**

BETWEEN

REPUBLIC..... APPLICANT

AND

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

THE CABINET SECRETARY, MINISTRY OF

AGRICULTURE, LIVESTOCK AND FISHERIES..... 2ND RESPONDENT

ALFRED BUSOLO TABU..... 3RD RESPONDENT

ROSEMARY MKOK.....4TH RESPONDENT

EX PARTE: WEST KENYA SUGAR COMPANY LIMITED

JUDGEMENT

Introduction

1. The applicant, **West Kenya Sugar Co. Ltd**, is described as a limited liability company within the

- meaning of Cap 486, which is also a duly licensed sugar miller within the meaning of Section 15 of the **Sugar Act, 2001** (now repealed) and section 20 of the **Crops Act, 2013**.
2. The 1st Respondent – The Agriculture Fisheries and Food Authority – hereinafter referred to as “AFFA” or “the Authority” is a statutory body established under Section 3 of the **Agriculture, Fisheries and Food Authority Act** which is hereinafter referred to as “the AFFA Act”.
 3. The 2nd Respondent the Cabinet Secretary, Ministry of Agriculture Livestock and Fisheries – hereinafter referred to as “the CS” – is the Cabinet Secretary for the time being responsible for matters relating to Agriculture and pursuant to Article 132(3) of the Constitution and Section 2 of the Crops Act, 2013 and Section 2 of the **AFFA Act, 2013** is responsible for oversight and policy over executive oversight over the implementation and administration of both the Crops Act, 2013 and the **AFFA Act, 2013**.
 4. The 3rd Respondent – **Alfred Busolo Tabu** – is described as the Interim Director General AFFA which is a statutory position established under Section 7 of the **AFFA Act**.
 5. The 4th Respondent – **Rosemary Mkok** – is the Acting Interim Head of Sugar Directorate which is one of the directorates established under section 11 of the **AFFA Act**.
 6. The 1st interested party, Butali Sugar Mills Limited is similarly a limited liability apparently engaged in the sugar milling industry.
 7. The 2nd interested parties are farmers who cultivate sugar cane in the areas in which the applicant and the 1st interested party carry out their activities.
 8. By a Notice of Motion dated 11th November, 2014 the *ex parte* applicant herein **West Kenya Sugar Company Limited**, seeks the following orders:

1. THAT an order of Certiorari be issued to bring into this Honourable Court for the purposes of being quashed the decision of the 3rd and 4th Respondents contained in two letters both dated 26th September, 2014 to commence the process to consider the application for operating licence by Butali Sugar Mills Limited.

2. THAT an order of Certiorari be issued to bring into this Honourable Court for the purposes of being quashed the decision of the 3rd and 4th Respondents contained in two letters both dated 26th September, 2014 to commence the process to consider the application for operating licence by Butali Sugar Mills Limited.

3. THAT an order of Mandamus be issued to compel the Cabinet Secretary, Ministry of Agriculture Livestock and Fisheries to make rules for election of specified members of the Agriculture, Fisheries and Food Authority and ensure the Board of the Authority is constituted and operational as provided for under Sections 5, 6 and 7 of the Agriculture, Fisheries and Food Authority Act, 2013.

4. THAT an order of Prohibition be issued to prohibit the Respondents from considering and determining the application by Butali Sugar Mills Ltd dated 0th April, 2010 for an operating licence unless and until the Board of the Agriculture Fisheries and Food Authority is constituted and operational.

5. THAT the costs of this application be borne by the Respondents.

Applicant’s Case

9. According to the applicant, section 3 of the **AFFA Act** establishes the AFFA which is the successor to various institutions including the Kenya Sugar Board whose functions includes the administration of the **Crops Act** and the **Fisheries Act** in accordance with the provisions of the said Act and to carry out such other functions as may be assigned to it by the **AFFA Act** and the **Crops Act, 2013**. Pursuant to Sections 2 and 20 of the **Crops Act, 2013**, AFFA is the registration and licensing authority of scheduled crops which include sugar cane and the licensing procedures are set out in sections 20(6), (7) and (8) of the **Crops Act, 2013**. However whereas the **AFFA Act**

- came into force on 25th January, 2013 and the **Crops Act, 2013** came into force in early, 2014, the Board of AFFA is yet to be established. Similarly, though section 5(1) of the **AFFA Act** vests the Management of the authority in a Board, the same has not been established to date.
10. According to the applicant, Section 5(1) of the **AFFA Act** provides for the composition of the Board of the Authority and it includes eight persons, being farmers' representatives, elected by the farmers to represent the major crop subsectors in Kenya. By dint of section 5(2) the Cabinet Secretary is required to make rules for election of the members of the Board to represent the farmers which rules, the Second Respondent has not made. Consequently, the 1st Respondent has been operating without a Board despite the provisions of section 7 of the **AFFA Act**. It was further contended that though under Section 10 of the **AFFA Act** the Director General is the chief executive officer of the Authority and discharges his functions subject to the direction of and in consultation with the Board, in view of the non-existence of the Board, the 1st – 4th Respondents cannot lawfully exercise the registration and licensing powers under Parts III and IV of the **Crops Act, 2013**.
 11. To the applicant, the **Crops Act, 2013** and **AFFA Act, 2013** are not being administered in accordance with the laws hence pursuant the provisions of Section 20 of the **Crops Act, 2013** the Respondents have no powers either severally or jointly to consider and determine the application by Butali, the 1st interested party herein, for an operating licence.
 12. According to the applicant, the delay or refusal to establish the Board of AFFA has aggrieved the Applicant particularly in the wake of the decision of the Court of Appeal delivered on 19th September, 2014 which, *inter-alia*, required that an application for a license by Butali– whose licensing by the defunct KSB the Applicant had challenged – be considered by the relevant body in accordance with the law. According to the applicant, consequent to the Judgement of the Court of Appeal aforementioned, the Applicants and the Respondents have exchanged correspondence that cumulatively emphasize the need to ensure that the Board is promptly established in order to discharge its statutory function. However, despite the said correspondence the 2nd Respondent has hitherto taken no effort to ensure that the Board is expeditiously established in order to discharge its mandate under the **AFFA Act, 2013** and the **Crops Act, 2013**. The immediate effect of non-establishment of the board, according to it, is that Butali continues to operate without a licence to the detriment of the Applicant and uncertainty remains as to whether or not Butali will eventually be permitted to operate within the Applicant's designated sugar growing zone and the consequences of such licensing to the grievances and losses suffered by the Applicant.
 13. It was therefore the applicant's case that the 2nd Respondent has refused, neglected or otherwise failed to discharge his statutory duty in relation to the lawful and proper administration of the **Crops Act, 2013** and the **AFFA Act, 2013**. The applicant's position was that the decisions and actions of the 3rd and 4th Respondents are illegal in view of the fact that under the **Crops Act, 2013** they are not the licensing authority hence no steps can be lawfully taken by the Respondents in connection with an application of Butali dated 10th April, 2010 for an operating licence in view of the orders made by this Honourable Court in **Nairobi High Court Constitutional Petition No. 59 of 2011 West Kenya Sugar Co. Ltd vs. Kenya Sugar Board & Others** that *inter-alia*, stayed the registration of Butali as a sugar miller.
 14. It was further contended that the decisions, actions and omissions of the Respondent requiring the Applicant to submit objections to the application of Butali for an operating licence are unreasonable because:
 - i. The Board of AFFA is not yet constituted.
 - ii. The decision by AFFA on whether it intends to grant a licence to Butali has not been gazetted as required by section 20 of the Crops Act.
 - iii. The putative Applicant Butali is not a registered miller in view of the Court orders aforementioned. The said registration is a condition precedent for any person to be licensed to manufacture sugar cane.
 15. It was the applicant's case that the decisions and actions of the Respondents in purported enforcement of the judgement of the Court of Appeal delivered on 19th September, 2014 are vitiated by procedural improprieties and bad faith on the part of the 3rd and 4th Respondents and

- that the impugned decisions and actions of the Respondents violate the Applicant's rights under Article 47 of the Constitution and its right to protection of law under Article 27 thereof and *Prima facie* violate Articles 3, 10 and 50 of the Constitution. The applicant relied on **Jacqueline Resley vs. City Council of Nairobi [2006] eKLR** to support its position.
16. It was submitted on behalf of the Applicant by its Learned Counsel, **Mr Kibe Mungai**, that by the judgement of the Court of Appeal dated and delivered on 19th September, 2014 the Court of Appeal at Kisumu allowed two appeals of the *ex-parte* Applicant namely Civil Appeals Nos. 89 of 2011 and 90 of 2011 **West Kenya Sugar Co. Ltd vs. Kenya Sugar Board and Butali Sugar Mills Ltd.**
17. According to the applicant, it is instructive to note three things. First, the ***Sugar Act, 2001*** was repealed in 2013 by dint of section 42 of the ***Crops Act, 2013*** (Act No. 16 of 2013). Secondly, by dint of section 4(3) of the ***AFFA Act***, the Kenya Sugar Board was one of the institutions whose function were taken over by AFFA. Thirdly, as the successor of the Kenya Sugar Board, AFFA the institution enjoined by the law and the Court of Appeal orders aforementioned to hear the opposition of the Applicant to the licence application by Butali. Unlike the ***Sugar Act, 2001***, the ***Crops Act, 2013*** contains elaborate provisions for the licensing of millers and the Court of Appeal enjoined that the same be complied with the licensing authority in considering the licence application by Butali. These proceedings, it was contended, were precipitated by the apparent refusal, neglect or failure of the Respondents to follow the law in considering the licence application by Butali.
18. The applicants while submitting on the purview of judicial review relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and contended that object of the ***AFFA Act, 2013*** are as follows:-

To provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes.

19. On the other hand the object of the ***Crops Act, 2013*** as set out in section 3 thereof are as follows:
- a. ***circumvent unnecessary regulatory bureaucracy in the crops subsector;***
 - b. ***reduce unnecessary levies, taxes or other barriers to free movement of crop products and provide for a rationalized taxation system;***
 - c. ***reduce unnecessary regulation or overregulation of the crops subsector;***
 - d. ***reduce duplication and overlap of functions among institutions involved in the regulation of crop agriculture;***
 - e. ***promote competitiveness in the crops sub-sector and to develop diversified crop products and market outlets; and***
 - f. ***attract and promote private investment in crop agriculture.***
20. To the applicant, the roles of AFFA are to administer the ***Crops Act*** and the ***Fisheries Act*** and regulate these sub-sectors in accordance with applicable laws and regulations. It goes without saying therefore that in the light of the new constitutional dispensation the role of AFFA is vital to the smooth implementation of the respective functions of the National Government and County Governments set out in the Fourth Schedule of the Constitution in so far as Agricultural Policy and Agriculture are concerned.
21. It was submitted that section 5 of the ***AFFA Act*** vests the management of the Authority in a board. It was asserted that it is not disputed in this case that the Board envisaged by section 5 is yet to be constituted. It is equally undisputed that in accordance with section 5(1)(a) of the ***AFFA Act*** the President has not appointed the Chairperson of the Board with the approval of the National Assembly. Similarly the Director General of the Authority must be competitively recruited and appointed with the approval of the National Assembly. Further the eight members to represent farmers are yet to be elected and anointed to their positions. According to the applicant, section 7 of the ***AFFA Act***, makes provisions for the conduct of business and affairs of the Authority and

provides that "the conduct and regulation of the business and affairs of the Authority shall be as provided in the Second Schedule" and that "except as provided in the Second Schedule, the Authority may regulate its own procedure" while the Second Schedule of the **AFFA Act** provides for the conduct of business and affairs of the Board of the Authority and with reference to the meetings of the Board paragraph 1(3) and (4) provides as follows:-

(3) Unless three quarters of the total members of the Board otherwise agree, at least fourteen days' written notice of every meeting of the Board shall be given to every member of the Board.

(4) The quorum for the conduct of the business of the Board shall be one half of all the members.

22. It was therefore the applicant's position that in view of these provisions in the Second Schedule, unless and until the board of the Authority has been fully constituted, it is not possible for any partially constituted Board to discharge the Board's mandate lawfully.
23. It was submitted that section 6 of the **Crops Act** provides for the role of National and County governments in development of Crops while section 40 of the **Crops Act** provides, *inter-alia* that the Cabinet Secretary may, in consultation with the Authority and the County Governments make regulations for the implementations of the Act. In this regard, it was disclosed that at the time of writing these submissions the Cabinet Secretary had circulated among select stakeholders various sets of regulations including the **Crops (Sugar Crop) Regulations, 2015** which proposed regulations provide, *inter-alia*, for objects and functions of the Sugar Directorate; procedure for Licensing and registration of sugar millers; conditions for registration and licensing of sugar millers; form of applications for registration and licensing of sugar millers; the designation and assignment of mill command zone (geographical sugar cane growing zone) by the Authority; and role of County Governments in registration and licensing of sugar millers.
24. According to the applicant, its prayers for certiorari raise the twin issues of whether the 3rd and 4th Respondents have legal powers to licence or commence the process to consider the application for operating licence by Butali and secondly, whether the decision of the 4th Respondent contained in a letter dated 15th October, 2014 to require the Applicant to submit its written objection or memoranda for consideration by the Authority in connection with Butali's application for an operation licence is lawful.
25. With respect to the first issue, it was submitted and the 3rd and 4th Respondents have no power to issue a manufacturing licence to Butali or to commence the process of issuing that licence. According to the applicant, following the judgement of the Court of Appeal aforementioned the issue of the application by Butali for a licence must be placed for consideration of the Board to act on it in accordance with the law. Secondly since the current holder of the position of the Director General and the CEO of the Authority **Mr. Alfred Busolo Tabu** is serving in an acting capacity, he has not been competitively recruited by the AFFA Board – which is yet to be constituted – and his appointment has not been approved by the National Assembly. The Director General pursuant to section 10(5) of the **AFFA Act** can lawfully be responsible for the management and affairs of the Authority subject to the directions of and in consultation with the Board. In the prevailing state of affairs, it was submitted that the 3rd Respondent lacked legal powers to make the decision or take the actions complained of by the Applicant.
26. Apart from the Director General, it was submitted that the holder of the position of Head of Sugar Directorate at the material time namely **Ms. Rosemary Mkok** was serving in an acting capacity. Under Section 11(5) of the **AFFA Act** the holder of the position of Head of Sugar Directorate shall be appointed by the board with the prior approval of the National Assembly. This has not happened to date for reasons aforementioned. The **AFFA Act** does not expressly empower the Head of the Sugar Directorate to exercise any of the licensing powers of the Authority and so there was no legal basis for the decisions and actions of the 4th Respondent complained of by the Applicant. For the sake of curiosity even the proposed Sugar Crop Regulations under the **Crops Act, 2013** would not justify her actions and decisions had they been in force at the material time.
27. According to the applicant, section 20 of the **Crops Act**, broadly provides for the process of

issuing a manufacturing licence for a scheduled crop. Under section 40 of the **Crops Act** the Cabinet Secretary may, in consultation with the Authority and the county governments, make regulations which are yet to be made by the Cabinet Secretary. However the proposed regulations aforementioned detailed provisions on the process of licensing of scheduled crops. Accordingly, it was submitted that non-compliance with section 20 of the **Crops Act** and the envisaged regulations invalidates the impugned process, decisions and actions of the 3rd and 4th Respondents.

28. The applicant reiterated that it expected that in the wake of the Court of Appeal Judgement the licence application of Butali would be considered in accordance with the law by the licensing Authority and the due process of law. This has not happened. On the contrary the 3rd and 4th Respondents have commenced an arbitrary process in brazen contravention of the law and apparently in disregard of whether or not they have power to make or take the impugned decisions and actions. Therefore the decisions of the 3rd and 4th Respondents are amenable to be quashed through these judicial review proceedings as it was held by the Court of Appeal in **Republic vs. Kenya National Examination Council ex-parte Geoffrey Gathenji and 9 Others** that:-

“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”

29. It was the applicant's view that the orders seeking certiorari to quash the decision of the 3rd and 4th Respondents contained in the letter dated 26th September, 2014 ought to be granted.

30. With respect to the legality of the direction by the 4th respondent to the applicant to submit objections to Butali's application for a manufacturing licence, it was submitted that section 20(6), (7) and (8) of the **Crops Act** was not adhered to.

31. It was submitted that the board of the licensing authority has not convened in order to make a proposal to grant an operating licence to Butali. Secondly, if and when such a proposal is made by the Board then, at least thirty days before granting a licence, the licensing authority shall give notice of the proposed grant in the Gazette and in such other manner as the authority may determine, to *inter-alia*, invite objections to the proposed grant of licences. No such notice has been published in the Kenya Gazette so as to invite the objections. It was therefore submitted that the clear non-compliance with the above legal provisions enjoins this Honourable Court to quash the decision of the 4th Respondent contained in the letter dated 15th October, 2014 which required the Applicant to submit its written objection or memoranda to the Authority in connection with Butali's application for an operating licence.

32. With respect to an order of *mandamus*, the applicant relied on section 5(2) of the **AFFA Act** which provides:

(2) The Cabinet Secretary shall make rules for election of the members of the Board under subsection (1)(i).

33. Whereas the Principal Secretary has annexed draft rules made in 2014 which she claims are under review by the Kenya Law Reform Commission (KLRC), it was submitted that there is no legal provision that requires such review and there is no evidence to show either that the said draft was submitted to the KLRC or why it has taken KLRC inordinately too long to review the draft rules. Whatever the case may be, the existence of the draft is a confirmation that the eight farmers' representatives are an integral part of the Board. More importantly, Section 5(2) of the **AFFA Act** has not been complied with and consequently the Board has not yet been constituted as provided for in section 5(1) thereof. According to the applicant, in paragraphs 23-28 of the Second Respondent's affidavit there is an implicit claim that someone has constituted and operationalised part of the Board. It is however not stated who did so, under which legal instrument and the membership of the incomplete Board, which must be fully constituted in accordance with section 5 of the **AFFA Act** does not exist. Therefore any other Board that has been secretly constituted and operationalised as deposed to by the Principal Secretary is an illegal Board which certainly

cannot conduct its business as provided for in section 7 of the **AFFA Act**. It was contended that by dint of Gazette Notice No. 4003 published in the Kenya Gazette of 29th May, 2015, the 2nd Respondent appointed the following persons as members of the Board of Directors of the Authority with effect from the 2nd June, 2015:

- i. Principal Secretary, State Department of Agriculture;
- ii. Principal Secretary, National Treasury;
- iii. Principal Secretary, State Department of Devolution;
- iv. Principal Secretary, State Department of responsible for Lands;
- v. Principal Secretary, State Department of Environment;
- vi. Principal Secretary, Ministry of Industrialization and Enterprise Development;

vii. Abdulkadir A. Khalif, National Land Commission

viii. Chairman, Transition Authority.

34. However, the Applicant submitted that the subsidiary Board so appointed and operationalised cannot lawfully conduct the business and affairs of the Authority since it is an illegal Board as the law does not provide for or allow constitution and operationalisation of a partial board without all members and their requisite qualifications. In support of this submission, the applicant relied on **Republic vs. Cabinet Secretary, Ministry of Information & Communication & 10 Others Ex-Parte Adrian Kamotho Njenga (2015) eKLR**, in which this Court in quashing the appointment of members of the Board of CAK stated as follows at paragraph 69:

“In my view if the 1st Respondent’s decision was outside the timelines set out by the Act, its decision was arrived at without or in excess of jurisdiction and whatever proceedings flowed from that decision would be null and void since a decision made without jurisdiction must of necessity be null and void. This is in line with the celebrated decision in *Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172* to the effect that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.”

35. In the applicant’s view, the issue of the constitution of the Board is certainly more profound than the 2nd Respondent seems to reckon or acknowledge. To it, five things are worthy of noting to underscore the importance of the Board’s composition. First, under the Fourth Schedule of the Constitution, Agriculture is a devolved function whilst the National Government is allocated the function of Agricultural policy. Secondly, Article 174(d) of the Constitution provides that one of the objects of devolution of government is *to recognise the right of communities to manage their own affairs and to further their development*. Thirdly, Article 6(3) of the Constitution provides with respect to devolution and access to services that a *national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service*. Fourthly, Article 10(2) of the Constitution provides that the national values and principles of governance include sharing and devolution of power, the rule of law, democracy and participation of the people, inclusiveness, equality, good governance, transparency and accountability. Fifthly, Section 40 of the **AFFA Act** requires effective participation of farmers in the governance of the agricultural sector in Kenya by providing as follows:

1. ***For purposes of ensuring effective participation of farmers in the governance of the agricultural sector in Kenya, there shall be close consultation with all registered farmers’ organisations in the development of policies or regulations and before the making of any major***

decision that has effect on the agricultural sector.

2. *The Cabinet Secretary shall make rules—*

(a) to ensure that any agreements, including any agreement with regard to contributions by farmers to their organizations, entered into between the farmers and the farmers' organizations to which such farmers belong shall be respected by any third parties; and

(b) to provide the procedures for internal democracy in the farmers' organizations.

36. In the applicant's opinion, besides the approval by the National Assembly, the practical mechanism of making the five factors above a reality is primarily achieved through the composition of the Authority's Board and the operationalisation of the Board in the absence of which the new constitutional dispensation would stand negated in relation to the agricultural sector in Kenya. Hence it is a gross abuse of power for the 2nd Respondent to trifle with this fundamental issue as it is clearly evident in the affidavit sworn by the Principal Secretary. In support of the submission that the subsidiary Board appointed is not lawful, the applicant cited **Okiya Omtatah Okoiti & 3 Others vs. Nairobi City County & 5 Others (2014) eKLR** in which it was held in quashing the purported appointment of directors of the Nairobi Water and Sewerage Company:

“The 1st respondent cannot purport to select the directors of the 5th Respondent, a company which, though wholly owned by the 1st Respondent, exists for the purpose of providing water services to the residents of the County. Its directors cannot be pre-selected and imposed on the residents. They must be appointed in a manner that takes into account stakeholder interests, that is open and transparent, and that gives an opportunity to anyone interested to seek appointment. Further, even the Articles of Association of the 5th Respondent, properly applied, cannot be said to countenance a situation where one person pre-determines the persons to be ‘elected’ as directors. It would be to abuse the provisions of the Articles of Association and the Companies Act, and a travesty of the Concept of elections. For the above reasons, I find and hold that the appointments made to the 5th Respondent's Board of Directors on 26th March, 2014 were not made in accordance with the Constitution, the Water Act, the Companies Act or the 5th Respondent's Articles of Association.”

37. According to the applicant, in the absence of the eight representatives of farmers the Board of this important Authority would consist of state or public officials in which case the new Constitution would be without any consequence to Kenyan farmers. Equally notable the chairperson of the Board and the Director General of the Authority must be appointed with prior approval of the National Assembly. Accordingly, it is a gross negation and scurrilous affront on the new Constitution for the Principal Secretary to claim that there is already a board in place, albeit incomplete.

38. The applicant pointed out that the cabinet Secretary has not sworn an affidavit to explain why he has neither complied with Section 5(2) of the ***AFFA Act*** nor operationalised the board and reliance was placed on **Republic vs. National Land Commission & Another, Ex-Parte Esther Waringa Ndirangu & 2 Others (2015) eKLR**, on the failure to explain the failure to comply with the law. In the applicant's view, remembering that the ***AFFA Act*** and the ***Crops Act*** seek to implement reforms in the agricultural sector, in the wake of the new Constitution it should be clear that the most effective way to curtail such reforms is secured by preventing or delaying the constitution of the Board of AFFA which is designed to be an independent and autonomous institution. In its absence, the bureaucrats at the Ministry of Agriculture will continue calling all the shots in the agricultural sector as they did in the old constitutional order. It is the duty of this Honourable Court to ensure such a schedule does not succeed. The applicant relied on **Republic vs. Cabinet Secretary for Ministry of Interim & Co-ordination of National Government & 2 Others Ex-Parte Patricia Olga Howson (2013) eKLR**.

39. Based on the foregoing the applicant urged the Court to issue the order of mandamus sought by the Applicant lest the Constitution counts for nothing for Kenyan farmers and stakeholders in the Agricultural sector such as the Applicant.
40. With respect to the prayer for Prohibition, it was submitted that if this Honourable Court finds that the law requires the Board of the Authority to be constituted and operationalised without excuses and chicanery, then it is enjoined to proceed and issue the order of prohibition sought by the Applicant. Thus the licensing of Butali cannot proceed in the absence of the duly constituted and operationalised Board of the Authority and accordance with due process and legal framework for the licensing of Sugar milling companies. This submission was based on the decision of **Warsame J** (as he then was) in **Cape Holdings Limited vs. Attorney General & Another [2012] eKLR** in which he expressed himself thus:

“It is the duty of the court to ensure that public power and authority are not used as tools to intimidate, harass and achieve an ulterior motive not pertaining to that which the system was even formed to perform.”

41. Dealing with the responses of the 1st, 2nd and 3rd respondents, it was the applicant’s view that the said Respondents have not stated the legal basis of their decisions and actions that have aggrieved the Applicant or otherwise justified why in the absence of the duly constituted Board of the Authority, they should grant a manufacturing licence to Butali as they seem determined to do notwithstanding the objections of the Applicant and the due process of law. The composition of the Board of AFFA is clearly spelt out by law and in the absence of it no other board can be deemed to have the necessary mandate to discharge the statutory mandate of the Authority. The applicant’s position was that the alleged public anxiety by cane farmers and local leadership on the status of Butali, is an extraneous matter because there is no reason why the board of the Authority has not been duly constituted although the *AFFA Act* has been in force since January, 2014 and relied on **Republic vs. Cabinet Secretary for Ministry of Interior & Coordination of National Government & 2 Others Ex-Parte Patricia Olga Holson (2013) eKLR**.
42. With respect to the accusation that the Applicant is forestalling compliance of the Court of Appeal order, the Applicant retorted that the Court of Appeal ordered that the application by Butali be considered in accordance with applicable laws. To the applicant, it is the Respondents rather than the Applicant who are seemingly uncomfortable with the applicable laws and cited **Republic vs. Cabinet Secretary, Ministry of Information & Communication & 10 Others Ex-Parte Adrian Kamotho Njenga [2015] eKLR** – quoting the decision in **Republic vs. Evans Gicheru (Hon) & 3 Others Ex-Parte Joyce Manyasi** – in which the Court held at paragraph 78 that where a regulation is couched in mandatory terms, it demands strict compliance. Non-compliance with the spirit and letter of such a regulation is fatal to any action taken in pursuance thereof.
43. In response to the issues raised by the 2nd respondent, it was submitted that whereas in the replying affidavit sworn by Principal Secretary **Sicily Kanini Kariuki** on 13th July, 2015 it was deposed that steps were being taken to constitute a subsidiary Board, which in fact by Gazette Notice No. 1355 published in The Kenya Gazette dated 29th May, 2015 the second respondent appointed, instead of the Second Respondent ensuring that the Board provided for by the *AFFA Act* is constituted and operationalised, he has elected to appoint and operationalised a subsidiary board allegedly in public interest.
44. Further, whereas in the same affidavit it was conceded that the process of issuing a licence to Butali has already commenced, the deponent insisted that the 2nd respondent would still issue the Gazette Notice if at all it decides to issue the licence to Butali and that such licence can only issue 30 days after publication. To the applicant, besides the fact that the replying affidavit of the Authority does not contain that affirmation, the consequence of that extra-statutory procedure set out therein is that the Applicant will lose its right to protection of law embodied in Section 20 of the *Crops Act*. Since the subsidiary Board was constituted and operationalised on 29th May, 2015, it puzzles that nonetheless the Principal Secretary defends the legality of the decisions and actions of the 3rd and 4th Respondents in respect of the licensing application of Butali made or taken prior to the formation of the said subsidiary Board.
45. To the applicant, the allegation that Draft Election Regulations are still under review by the Kenya

Law Reform Commission are not credible particularly because to the **AFFA Act** came into force in January, 2014. Moreover, the “...urgent and immediate constitution and operationalization...” (see para, 26) of the subsidiary Board shows that it is not a priority to the Ministry of Agriculture for the Board to have elected farmers representatives. With respect to the assertion that the proceedings have been precipitated by the Applicant’s grievances over numerical vacancy in the Board, it was submitted that this is a gross simplification of a very serious public matter since under section 5 of the **AFFA Act**, the chairperson of the Board and the Director General of the Authority are required to be persons who have the relevant expertise qualification and experience in the agricultural sector and be appointed through a competitive recruitment process besides the approval of the National Assembly. Additionally, even the eight representatives of the farmers must have the relevant expertise, qualification and experience in the agricultural sector. In the absence of duly appointed Chairperson, Director General and the eight farmers’ representatives, the applicant submitted that it is not possible to strain legal reasoning to confer legality to the subsidiary Board constituted by the 2nd Respondent and relied on **Kenya Commercial Bank vs. Kenya National Commission on Human Rights (2008) eKLR.**

46. With respect to the contention that section 33 of the **Interpretation and General Provisions Act** protects the powers of the Board from being affected by anomalies in its membership, it was contended that the contention is based on a legal fallacy on at least three grounds. First, section 53 applies to a vacancy in relation to a duly constituted board and so it would be a legal heresy to extend it to a board which has not been duly constituted. To do so would amount to validation of an illegality. Secondly, the subsidiary Board cannot lawfully discharge its functions as provided for in Section 7 of the **AFFA Act** and the Second Schedule to that Act. Thirdly, where Parliament has set out the composition of a board, it would be a serious subversion of the rule of law and good governance for this Honourable Court to accept the proposition that a board otherwise constituted is protected by Section 53 of the **Interpretation and General Provisions Act**. In support of this position the applicant relied on **Republic vs. Complaints Commission, Media Council for Kenya & 2 Others [2003] eKLR**, where the Court rejected an interpretation of section 53 similar to the 2nd Respondent’s herein in holding “that without a chairperson of the Commission whose qualifications are stipulated in law, one cannot say that the commission was properly constituted”.

47. In the practice alluded to that “*in Kenya in all State regulated industries, that for continuing operators, between the time of lapse of a renewable licence and issuance of the present one and as long as the applicant has already applied for the licence and it is pending consideration and approval of rejection, the applicant continues in operation pending the determination*”; it was submitted that first, the alleged practice is not founded in law and at best applied to renewal of licences under the **Sugar Act, 2001** which did not have express provisions on renewal of licences unlike the **Crops Act**. Moreover, such practice could not apply to permit an entity which has never been licensed as a miller to operate as one pending the issuance of a licence. Secondly, a practice or estoppel cannot be pleaded to substitute the law. As this Honourable Court held in **Republic vs. Complaints Commission, Media Council for Kenya**, supra, at paragraph 40:-

“It is however the contention of the respondent and the interested party that the applicant having opted not to follow the appellate procedure provided under the Act is estopped from questioning the decision. It must be remembered that as was held in Orengo vs. Attorney-General & Another [2008] 1 EA 309 and Kukal Properties Development Ltd vs. Maloo & 3 Others Civil Appeal No. 155 of 1992 [1993] KLR 52 [1990-1994] EA 281 the doctrine of estoppel does not apply to a statutory obligation or operate against the law or an Act of Parliament. In fact the Court of Appeal held in Niazons (K) Ltd. vs. China Road & Bridge Corporation (K) Civil Appeal No. 187 of 1999 that jurisdiction cannot be conferred by estoppel, consent acquiescence or default.”

48. The applicant disagreed with the assertion that it has instituted these proceedings to seek revision, interpretation and or qualification of the Court of Appeal’s order as it has not sought such a relief. To it, the position taken that the alleged drastic consequences of the orders sought by the Applicant are not only false but amounts to scaremongering and incredible justification of illegality and relied on **Republic vs. Cabinet Secretary, Ministry of Communication & 10**

Others Ex-Parte Adrian Kamotho Njenga (2015) eKLR, where this Court stated as follows at Paragraph 76:-

“In my view a relief cannot be denied solely on the basis that the decision sought to be quashed has been undertaken and that the quashing thereof would lead to difficulties. Though that is factor to be considered in deciding whether or not to exercise the undoubted discretionary jurisdiction, to hold that in all cases where hardship is likely to result from the grant of otherwise merited reliefs would be to grant to administrative bodies and authorities blank cheques as it were to disobey statutory provisions with impunity and make decisions which are otherwise illegal.”

49. According to the applicant, the depositions in the Replying Affidavit are tacit defence of the Ministry of Agriculture for acquiescing in, aiding and abetting the continuing operations of Butali without an operating licence despite the fact that section 18(1) of the **Crops Act** is categorical that:

“A person shall not manufacture or process a scheduled crop product for sale except under and in accordance with licence issued under this Act”.

50. With respect to the contention that the Applicant is also a beneficiary of the Respondents’ illegal management of the Authority’s affairs and so it has no *locus standi* to complain as it does in these proceedings, the applicant respondent that this is a new law in Kenya’s entrenched culture of impunity.

51. In response to the position taken by Butali, it was contended that the replying affidavit of Butali does not address the actual prayers and issues of law in the instant application. To the contrary, the said affidavit does two things. First, it either re-characterizes or mischaracterizes the application by calling in its aid extraneous and irrelevant matters of historical significance or which are the subject of other court proceedings. Secondly, the affidavit advances the argument that due process and fidelity to procedural requirements in considering its licence application are inimical to its economic interests and undoubted right to be issued with the licence as a matter of course. It was submitted that notwithstanding the prohibition of section 18 of the **Crops Act** which prohibits any person from manufacturing a scheduled crop without a manufacturing licence, Butali with the now acknowledged acquiescence, aid and abetment of the Respondents has continued to operate its factory since the delivery of the Court of Appeal’s judgement. Thus to Butali when you have a self-declared massive investment with many stakeholders, it cannot be in public interest for you to either obey the law or the authorities to enforce it against you. Whereas Butali has never been lawfully issued with a licence by the licensing authority, it places itself on the same footing with other licenced millers. In law there is obvious and significant difference between grant of a licence and renewal of a licence. However, in order to allege discrimination, Butali has repeatedly chosen to ignore that difference. Butali claims it has invested 5.5 Billion on its plant. It chose to do so by taking a calculated risk to build a factory without approval and thereafter claim a sacred right to an operating licence. Such a risky investment does not enjoy the protection of Article 40 of the Constitution.

52. The applicant while agreeing with Butali’s position that under Article 47 of the Constitution, its legitimate expectation is “that the matter of its licensing shall be considered expeditiously, efficiently, lawfully, reasonably and procedurally fairly”, contended that this application seeks to achieve precisely the same objective. However, the true reason why Butali opposes this application is that it is not comfortable to have its application determined in accordance with provisions of the **Crops Act** and the due process of law in the envisaged regulations thereunder.

53. In response to the position taken by the farmers, it was submitted that the bulk of the depositions in their replying affidavit relate to matters that the Board of the Authority should consider pursuant to section 20 of the **Crops Act** in determining whether or not to issue a manufacturing licence to Butali. To the applicant, if the orders sought by the applicant are granted all that will happen is that the duly established Board of the Authority will determine the application of Butali for a manufacturing licence in accordance with the law. Secondly, the Court of Appeal Judgement underscored the importance of ensuring that Butali application is considered in accordance with the law – the Applicant seeks precisely that. Thirdly, the Applicant – for the record – is not afraid

of letting AFFA decide the issue of Butali's licence once and for all. On the contrary all that the Applicant seeks is fidelity to the law and procedure. This undoubtedly falls within the jurisdiction of this Honourable Court.

54. To the applicant, all the Respondents have cited various extraneous matters, alleged motives of the Applicant and the nature of the discretionary nature of judicial review remedies in urging this Honourable Court to dismiss the instant application. In its submission, the law does not permit this court to deny a relief that is necessary to remedy the wrongdoing or injustice. Indeed, the right to judicial remedies in an integral part of a litigant's right to protection of law under Article 50 of the Constitution. Thus in **Stephen S. Pareno vs. Judicial Service Commission of Kenya [2004] eKLR** the Court of Appeal expressed itself as follows:-

“We have on our own, considered the above findings in the light of the facts and principles of law applicable and we find that the appellant was genuinely aggrieved not only by the learned trial Judge's reasoning but also by his digression from the core business he had been invited by the appellant to adjudicate upon which was namely to issue an order of certiorari by way of Judicial review. Instead he digressed into other extraneous issues which according to the appellant were calculated to justify the withholding of a relief which had in fact crystallized in his favour... We however agree with the finding of the learned trial Judge that the relief of judicial review by way of certiorari is available where breach of rules of natural justice is proven. Having said so, we find it strange that the learned judge withheld this relief from the appellant despite agreeing with the appellant's contentions that regulation 26 of the Judicial Service Commission Regulations had been flouted... The appellant's grievance in the judicial review proceedings was not that reasons had not been given by the respondent for his dismissal, but that a wrong process had been employed to relieve him from his employment service with the respondent. In other words, he alleged excess jurisdiction by a public body which is a criteria for one to seek the relief of judicial review by way of certiorari. What the appellant moved to attack was the process leading to the decision reached and not the merits of the decision reached. He should have therefore been accorded the relief sought.”

55. To the applicant, the logic in the said expression similarly applies to the instant case. The applicant therefore urged the Court to grant the prayers sought in order to pave way for the dispute of the licensing of Butali to be determined in accordance with the law.

1st, 3rd and 4th Respondents' Case

56. According to the 1st, 3rd and 4th respondents (in this part referred to as “the respondents”), the feud between the Applicant and Butali has become legendary spewing in its wake a litany of litigation some which are still pending before this Court.
57. According to them by an order of *mandamus* issued in **Kisumu High Court Judicial Review No. 17 of 2010** dated 30th November 2010, Kenya Sugar Board was directed to grant an Operating Licence to Butali but the applicant could not immediately comply with this order as there was in existence conservatory orders issued in **Nairobi High Court Petition No. 59 of 2010** restraining it from granting a Licence to Butali which then instituted contempt proceedings against Kenya Sugar Board for failing to comply with the order of *mandamus*. Faced with the dilemma of two conflicting orders, Kenya Sugar Board sought the advice of the Attorney General who advised that Kenya Sugar Board should comply with the order of *mandamus* as it was a final order compared to the interlocutory order emanating from **Petition No. 59 of 2010** and Kenya Sugar Board therefore proceeded and granted Butali an operating Licence which has been renewed to date on annual basis.
58. In the meantime, the applicant aggrieved by the decision in **Kisumu Judicial Review No. 17 Of 2010** lodged an Appeal which upon hearing the Court of Appeal delivered its Judgment on 19th September 2014 wherein it allowed both Appeals and set aside the High Court orders of 12th November 2010 and 30th November 2010, proceeded to issue an order of *mandamus* compelling Kenya Sugar Board to hear and determine the Application for a Licence by Butali dated 10th April

- 2010 within a reasonable time and according to the law and directed that in determining the said Application by Butali, Kenya Sugar Board must give the applicant the right to be heard in opposition.
59. It was contended that even as the Court of Appeal was issuing this orders directed at the Kenya Sugar Board, the Kenya Sugar Board no longer existed as its Constituent Legislation the ***Sugar Act No. 10 of 2001*** has been repealed by virtue of the Provisions of Section 42 of the ***Crops Act No. 16 of 2013*** and as such the substantive law governing licensing of Millers, unlike the prevailing law as at 10th April 2010, has also changed. According to these respondents, as a result of the aforementioned legislative framework, the Court of Appeal decision and order is now directed at the AFFA which is the authority contemplated in view of the provisions of section 4 of the Third Schedule to the ***Crops Act***.
60. Upon receipt of the aforesaid judgment of the Court of Appeal, AFFA sought legal advice on the necessary steps that it ought to undertake in compliance with the said judgment and was advised that it must publish a notice of the proposed grant of licence as a first statutory step and secondly, that the notice should invite objections to the proposed grant by requiring the objections to be lodged with the AFFA within 14 days. As such, the letters dated 26th September, 2014 and 15th October, 2014 were written as necessary steps in compliance with the order of the Court of Appeal.
61. With respect to ***Nairobi High Court Petition No. 59 of 2010*** the Court of Appeal proceeded to order the Authority to hear and determine the Application by Butali notwithstanding it being aware the subsisting orders in the aforesaid Petition. It in fact remarked that the conservatory orders issued by the High Court had lapsed by effluxion of time. To the respondents, they are thus bound by the order of the Court of Appeal until the same is varied or vacated and any argument to the effect that the Respondents cannot take any steps in connection with the application of Butali because of the orders subsisting in ***Nairobi High Court Petition No. 59 of 2010*** can only mean that a divergent view of the effect and purport of the Appellate Court's judgment in this regard is being entertained. Such an argument, however attractive, cannot afford the Respondents the liberty to ignore the directive of the Court of Appeal.
62. While conceding that AFFA is yet to be fully constituted, it was the respondents' position that is in law deemed to have the necessary mandate to discharge its statutory mandate as if it was fully constituted and that not only is it imperative to give effect to the order of the Court of Appeal without undue delay as therein directed but there is also growing public anxiety especially by cane farmers and local leadership on the status of Butali. To them the *ex-parte* Applicant seeks to impermissibly forestall compliance of the Court of Appeal order through an order of this Court thereby throwing into disrepute the hierarchical order of the judicial system. To them, the present Application has been filed for ulterior purposes and is therefore an abuse of the court process and fails to set out a compelling case meriting the exercise of this Court's prerogative powers under sections 8 and 9 of the ***Law Reform Act***, Cap 26 of the Laws of Kenya. Having not satisfied the well-established threshold, the *ex-parte* Applicant is thus undeserving of any orders from this Honourable Court.
63. It was submitted on behalf of these respondents by their Learned Counsel, **Mr Kemboy**, that this is yet another duel in the corridors of justice in the never ending feud between the applicant and Butali spewing in its wake a litany of litigation some of which are still pending before this Court. While reiterating the facts of the dispute, it was submitted that this Court's discretionary power by virtue of Order 53 of the ***Civil Procedure Rules*** and sections 8 and 9 of the ***Law Reform Act***, Cap 26, Laws of Kenya can only be exercised by the Court where the Applicant meets the set threshold to warrant the grant of Judicial Review orders and where the threshold is not met, the Court would dismiss and or refuse to grant the judicial review orders sought. The respondent based this line of submission on **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR.**
64. To the respondents, it would be a travesty of justice and a sad day in the realm of justice should this Honourable Court proceed to grant the judicial review orders sought herein by the *ex-parte* Applicant without taking into consideration a multitude of factors amongst them the far reaching consequences of the orders sought as weighed with the dictates of public interest.
65. On the grounds for grant of judicial review the respondents relied on **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan**

Development & another [2014] eKLR and Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. Based on Republic vs. Secretary County Public Board & another Ex parte Hulbai Gedi Abdille [2015] eKLR and Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR it was submitted that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

66. The rationale for the foregoing position, according to the respondents is because this Court ought not to place itself in the position of an appellate tribunal of the decision maker in question or in a position where it usurps the power of the decision hence it would be impermissible to invite this Court to delve into the merits of the decision. The Court is only concerned with such issues as to whether the decision makers had the requisite jurisdiction to make the determination they made and whether the persons so affected by the decision were heard before the determination was made and **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 85 of 2001** and **Republic v Kenya Revenue Authority Ex-parte Yaya Towers Limited [2008] eKLR** were cited in support of this position.
67. According to the respondents, the Court of Appeal judgment dated 19th September, 2014 in **Kisumu Civil Appeals No. 89 and 90 of 2011** must be accepted as the final adjudication of the parties rights in so far as the issues therein are concerned there being no appeal to the Supreme Court by either party. According to the respondents, in compliance to the said order of the Court of Appeal, the 1st Respondent sent out letters to the Applicant, Butali and all stakeholders for a stakeholders meeting on 6th October 2014 at Malava in Kakamega County for public views on the intended licensing of Butali. This was intended to give an opportunity to the farmers and the general public to give their views - a mandatory process under the ***Crops Act, 2013***. Thereafter, the 1st Respondent sent out invitations to the Applicant to appear before the 1st Respondent on 22nd October 2014 and articulate its views on the question of licensing of Butali. The above processes, it was submitted, were undertaken under provisions of section 20(6) of the ***Crops Act, 2013***. Besides the particular meetings above, the 1st Respondent prepared to publish in the Kenya Gazette the issue of intended licensing of Butali and to invite objections or comments from all stakeholders or any party that wished to state an objection. However, even before the process above could be completed, the Applicant filed the present Application seeking orders of certiorari against decisions already made in the start up to the determination of the licence application of Butali and seeking to stay all and any actions of the 1st Respondent on the basis that the 1st Respondent is not legally properly constituted to undertake any actions under the ***Crops Act***, for want of filling of the slots of the farmers’ representatives on its Board.
68. Having convinced the Court for the grant of Leave to operate as stay in these proceedings, the applicant then moved the **High Court in Kakamega Petition No. 26 of 2014** by a **Constitutional Petition** and an Application dated 4th December, 2014 (“Application”) sought several conservatory orders pending the hearing and determination of this Application namely:-
- i. **a conservatory order of prohibition to restrain BMSL and its agents from in any way continuing with operations of its factory and or milling of sugarcane at its factory situated on Land Parcel L.R No. KAKAMEGA/MALAVA/303 in Kakamega County without an operating licence.**
 - ii. **a conservatory order by way of a prohibitory injunction against BMSL and its agents restraining it from in any way continuing with operations of its factory and or milling of sugarcane at its factory situated on Land Parcel L.R No. KAKAMEGA/MALAVA/303 in Kakamega County without an operating licence pending the hearing and determination of the Petition.**
 - iii. **a conservatory order by way of a prohibitory injunction restraining the 1st Respondent from considering BMSL’s Application for a licence unless and until BMSL stops operations of its factory.**
 - iv. **a conservatory order by way of a Mandatory injunction to compel the 1st Respondent to**

- comply with Section 19 of the of the Crops Act, 2013 by immediately stopping BMSL from continuing with operations of its factory and /or milling of sugarcane at its factory situated on Land Parcel L.R No. KAKAMEGA/MALAVA/303 in Kakamega County without an operating licence pending the hearing and determination of the Petition.
- v. orders that the 3rd and 4th Respondents be summoned to court to show cause why they have acquiesced in and abetted the operations of BMSL's factory without a licence in violation of Section 19 of the Crops Act, 2013 pending the hearing and determination of the Petition.
 - vi. orders that the 1st Respondent and BMSL be ordered to jointly and severally deposit a sum of Kshs. 200,000,000/= per month as security for the compensation due to the Applicant on account of the illegal operations of BMSL.
 - vii.orders restraining the 3rd and 4th Respondents from any involvement or role in consideration of BMSL's Application for a manufacturing licence pending the hearing and determination of the Petition.

69. According to the respondents, it is readily discernible that there is a fundamental problem with the Applicant's conduct in so far as the administration of justice is concerned. Firstly, the spectre of multiplicity of suits and orders is untenable as there is a possibility of the courts of concurrent jurisdiction reaching different decisions thereby causing serious embarrassment to the administration of justice. Secondly, the Applicant in real sense is seeking the shutting down of Butali pending issuance of a licence yet it has on one hand stayed the licensing process. Given the above background, this Court was invited to note that the intention of the Applicant is not to vindicate any right as the pleadings camouflage but it is manifestly intended to stifle out competition and to ensure the Applicant gets a monopoly of the Kabras sugar zone. There is therefore manifest ulterior motive ingrained at the very heart of the Applicant's quest for relief and on this basis alone, the Court is entitled to dismiss the proceedings *ab initio*.

70. It was submitted that it is incontestable that, the 1st Respondent is the entity empowered by law to administer the provisions of the **Crops Act** and those of the **Fisheries Act**. By operation of the law and as provided for in the transitional provisions it is deemed to be vested with the necessary functional and operational mandate assigned to it by statute. Any argument to the contrary, it was submitted, would create an artificial vacuum not contemplated by the legislative intent. In this regard, the 1st Respondent is tasked under section 20 (1) of the **Crops Act** with the mandate of issuing Licenses to dealers of scheduled crops that include Tea, Coffee, Pyrethrum, Sugar etc and licenses for Sugar Millers fall within this mandate. As such, the Applicant just like Butali holds licences issued by the 1st Respondent. It is therefore hypocritical for the Applicant to fault the legal validity of the 1st Respondent without disclosing or impeaching its own licence and the licences issued by the 1st Respondent on all other scheduled crops. To the respondents, it is this selective approach to the public duty of the 1st Respondent that undermines the legitimacy of the Applicant's plea.

71. To the respondents, it is impossible to envisage how the 1st Respondent's action, undertaken in accordance with the provisions of section 20 (6) and (7) of the **Crops Act** and in furtherance of the Court of Appeal's Judgment that was to be effected and/or performed "*within a reasonable time*" could have fouled the legitimate expectations of the ex-parte Applicant. Further, it was averred that the Applicant woefully failed to demonstrate how the 1st Respondent's letters dated 26th September, 2014 and 15th October, 2014 are actions tainted with illegality, irrationality and procedural impropriety. Accordingly, the Court was urged to find as was the case in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 85 of 2001** and **Republic vs. Kenya Revenue Authority Ex-parte Yaya Towers Limited [2008] eKLR** that the *Ex-parte* Applicant is undeserving of any relief that it has sought. The 1st Respondent had the requisite jurisdiction to write the letters in question and since its actions are fair to all persons who would in the eventuality be affected by its final decision, the Applicant could not suffer any conceivable prejudice. Furthermore, the reality is that the *ex-parte* Applicant's Application is rather premature as no final determination as to the licensing of Butali Sugar Mills Limited has been made by the 1st Respondent since the letters were merely to commence the process.

72. The respondents' position was that the Applicant is by and large pursuing a private remedy. Even if its pedantic arguments were to be believed, public interest trumps any argument, however forceful, to invalidate the 1st Respondent. Consequently, the Applicant's grouse with the 1st Respondent even when taken at its highest is inimical to public interest and this Honourable Court is perfectly entitled to refuse to grant the orders sought in line with the holding in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** (supra).

73. In the respondents' view, the Applicant's Application is an abuse of the Court process and should forthwith be dismissed. To them this is not the first attempt by the *ex-parte* Applicant to abuse the court process but has over the years filed a multitude of suits against the then Kenya Sugar Board and Butali with the sole aim of disrupting Butali's licensing and continued operation in order that it may acquire a monopoly in the Kabras catchment area. The applicant was accused of being in the business of commencing proceedings, abandoning them upon receipt of interim orders, only to reactivate the same at a later time when it is convenient to it such as **Nairobi Constitutional Petition No. 59 of 2010; Nairobi High Court case No. 206 of 2010 and Kakamega Constitutional Petition No. 26 of 2014**. In making the present Application for the issuance of prerogative orders, the *ex-parte* Applicant conveniently failed to mention all its existing litigation challenging the licensing of Butali yet the principle of *uberrima fidei* dictates *inter alia* that all *ex-parte* Applicants must make full disclosure of all material evidence as was appreciated in **Republic vs. President & 7 Others Exparte Wilfrida Itolondo & 4 Others [2014] eKLR** wherein reference was made to the case of **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated that:

“It is perfectly well-settled that a person who makes an *ex parte* application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.

It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include;

- i. The duty of the applicant is to make full and fair disclosure of the material facts.**
- ii. The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers.**
- iii. The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries.**
- iv. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including**

(a) the nature of the case which the applicant is making when he makes the application,

(b) the order for which the application is made and the probable effect of the order

on the defendant, and

(c) the degree of legitimate urgency and the time available for the making of the inquiries.

74. Further support was sought from **Republic vs. President & 7 Others Exparte Wilfrida Itolondo & 4 Others [2014] eKLR** in which the Court laid out the consequences of non-disclosure as follows:

“The law is clear that where a party, at the ex-parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex-parte orders so obtained”.

75. According to the respondents, the Court of Appeal noted in **Kisumu Civil Appeals 89 and 90 of 2011** that the business of regulation of the sugar industry is by law intended to be left for the expertise of the 1st and 2nd Respondent. Interferences such as is portended by the numerous suits the Petitioner is filing are affecting the discharge of mandate by the regulator; they are inviting the court into matters that are strictly not within the Courts’ jurisdiction. All these manoeuvres of the Petitioner are hurting public interest and time has come when the Honourable Court has to be categorical in protecting public interest. It was asserted that the Applicant in abuse of Court process has claimed herein that the 1st Respondent has no jurisdiction and power to act at all and has in fact sought the writ of *certiorari* to quash all its actions so far. In the Kakamega Petition and Application, the Applicant seeks orders against the 1st Respondent based on its mandate under the AFFA and *Crops Act*. This inconsistent pleading constitutes an estoppel of record against the Applicant and is an abuse of court process and **King –vs- General Commissioners of Income Tax for the District of Kensington[1917]1 KB 486**, was cited for the holding that:

“There having been a suppression of material facts by the applicant in her affidavit, the court would refuse a writ of prohibition without going into the merits of the case.”

76. To the respondents all proceedings including judicial review and constitutional Petitions must be founded on utmost good faith so as to prevent ensuing orders from visiting hardship on innocent parties and the court’s Jurisdiction to prevent abuse of its process was emphasized in **Mitchell and others vs. Director of Public prosecutions and Another (1987) LRC (const) 128**.

77. It was further submitted the application of the *ex-parte* Applicant fits like a glove into and/or falls within the confines of what is considered to be a scandalous, frivolous and vexatious pleading as was set out in the case of **Horkan Investment Limited vs. Namayuk self Help Group, Nairobi HCCC No. 2185 of 2001** (unreported) as was stated in **Charity Ngilu vs. Headlink Publishers limited and 4 others [2011] eKLR**, which stated that:

“A pleading is scandalous if

- i. It states matters that are indecent.***
- ii. Matters that are offensive or***
- iii. Matters made for the mere purposes of abusing or prejudicing the opposite party.***
- iv. Matters that are immaterial or unnecessary which contain imputation on the opposite party.***
- v. Matters that charge the opposite party with bad faith.***
- vi. Matters that containing degrading charges.***
- vii. Matters that are necessary otherwise accompanied by unnecessary details.***

A matter is frivolous:

- i. If it has no substance or***
- ii. It is fanciful or***
- iii. Where a party is trifling with the court.***
- iv. When to put forward the defence would be wasting court’s time.***

v. *When it is not capable of reasoned argument.*

A pleading is said to be vexatious when:

- i. *It has no foundation*
- ii. *It has no chance of succeeding*
- iii. *The defence (pleading) is brought merely for purposes of annoyance or*
- iv. *It is brought so that the party pleading should get some fanciful advantage or*
- v. *Where it can really lead to no possible good.*

A pleading tends to prejudice, embarrass, or delay fair trial when:

- i. *It is evasive or*
- ii. *Obscuring or concealing the real question in issue between the parties in the case. Each party may claim debito justitiae to have opponents case presented in intelligible form so that he may not be embarrassed in meeting the claim. The opposite party's pleading must be within rules of procedure set down by law. Not his own concoction and patch."*

78. To the respondents, to indulge such a pleading is to impermissibly allow a litigant to subvert this Honourable Court's mandate to ensure the just determination of proceedings and ultimately to enable the *ex-parte* Applicant derail the implementation of the Court of Appeal's Orders and further support for the issue was sought from John Kimani Njoroge vs. Joseph Muthiora Wainaina [2012] eKLR where the words of Kimaru, J in the case of Stephen Somek Takwenyi & Another vs. David Mbuthia Githae & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 were cited to the effect that:

"The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue...there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it"

79. Accordingly, the respondents urged that the instant Application be struck out with costs to the 1st, 3rd and 4th Respondents for being an abuse of Court process since the Court should be guided by the principle that 'costs follow the event': the effect being that the party who calls forth the event by instituting the suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or respondent will bear the costs.

2nd Respondent's Case.

80. According to the 2nd respondent, the CS, the effect of the operationalization of AFFA by dint of section 1 of the *AFFA Act* and the *Crops Act* in January 2014 and 1st August, 2014 respectively was that the agricultural sector in the Republic of Kenya had no agencies to operationalise its different segments other than those created by the said Acts. The two Acts, it was contended abolished all the hitherto existing agencies and consolidated their functions into a single apex authority and all Directorates in the agriculture sector in the country exist as delegates of the AFFA, under section 11 of the *AFFA Act*. Absence, dysfunction, or stalling the operation of

- AFFA, correspondingly means that the functioning of the several named Directorates is equally stayed.
81. According to the CS, the AFFA it is in law deemed to have the necessary authority to discharge its statutory mandate and in the meantime, steps are being taken to constitute a subsidiary Board. It was disclosed that the Ministry through *The Standard* and *Daily Nation* newspapers had invited applicants for the position of Chairman of the AFFA Board and further advertised in the newspapers the list of shortlisted candidates who were invited for interviews. Under section 5(1) (a) of the **AFFA Act**, the chairperson can only be appointed upon the approval of the National Assembly and as much as the interviews have been done, the other process is not within the control of the Ministry. It was further disclosed that the **AFFA Act** at section 5(1)(i) provides for the election of eight (8) farmers' representatives and draft Election Regulations have been developed and are under review by the Kenya Law Reform Commission.
82. In the CS's view, the instant Application on the Authority's Board is because of numerical vacancy. However, the law is very clear regarding the effect of a defect in the membership or composition of the Board on a decision made by it since section 53 of the **Interpretation and General Provisions Act** provides that the powers of a board cannot be affected by anomalies in its membership.
83. To the CS, the issuance of the letters 26th September 2014 and 15th October 2014 was in fact being undertaken in compliance with the order of the Court of Appeal in **Kisumu Civil Appeal No. 89 and 90 of 2011 West Kenya Sugar Company limited vs. Kenya Sugar Board and Butali Sugar Mills Limited**, where the Court of Appeal issued a writ of *Mandamus* compelling Kenya Sugar Board to hear and determine the application for license by Butali dated 10th April 2010 within a reasonable time and according to the law. By extension, the order required Kenya Sugar Board to invite any person (especially the Applicant herein) to submit objections. Pursuant thereto, AFFA did invite all stakeholders in the sector to a meeting on 6th October 2014 at Malava including the Applicant to take views on the matter of licensing of Butali Sugar Mills Limited. This course was adopted because given the numerous stakeholders it was impractical to effectively review written memorandum of thousands of people, within the timeframe contained in the order of the Court of Appeal. In his view, the decision to call for the meeting of stakeholders at Malava on 6th October 2014 and to invite the Applicant to be heard was lawful since section 20(6) of the **Crops Act** provides that the licensing authority shall give notice of the proposed grant in the Kenya Gazette and in such other manner as the authority may determine at least thirty days before granting the licence. In his view, taking into account the limited timeframe ordered by the Court of Appeal in the said **Kisumu Civil Appeal No. 89 and 90 of 2011** and considering the peculiar nature of participation in the sugar sector for the longest period now, the discussion and communication to the stakeholders was done through meetings and invitation to submit views. It was however averred that AFFA affirms that it shall still issue the Gazette notice and if at all it decides to issue the licence to Butali Sugar Mills Limited then such licence can only issue 30 days after publication.
84. It was asserted that notwithstanding the pending issuance of the operating license to Butali, it is practice in Kenya in all State regulated industries, that for continuing operators, between the time of lapse of a renewable licence and issuance of the present one and as long as the applicant has already applied for the licence and it is pending consideration and approval or rejection, the applicant continues in operation pending the determination. According to him, the averments carried in paragraph L of the Grounds to the Chamber Summons and paragraph 27 of the Statement accompanying the application herein both dated 6th November 2014 fallaciously suggest that no other sugar miller is allowed to operate within the Applicant's designated sugar growing zone.
85. It was averred that the issue of the Applicant's sugar growing zone is *sub judice*. It is an issue pending determination in **Nairobi HCCC No. 206 of 2010 West Kenya Sugar Company Limited vs. Kenya Sugar Board and Butali Sugar Mills Limited** and **Nairobi High Court Constitutional Petition No. 59 of 2010 West Kenya Sugar Company Limited vs. Kenya Sugar Board, Butali Sugar Mills Limited & Another**. In any case, section 44 of the **AFFA Act** obligates the Authority to ensure fair competition between players in the sector and to completely discard any dominance in the market.
86. To the CS, in filing these proceedings, the Applicant is in effect attempting to invite the High

- Court to interpret the said order of the Court of Appeal while avoiding returning to the Court of Appeal for revision, interpretation and or qualification of the order.
87. It was his position that granting the orders sought herein would result in crippling and completely paralyzing all Government functions in the agriculture sector. Besides calling into question and indicting the decisions of the Authority and the Directorates already taken and in course of implementation, it invites enormous irreparable consequences. Further, the granting the orders sought would mean total cessation of regulation of the agriculture sector: cessation in issuing permits for importation and exportation of all scheduled crops, cessation of issuance of licences for all the scheduled crops, cessation of auctions of tea and coffee, cessation of regulation of exportation of fish stock, among other critical functions and for the said reasons, it cannot be lawful interpretation that section 5 (1) of the **AFFA Act** demands complete constitution of the Board before conduct of the business of the Authority can commence. To the extent that the law took notice of the process of subsidiary law making under Part III of the **Interpretation of General Provisions Act**, it cannot be the intention of the law to keep a Government sector unregulated for months if the court was to adopt this interpretation of the law, it would similarly mean that the Applicant and all other agricultural producers must stop operations because they would not be having valid licenses. It was therefore pertinent for the urgent and immediate constitution and operationalization of the Authority's Board and the decisions connected therewith were made *inter alia* in the public interest.
88. It was further averred that all Directorates in the agriculture sector in the country such as the Sugar Directorate, Tea Directorate, Fisheries Directorate and so on exist as delegates of the Authority under section 11 of the **AFFA Act** and absence, dysfunction, or staying the operation of the Authority correspondingly means that the functioning of the several named Directorates is equally stayed. To him, the Applicant is also applying double standards as it was also issued with its current milling license by the same Authority it now claims not to be competently constituted. He disclosed that the Applicant's application for a milling licence for the period of 1st July 2014 to 30th June 2015 was received by the then Kenya Sugar Board and deliberated on. As at 30th July 2014, the last meeting, sitting and existence of the Kenya Sugar Board the said application was rejected and the Applicant was advised to produce further documents, viz, evidence of their source of raw material to sustain its production, to provide National Environmental Management Authority license and to pay license fees of Kshs. 1 million. The Kenya Sugar Board never sat again to receive and deliberate on the Applicant's application. On 1st August 2014, the **Crops Act** was operationalised and the Kenya Sugar Board was abolished. The Applicant's license was consequently forwarded on 6th August 2014 by the AFFA under the Sugar Directorate. In effect therefore, the licence was issued by the AFFA. If it had no jurisdiction to act as the Applicant alleges, then the issued licence was illegally done and the Applicant should cease milling, pending full composition of the Board. Therefore, the Applicant cannot now come to court with unclean hands claiming illegality on the same process of issuance of the same license to a competitor. It was therefore the CS's case that the Application herein is therefore misconceived, misinformed, without merit, brought in bad faith and against the public interest and should therefore be dismissed.
89. It was submitted on behalf of the 2nd respondent by his Learned Counsel, **Mr Njoroge** and **Mr Kamunya**, that the law is very clear regarding the effect of a defect in the membership or composition of the Board on a decision made by it as section 53 of the **Interpretation and General Provisions Act**, Cap. 2 provides that the powers of a board cannot be affected by anomalies in its membership. Its decisions therefore retain their full legal effect notwithstanding the defect in membership or composition. The said provision according to the CS provides as follows:

Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by—

- (a) ***a vacancy in the membership thereof; or***

(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof

90. It was submitted that though the Board of the AFFA is yet to be constituted as required by the provisions of section 5 of the *AFFA Act*, this does not mean that the decisions of the AFFA are affected, or that AFFA is completely crippled as the said provision has been applied in numerous cases and is relevant in the circumstances of this case and reference was made to **Kenya Coffee Producers and Traders Association & another vs. Coffee Board of Kenya & 6 others [2013] eKLR.**

91. Further reference was made to **Michael Sistu Mwaura Kamau vs. Ethics and Anti-Corruption Commission & 3 others [2015] eKLR,** in which the court was called upon to examine, albeit at a preliminary stage, the validity of the actions and decisions of the Ethics and Anti-Corruption Commission given the current composition of its Board. **Ngugi, J** held as follows;

“42. As submitted by the respondents, the question of the composition of the EACC, in the absence of some of its Commissioners, has been considered by the High Court. In the case of African Centre for International Youth Exchange vs EACC & Jane Muthaura (supra) Majanja J observed as follows:

[38.] “This case highlights the challenges faced in the transition process, where uncertainties may be created by litigation and by the mere fact that processes required to effect the transition are controlled by human beings and not machines. The Court is required to consider all the facts and more importantly to address itself to the objects and intent of the Constitution. Article 259(1) requires that the Constitution be interpreted in a manner that promotes, its purposes values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the bill of rights and permits development of the law and contributes to good governance.

[39.] The Ethics and Anti-Corruption Commission is the foundation upon which Chapter Six of the Constitution is built. It is the body required to superintend and enforce the provisions Chapter Six and the Leadership and Integrity Act, 2012 which is the legislation giving effect to Chapter Six. Therefore, any approach to this issue should be to secure the institution rather than diminish its capacity. In the words of Article 259, the approach must be one that meets the Constitutional purposes and objectives and fosters good governance.”

43. In the above case, Majanja J cited with approval the words of Achode J in Ruth Muganda vs Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc.Crim. Appl. No. 288 of 2012 in which the Learned Judge had expressed herself as follows:

[45] “... Thus this Court is alive to the fact that the envisaged transitional period prescribed in the statute could not foresee all transitional challenges, bearing in mind possibilities of litigation as in the case here affecting the appointment of the chairman and therefore assumption of office by members of the Commission.

[46] A purposive approach to this issue requires the Court, in the spirit of the Constitution, to promote the continuing and intended objects and functions of the Commission throughout the transitional process as opposed to extinguishing its existence.”

44. The effect of the holding in these two decisions is that the acts of the EACC, even in the absence of Commissioners, are valid.

45. Admittedly, as argued by Mrs. Wambugu for the petitioner, these cases were dealing with the question of the existence and functioning of the Ethics and Anti-corruption Commission

and the contracts of its staff in the transition between the old and the new Constitution, and the EACC it established. However, in my view, they represent the best judicial authority on this question at this point in time. They certainly far outweigh the petitioner's bare assertion that because the EACC does not have Commissioners, it did not have the legal mandate to investigate him, or to make recommendations to the DPP for his prosecution. In the present circumstances, therefore, I am satisfied that there is no violation or threat of violation of the petitioner's rights demonstrated that would justify the grant of conservatory orders in his favour."

92. It was submitted that being the principal agricultural Authority in Kenya, AFFA holds equal status as the EACC does in the governance sector as was observed by **Majanja, Achode and Ngugi, JJ** above, no other body, including the 2nd respondent can legally perform AFFA's functions if AFFA is stopped from running. The Court was urged to apply the purposive approach herein as was done by the judges in the above cases.

93. Support was similarly sought from **Peter O. Ngoge vs. Francis Ole Kaparo & 4 Others [2007] eKLR**, in which while determining a question as to whether Parliament was at a time during the election of the Speaker was properly constituted, the court held:

"The fact that the nominated members were gazetted after the election of Speaker does not invalidate the election of Speaker, on the very clear wording of the above section. The vacancy occasioned by the absence of the nominated members cannot and does not invalidate any business conducted at the first sitting after dissolution of Parliament or at all."

94. It was contended that the Board of the AFFA has not been constituted as per the law for reasons enumerated in the affidavit of **Sicily Kanini Kariuki** and that no intention of bad faith can be imputed on the part of the 2nd respondent for this state of affairs.

95. The CA further relied on section 52 of the ***Interpretation and General Provisions Act*** which states:

Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, a person who is by that written law empowered to appoint any or all of the members thereof—

(a) appoint one or more duly qualified persons to be alternate members, and any one alternate member may attend a meeting when a substantive member is temporarily unable to attend;

(b) appoint a duly qualified person to be a temporary member in the place of a substantive member who is precluded by illness, absence from Kenya or other cause from exercising his functions, and, when attending a meeting of the board, commission, committee or similar body, the alternate or temporary member shall be deemed for all purposes to be a member thereof.

96. On the strength of this provision, it was submitted that the 2nd respondent appointed the 3rd and 4th respondents to ensure AFFA is functional pending the full constitution of the Board. To the CS, the legislative rationale of the above provision was that there cannot be a vacuum and that situations such as is presently before the court were contemplated by the drafters of the Act and the purpose of this provision is to allow the appointment of temporary directors, and that the actions of a director later found to have been improperly in office will still be deemed valid. A process has commenced, as has been ably demonstrated in the affidavit of **Sicily Kanini Kariuki**, to ensure that the Board is properly constituted pursuant to section 5 of the ***AFFA Act***.

97. The CS submitted that it is in the public interest that the decisions of AFFA complained of in this application and all other decisions be declared as validly issued. **"Public interest"** is defined in the ***Black's Law Dictionary***, 9th Edition (page 1350) as: ***"the general welfare of the public that***

warrants recognition and protection” or “something in which the public as a whole has a stake, especially an interest that justifies governmental regulation”. It was reiterated that granting the orders sought herein would result in crippling and completely paralyzing all Government functions in the agriculture sector. Besides calling into question and indicting the decisions of the Authority and the Directorates already taken and in course of implementation, it invites enormous irreparable consequences. Granting the orders sought would mean total cessation of regulation of the agriculture sector: cessation in issuing permits for importation and exportation of all scheduled crops, cessation of issuance of licences for all the scheduled crops, cessation of auctions of tea and coffee, cessation of regulation of exportation of fish stock, among other critical functions. In support of this position the CS relied on **Kenya Guards Allied Workers Union vs. Security Guards Services & 38 Others, Misc. 1159 of 2003** where Justice Nyamu (as he then was) so passionately expressed the importance of public interest as follows:

“Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist -Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts...”

98.The CS also cited **Multiple Hauliers East Africa Limited V Attorney General & 10 Others [2013] eKLR** in which the sentiments of Justice Nyamu’s in the case of **Kenya Guards Allied Union** (above) were restated where the Petitioner in that case (Multiple Hauliers) was dispossessed of land premised on the principle of public interest. The court stated at paragraphs 48 and 55 of the judgment:

“I agree that public interest considerations are critical factors for a Court to take into account, and in the circumstances of this case, construction of a road is for the public good. However, the public interest will be better served if the state and all organs of state and public authorities scrupulously act in accordance with the dictates of the Constitution...I agree with the respondents in this regard. As often happened in that regrettable epoch in our history when public property was being parceled out in complete disregard of the interests of the public, the petitioner may have been a victim of surveyors who may have prepared subdivision plans in ignorance or disregard of the existing road corridor-see **CYCAD PROPERTIES & OTHERS -VS- MINISTRY OF ROADS & OTHERS HIGH COURT PETITION NO. 70 OF 2010. In the circumstances, I cannot find a basis for alleging a violation of the petitioner’s legitimate expectations on the part of the respondents.”**

99.It was submitted that if the orders sought in the instant application are granted, the legality of all other decisions and actions previously made by AFFA will be impugned. Subsequently, AFFA which by virtue of section 4 of the ***AFFA Act*** is the sole institution responsible for Kenya’s agricultural sector, will no longer be able to operate hence the application ought to be dismissed.

1st Interested Party’s Case

100.According to the 1st interested party, Butali, it applied for a registration certificate and was registered by the first Respondent to construct a sugar milling plant at Kakamega/Malava/303 (hereinafter ‘Butali site’) and has since its licence of January 2011 milled sugar at the stated location. According to it, its registration at the Butali site followed empirical consideration of recommendations of a report of taskforce in 2005 set up by then Minister for Agriculture (**Mr. Kipruto Arap Kirwa**) and which recommendations were *inter alia* that the Kabras Sugar Zone, which encompasses the Butali site had potential to sustain another sugar mill because more cane could be developed and because there was surplus cane that was going to waste without a market

- to consume it.
101. It was averred that following Butali's registration Butali through its outgrower institution and through its own mechanisms, with a view to increasing sugarcane plantation to ensure steady and uninterrupted supply of sugarcane to its plant undertook campaigns for sugarcane development and as at today it has registered farmers, who have grown sugarcane for supply to its plant numbering about 50,000 and with sugarcane standing on about 26,308 hectares. Following frustrations at the hand of the then Regulator Kenya Sugar Board and the Applicant herein with the investment of Butali, Butali having applied for a milling license on 10th April 2010, filed Kisumu High Court Judicial Review 17 of 2010 **Republic vs. Kenya Sugar Board Ex parte Butali Mills Limited** seeking orders to compel Kenya Sugar Board for issuance of its milling licence which the High Court granted culminating in issuance of Butali's first milling licence in January 2011 which expired on 30th June 2011 and which was renewed subsequently at the instance of Kenya Sugar Board resting with the licence for 2014/2015 approved by Kenya Sugar Board but issued by AFFA, like all other millers in the Country.
102. However, the Applicant herein appealed to the Court of Appeal and by Judgment of the Court of Appeal of 19th September 2014 issued in Kisumu Civil Appeal No. 89 and 90 of 2011 **West Kenya Sugar Company Limited vs. Kenya Sugar Board and Butali Sugar Mills Limited**, the court set aside the order of *mandamus* as issued by the High Court and in its stead issued an order of *mandamus* "*compelling Kenya Sugar Board to hear and determine the application for a license by Butali Sugar Mills Limited dated 10th April 2010 within a reasonable time and according to the law giving the appellant a right to be heard in opposition.*"
103. It was averred that following abolition of the Kenya Sugar Board by the ***Crops Act 2013***, the created regulator Agriculture, Fisheries and Food Authority (AFFA) took over all legal responsibility of Kenya Sugar Board, per Regulation 3 of the Third Schedule to the ***Crops Act 2013*** and therefore reference to Kenya Sugar Board in the Court of Appeal order is by law substituted with AFFA.
104. On 22nd September 2014, Butali wrote a letter to AFFA and the Sugar Directorate a letter advising of the order of the Court of Appeal and requesting that the licensing process commences with the urgency ordered by the Court of Appeal with a reminder thereto on 16th October 2014, to AFFA and the Sugar Directorate. In commencing the licensing process, AFFA wrote to the Applicant, Butali and all stakeholders in the sector for a meeting at Malava, in Kakamega County at Friends Church Malava for 6th October 2014 which meeting was duly held attended by thousands of farmers including leaders of the region, from the County government, Senatorial representation and Members of Parliaments and who significantly articulated view on the issue of licensing of Butali.
105. According to Butali, it has complied with all requisites at law and presently resides awaiting issuance of its milling licence. In fact having milled for three (3) years, its application for milling licence for the year 2014/2015 was considered by the Kenya Sugar Board in the Board's sitting of 30th July 2014, the board having considered all the technical and material requirements necessary at law for issuance of a milling licence approved Butali's application. According to it, there are no material differences between Section 15 of the ***Sugar Act, 2001*** and ***Crops Act*** on the technical and material requirements for licensing, save the expanded requirements of public participation and gazettment before issuance of licence.
106. Butali disclosed that it established its plant at its site and has until presently expended the sum of Kshs 5.5 Billion and this being a Greenfield project any interruption of its business translates in losses of Millions of shillings. Further, interference and delays in licensing process of Butali are causing anxiety and prejudice in the business of Butali, investors including recurrent financial commitments is prejudiced, farmers, County government and over 353,409 Kenyans who directly rely on Butali for livelihood remain in anxiety. Butali having established its plant, expending the astronomical sum of capitalization stated above is indeed entitled at law to operation without obstruction. According to it, until today Butali has paid to the various stakeholders in Kenya the sum of over Kshs 9,140,516,381.15 distributed as follows:

- a. Gross payments to farmers Kshs. 5,867,929.045;

b.	Outgrowers Levy	Kshs. 41,284,435.00;
c.	County Council Cess	Kshs. 53,988,849.00;
d.	Value Added Tax	Kshs. 1,714,410,643.00;
e.	Sugar Development Levy	KShs. 464,865,972.00;
f.	Standards Levy	Kshs. 1,466,664.00;
g.	PAYE	Kshs. 173,285,965.00;
h.	Withholding Tax	Kshs. 14,610,458.00;
i.	Corporation Tax	Kshs. 222,687,187.00;
j.	Employees Union (COTU & KUSPAW)	Kshs. 2,663,431.00;
k.	Salaries to employees	Kshs. 922,003,733.00

107. It was therefore contended that besides the position of its investment, Butali has significant consequence to the national economy and it is literally propping up the economy of the County Government and that persons directly depending on Butali's plant and its functioning aggregate 353,409 people whose livelihoods are threatened with destitution by any disruption in its milling activities. Besides the direct payments to the growth and propping the economy as averred above, Butali has actively engaged in corporate Social Responsibility programmes, which are recurrent and which are sustained continuously and any disruption or interference with Butali's milling business impacts on those necessary projects which include maternity wards at Kamasai village and Chebwai village, constructions of roads and by-passes at Shivanga-Kamasi and Malichi-Koiban, construction and sustenance of schools Manyonje, supply of sanitary towels for girls in schools in the region, sponsoring and hosting free eye medical camps, making of cash donations to schools for development, to school fees for students and pupils, to hospitals for development, to churches, to regional resource centres, to orphanages among other deserving enterprises. Further, Butali is a decorated tax payer and was awarded the best tax payer in the year 2012 in the category of VAT-MST (Small Tax Payers) and the distinguished tax payer in the year 2013 in the regional award category for western region. In sum therefore, it was contended that it is critical that the operations of Butali are not interrupted and or interfered with without supreme reason since any interruption of Butali's business for even a day has the far reaching consequences averred in the foregoing paragraphs as it threatens the investment of Butali and hundreds of thousands of Kenya citizens with destitution as well as public interest.

108. To Butali, the critical nature of the sugar industry generally and Butali in particular cannot remain in limbo to await making of regulations. Based on legal advice it was averred that considering provisions of the **Statutory Instruments Act, 2013** and the **Interpretation of General provisions Act** (Chapter 2 of the Laws of Kenya) making of Regulations takes an appreciable period of time yet the nature of the business that Butali is and its stakeholders aforesaid has no capacity to remain in suspension for such periods. However, urgent operationalization of AFFA has served to ensure the smooth transition and ensure operation for all millers in Kenya and the situation could have been catastrophic to the economy and the people of Kenya, a situation that the Applicant seeks to discriminately apply to Butali. This is averred and exemplified in two facts. Firstly, the **Crops Act 2013** came in to operation on 1st August 2014. This Act abolished the Kenya Sugar Board on 1st August 2014. The Kenya Sugar Board sat and discussed the Applicant's application for milling licence last on 30th July 2014 and in the meeting the Board rejected the application for reasons of failure to supply information as a source of raw materials, to pay the Kshs. 1,000,000.00, to provide NEMA licence and self-evaluation form. The Kenya Sugar Board

never sat again to receive, evaluate and decide on the application of the Applicant till midnight of 31st July 2014 when it was abolished. Secondly, the milling licence to the Applicant as all other millers was issued and forwarded on or about 6th August 2014, by AFFA.

109. It was disclosed that the milling licence to the Applicant was then determined, issued and forwarded by AFFA hence the Applicant is approbating and reprobating since AFFA had no authority whatsoever to act, even in transition, then the Applicant's licence is equally illegal and void. Butali further disclosed the existence of court cases dealing with various issues filed by the Applicant against the Kenya Sugar Board, Butali and the Attorney General. In the first one - Nairobi High Court Civil Case No. 206 of 2010 **West Kenya Sugar Company Limited vs. Kenya Sugar Board and Butali Sugar Mills Limited** - the Applicant, West Kenya Sugar Company Limited seeks orders against non-licensing of Butali in the Kabras Sugar belt, on the basis of existence of a sugar zone to it of 24 KM radial distance from its plant. In this suit the Applicant sought an injunction against licensing of Butali at its site, but the application was dismissed on 17th September 2010. The suit is still pending. In the second suit - Nairobi High Court Constitutional Petition NO. 59 of 2010, **West Kenya Sugar Company Limited vs. Kenya Sugar Board, Attorney General and Butali Sugar Mills Limited** - the Petitioner filed Petition challenging the registration certificate of Butali and seeking injunction against licensing of Butali at its present site. The basis of the Petition is to claim existence of a zone exclusive to the Applicant in the Kabras zone. The Petition is still pending.

110. It was Butali's legitimate expectation that its application for milling licence will be licensed without delay at law which was further confirmed by the order of the Court of Appeal issued in Civil Appeals 89 and 90 of 2011 but is threatened by the present application and averred that Butali and its entire stakeholders stand to suffer irreparably if the orders sought in the application are granted which orders according to it shall be against public interest and shall egregiously violate fundamental rights of Butali thus this court in such enterprises shall be the agent oppression and violation of fundamental rights, as follows:

a. **Article 27 of the Constitution-Right to protection from discrimination**: AFFA as presently constituted is operating and did on or about 6th August 2014 consider, issue and forward the milling licence to the Applicant. AFFA also made out and forwarded licences to other millers on the same date. The present application seeks to declare AFFA incapable of action in determining the milling licences of the Applicant and other millers. Further, AFFA through its directorates have acted and continues to act in licensing other handles of scheduled crops. It shall be grossly be discriminate to apply a prejudicial set of rules to Butali and not other parties.

b. **Article 40 of the Constitution-Rights to protection of Property and 260-property also includes vested and contingent rights**: Butali has expended so far Kshs. 5.5 Billion on its plant. This is a business enterprises and in milling it creates wealth, creates property. Its business is lawfully established, it has the right to apply for milling licence which it did, AFFA has the obligation to determine its licence within reasonable time, to enable Butali continue and to protect its property. Derailing Butali's operation is an egregious threat to this right to property;

c. **Economic Rights**: orders of suspension of the process of licensing shall disrupt the economic rights of Butali;

d. **Article 47 of the Constitution-Fair Administrative action**: By this right, Butali has the legitimate expectation that the matter of its licensing shall be considered expeditiously, efficiently, lawfully, reasonably and procedurally fairly. This expectation is further codified by the Order of the Court of Appeal in Civil Appeal No. 89 and 90 of 2011. Derailing the licensing process of Butali shall directly and without lawful reason violate this right;

111. According to Butali, while pending determination of this case notwithstanding the pleading by the ex parte Applicant that the 1st Respondent is in-operational, the ex parte Applicant applied to

- the 1st Respondent for a Milling licence for the year 2015/2016 duly filled application forms, paid requisite fees and was issued a Milling licence.
112. It was submitted by Butali through its Learned Counsel, **Mr Nowrojee, SC** and **Mr. Ochieng' Oduol**, that it is possible that as at present the ex parte Applicant has been issued with such licence by the 1st Respondent and in effect therefore, the substratum of the present application for reliefs of Judicial Review has been defeated by the very acts of the ex parte Applicant since on the one hand the ex parte Applicant claims that the 1st Respondent is improperly constituted and unable to operationalise, and on the other hand it proceeds to apply to the same body for a licence, an act of legal recognition of its functionality. It was submitted that the 1st Respondent issued milling licences to millers on 5th August 2014 and that without even considering the compliance of the ex parte Applicant issued a milling licence to the ex parte Applicant on 5th August 2014 which the ex parte Applicant had no problem receiving without raising any issue about deficiencies in composition of the 1st Respondent at that stage but instead proceeded to mill and operate under this licence issued by the 1st Respondent until its expiry on 30th June 2015. Thereafter, the ex parte Applicant had no problem, even during pendency of these provisions to make an application to the 1st Respondent for a milling licence. It is only when the same 1st Respondent begun considering application by the 1st Interested Party per the order of the Court of Appeal in Kisumu **Civil Appeal 89 and 90 of 2011** that the ex parte Applicant raised the issue of incompetence of the 1st Respondent. To Butali, this is a classic illustration of abuse of process, by reprobation and approbation and by suppresser of material facts hence such a party, is not deserving of the discretionary writ of judicial review of this Court.
113. Based on **Anthony Athanas Ngoto T/A Ngoto Architects vs. National Industrial Credit Bank Limited [2004] eKLR**, **Dr. Sunny Samuel vs. Simon M. Mbwika & Another [1998] KLR**, **Industrial and Commercial Development Corporation Vs. Kariuki Gatheca 1977 KLR 52**, **Abedare Freight Ltd Hdwc App. 9410/04**, and **Behan & Okero Advocates vs. National Bank of Kenya (2007)**, it was submitted that a litigant cannot blow hot and cold by relying on a position in one case and renege on that position in another, just because of convenience. According to Butali, this abuse, is blind pursuit, it is contrary to statute, section 44 of the ***AFFA Act***, section 23 of the ***Competition Act***, and a violation of hundreds of thousands of farmers in the Kabras region, who have in any event filed pleadings before this court. Notwithstanding such interests that are threatened, the *ex parte* Applicant has no such caution, or conscience. This Court was therefore urged as a cathedral of justice, to render justice that is mindful of cumulative rights and interests of the Interested Parties who have taken refuge from the hail storm, that is the *ex parte* Applicant's legal foundation-less suits, in this Honourable Court.
114. It was submitted based on **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 others**, (supra) that save for prayer number 3 of the Motion, the remaining writs and the grounds that support them, apart from being without merit, are dangerous prayers since the substratum of the grounds of the application is to ground the 1st Respondent and all its directorates as being incapable of performing its functions under the ***Agriculture, Fisheries and Food Authority Act, 2013*** and the ***Crops Act, 2013***. It must be understood that the effect of granting the prayers in the application, shall not only affect the 1st Interested Party, but all millers including all stakeholders in the industry and shall affect all the other directorates of the 1st Respondent, to include the directorates for Coffee, Tea, Pyrethrum, Sisal, Coconut, Horticulture and Cotton. If the 1st Respondent is declared dysfunctional, it was submitted it shall not only be dysfunctional for purposes of determining an application dated 10th April 2010 by the 1st Interested Party but for any all purposes under the said legislation, it shall thus be an across the board scenario, including the licensing of the *ex parte* Applicant. Granting the prayers as sought and on their grounds is what this Court refused in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 others [2014] eKLR** on the ground of '*...or where it would cause administrative chaos and public inconvenience...*' Only that in the present case, it shall not only cause administrative chaos and public inconvenience, but a tragedy in the agriculture sector and to the government and nation of Kenya in general.
115. On the significance of AFFA's operations, Butali cited various legal provisions and submitted

that in context of sugar it means, the transporter of sugarcane, the storing of sugar, the purchaser and seller (including supermarkets) must be registered by the 1st Respondent. When this is replicated to over the eight (8) directorates, it applies to the transporting of coffee and tea, the auction licences, the manufacturing licences, the brokerage licences and the export licences, all must be and have been issued by the 1st Respondent. Butali was therefore of the view that this court cannot declare the 1st Respondent dysfunctional then fail to recall all acts done and licences issued by the dysfunctional authority and recalling all these shall include all mill licences including the licences issued to the *ex parte* Applicant, all licences in the tea sector, coffee sector, horticultural sector, coconut sector, sisal sector and all other sectors regulated by the 1st Respondent including all import, auction and export licences. Moving forward it shall mean grounding all operations in the scheduled crops sector, including harvesting, transporting, manufacturing, storing, buying, selling, auctioning of any and all scheduled crops which in Butali's view would be tragic and would '*...cause administrative chaos and public inconvenience...*'

116. On the issue of the Constitution and operationalization of AFFA, it was submitted that **AFFA Act** came in to operation on 17th January 2014 while the **Crops Act** came in to operation on 1st August 2011. Under this Act all previous institutions under the repealed Acts stood abolished and all their authority and jurisdiction to regulate immediately was transferred to the 1st Respondent. On 1st August 2014 therefore the 1st Respondent begun regulation of the agriculture sector hitherto wielded by the abolished institutions and today, the following offices on the 1st Respondent's board are officially filled, vide gazettelement by the Acting Secretary Ministry of Agriculture in the Kenya Gazette Special Issue of 29th May 2015, under section 5(1) of the **AFFA Act**:

- i. **The Principal Secretary in the Ministry responsible for agriculture;**
- ii. **The Principal Secretary in the Ministry responsible for finance;**
- iii. **The Principal Secretary in the Ministry responsible for matters relating to county governments;**
- iv. **The Principal Secretary in the Ministry responsible for lands;**
- v. **The Principal Secretary in the Ministry responsible for environment;**
- vi. **The Principal Secretary in the Ministry responsible for co-operatives;**
- vii. **A representative of the National Land Commission;**
- viii. **The Chairperson of the Transition Authority or his representative.**

117. Besides these persons the Secretary Ministry of Agriculture had appointed an Interim Director General under section 5(1)(j) of the **AFFA Act**, to ensure continuity. In all therefore, there are eight (9) members of the 1st Respondent and there is remaining an election of eight (8) farmers' representatives and the chairperson and the Rules envisaged under section 5(2) have been made in draft and await Parliament's approval while the place of chairperson awaits vetting.

118. To Butali, legally, the law did not envisage a vacuum, for there can be no vacuum in government business hence the 1st Respondent as transitioned became operational notwithstanding vacancies in the Board, as stated above. At law, even where there is a vacancy in a Board or Commission, the Board's or Commission's functions are carried out nonetheless as provided under section 53 of the **Interpretation of General Provisions Act**. The plain interpretation here is that as long as statute has established a Board (for this case the 1st Respondent), and statute has become operational, then as long as some members of that Board are in existence, notwithstanding that there are still vacancies, the Board can lawfully commence performance of function of the objectives for which it was constituted, unless a contrary intention appears. It was submitted that the 1st Respondent is established and operationalized, it has 9 members and no contrary intention appears from statute barring it from functioning until all the 18 members are constituted. The aspect of section 53 above, of '*unless a contrary intention appears*' is completely neutralized by presence of the following two (2) circumstances: Firstly, is Second Schedule to AFFA Act, Rule 1(4)- quorum of the AFFA Board Regulation 1(4) the second Schedule to **AFFA Act** provides that the quorum for the conduct of the business of the Board shall be one half of all the members.

One half of all the members of AFFA Board per section 5(1) of the *AFFA Act* are 9 members and as there is in place 9 members of the Board, already there is quorum for the 1st Respondent at law. Secondly, is the pertinence of urgent and immediate operationalization of AFFA Board-the *Public Interest argument or the Doctrine of necessity*. The effect operationalization of the *Crops Act* on 1st August 2014 was that the agricultural sector of the Republic of Kenya had no agencies to operationalize its different segments save the created 1st Respondent, for the *Crops Act* abolished all the hitherto existing agencies and consolidated their functions into a single apex authority. All directorates in the agriculture sector in the country exist as delegates of the 1st Respondent, under section 11 of the *AFFA Act*. Absence, dysfunction, or staying the operation of 1st Respondent, correspondingly means that the functioning of the several named Directorates is equally stayed. The practical implication is to cripple and completely paralyze all governmental functions in the agriculture sector, besides calling in question and indicting the decisions of the 1st Respondent and the Directorates already taken and in course of implementation, invites enormous irreparable consequences. Simply stated, it is a disaster. This also means total cessation of regulation of the agriculture sector: cessation in issuing permits for importation and exportation of all scheduled crops, cessation of issuance of licenses for all the scheduled crops, cessation of auctions of tea and coffee, cessation of regulation of exportation of fish stock, among other critical functions. It was submitted that for the foregoing reasons, it cannot be lawfully interpreted that section 5(1) of the *AFFA Act*, demands complete constitution of the Board before conduct of the business of the 1st Respondent could commence. In any event to the extent that the law took notice of the process of Subsidiary law making under Part III of the *Interpretation of General Provisions Act* (Chapter 2 of the Laws of Kenya), it cannot be the intention of law to keep a government sector unregulated for months and reliance was placed on **Kenya Coffee Producers and Traders Association & another v Coffee Board of Kenya & 6 others [2013] eKLR.**

119. To Butali, this principle is on all fours similar to the situation at hand. The attack on the 1st respondent presently is because of numerical vacancy which does not hinder the Board from functioning. Further reference was made to **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**, where the Supreme Court of Kenya dealt with the issue finding that there can be no vacuum in government institutions because of delays in legislation. It was submitted that in that case the Court expressed itself in paragraphs 131, 195, 204, 205 and 206 as follows:

“The inevitable inference resolves into the principle that the new Constitution did not envisage or create a legal vacuum, and all processes regulated by law were to continue in progress, as signalled by the Constitution...The comparative lesson is this: there ought to be no vacuum occasioned by failure or delay on the part of the legislature. This is why all existing laws were given the leeway to continue operating, on condition that they would be construed with necessary alterations, adaptations, qualifications and exceptions to bring them into conformity with the Constitution...In our considered view, such court challenges will continue until a balance that aligns the legislation to the Constitution is found. In the meantime, there is no legal vacuum as we have upheld, the constitutionality of the CCK and its independence to consider and issue licences under Article 34(3) of the Constitution continues...In such context, can it be concluded that the promulgation of the Constitution, on the 27th of August, 2010 immediately rendered CCK and all its actions thereafter unconstitutional? Such is the conclusion the Appellate Court arrived at, and which occasioned the nullification of the licence that had already been issued to the 5th appellant herein. It is clear to us that this conclusion was based on the assumption that Article 34(3) and (5) had somehow envisaged the reconstitution of CCK. However, this assumption, although not devoid of logic, is not supported by the tentative cast of the two sub-Articles. The three-year time-frame within which legislation was required to be enacted, pursuant to the Fifth Schedule as read with Section 7(1) of the Sixth Schedule, should be understood to mean that the Constitution did not contemplate a vacuum in the licensing of airwaves... CCK had been established and mandated to, inter alia, license and regulate the airwaves and signal distribution, before the promulgation of the new Constitution (by the Kenya Information and Communications Act, 1998). Hence, having been in existence before the

date of promulgation, CCK had a lawful existence, and its actions were not unconstitutional. The transition Chapter and clauses in the Constitution are meant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order. Unless it is demonstrated that the legislation establishing CCK was incapable of being construed with the necessary alterations and exceptions, so as to bring it into conformity with the Constitution, pending the three-year legislative intervention, it would be improper in law and in principle, to declare CCK unconstitutional.”

120. It was Butali’s view that the Supreme Court sets the foundation that there ought to be no vacuum occasioned by failure or delay on the part of the legislature which is precisely what the present Judicial Review application seeks, to create a vacuum in the agriculture sector, suspend the regulatory framework and recall all the regulation done.
121. It was therefore contended that the 1st Respondent is properly constituted at law and can legitimately perform the functions of the *AFFA Act* and the *Crops Act*. Further pursuant to section 53 of the *Interpretation of General Provisions Act*, acts of the Board cannot be recalled. Accordingly the decision in letters dated 26th September 2014 and 15th October 2014 cannot be quashed. In the same all acts undertaken by AFFA and its Directorates: the licenses, guarantees, undertakings, etc. cannot be recalled. If, the Applicant is to insist that AFFA has no authority to act, nor its Directorates because of vacancies in the AFFA Board, then WKSCL has to cease operations of its sugar mill as well. The argument however, is that the 1st Respondent and the Sugar Directorate are lawfully functional and can hear and determine issuance of a milling license, in the same manner that it issued the licence to the ex parte Applicant.
122. It was submitted that the application licence in issue is one dated 10th April 2010 which is to be undertaken at 2 levels: *firstly* as a general duty under the Crops Act and *secondly* in obedience to the Order of the Court of Appeal in *Kisumu Civil Appeal No. 89 and 90 of 2011 West Kenya Sugar Company Limited vs. Kenya Sugar Board and Butali Sugar Mills Limited*, whose implementation the 1st Respondent has commenced by inviting all stakeholders in the sector to a meeting on 6th October 2014 at Malava (Kakamega County) including the ex parte Applicant to take views on the matter of licensing of the 1st Interested Party. This course was adopted because of the numerous stakeholders it was impractical to effectively review written memorandum of thousands of people, within the timeframe in the Order of the Court of Appeal, ‘within a reasonable time’. Further to this the 1st Respondent through its Sugar Directorate wrote to the ex parte Applicant to attend a meeting at the Directorate’s offices on 22nd October 2014 and be heard in on the issue of determination of the 1st Interested Party’s application for milling licence dated 10th April 2010.
123. On allegation of the failure to comply with section 20(6) of the *Crops Act*, it was submitted, besides enjoining issuance of a Gazette notice also enjoins issuance of notice in other manner that the 1st Respondent may determine. The decision to utilize a meeting of stakeholders at Malava on 6th October 2014 and to call the ex parte Applicant to be heard was thus lawful as this course was taken considering the peculiar nature of the sugar sector that for the longest period now, discussions and communication to the stakeholders has been through the meetings. It was submitted that the 1st Respondent is still enjoined to issue the Gazette notice and if at all it decides to issue the licence to on the application dated 10th April 2010, then such licence can only issue 30 days after publication hence the allegations in the Notice of Motion of breach of procedures are completely misconceived.
124. Butali submitted that it established its business and has expanded it at a cost of Billions of Shillings hence is entitled to equal protection of law and protection of its property as other millers including the ex parte Applicant. Granting the reliefs in the Motion save for prayer 3 thereof shall be grossly and egregiously prejudicial to Butali as it shall violate the Butali’s right to protection from discrimination under Article 27(1) of the Constitution of Kenya as the application seeks that the 1st Respondent be declared dysfunctional only in relation to Butali and be very functional when dealing with all other persons in the same industry including the ex parte Applicant. Further,

the relief would violate Butali's right to protection of property, Article 40 of the Constitution of Kenya and if discriminated against, its said investment and property shall dissipate. It shall lose out on profit, and its raw material shall go to waste, its financiers shall recall debts and it may ultimately be grounded as an investment. It was submitted that the relief would also amount to a violation of its right to fair administrative action, Article 47 of the Constitution of Kenya since if the 1st Respondent attends to all persons but rejects to attend to the application dated 10th April 2010 by the 1st Interested Party, this shall not be fair administrative action.

125. According to Butali, the law is, a Court cannot hear and determine issues that are already under a consideration by another court and relied on **Thiba Min. Hydro Co. Ltd vs. Josphat Karu Ndwiga [2013] eKLR** and **Abdul Kassim Hassanali Gulamhussein Khala vs. Southern Credit Banking Corporation Ltd [2006] eKLR**, on the implication of *sub judice*. It was submitted that the issue of the Applicant's sugar growing sugar zone raised by the applicant is *sub judice* since it is the issue pending determination in **Nairobi HCCC No. 206 of 2010 West Kenya Sugar Company Limited vs. Kenya Sugar Board and Butali Sugar Mills Limited** and **Nairobi High Court Constitutional Petition No. 59 of 2010 West Kenya Sugar Company Limited vs. Kenya Sugar Board, Butali Sugar Mills Limited & Another**. In any event the issue of zone is now settled legally since section 2 of the repealed ***Sugar Act***, 2001 never conferred zones to anybody, the concept of exclusive zone is an illusion of the Ex parte Applicant with zero foundation in law. The ***AFFA Act*** however having been an improved legislation directly answers and settles the ex parte Applicant's illusory clamour since under section 44 of the ***AFFA Act***, the 1st Respondent is enjoined to ensure fair competition between players in the sector and to completely discard any dominance contemplated under section 23 of the ***Competition Act***. In any event this court has had occasion to deal with the issue of 'exclusive zone'. In **Kakamega High Court Civil Case No. 233 of 2012 John Marango & 5 Others vs. West Kenya Sugar Company Limited**, in which Court found at page 21 as follows:

'I am satisfied that the definition of zones as per the Sugar Act does not create exclusive zones for miller. The Act defines a zone to mean the area within a radius of up to a maximum of forty kilometres of a sugar mill. If the intention was to create zones, then millers would have been spaced far apart so as to give each miller a 40 kilometre radius.....other than contracted farmers, there are independent farmers whose interests have to be taken into account. Such farmers are at liberty to sell their cane to a miller of their choice. To stop a miller from buying cane from a certain zone completely would be to curtail the rights of the independent farmers and force them to sell their cane to a miller not of their choice...'

126. Butali further referred to **Nairobi Milimani High Court Civil Case No. 206 of 2010 - West Kenya Sugar Company Limited vs. Kenya Sugar Board and Butali Sugar Mills Limited** in which in a ruling on an interlocutory injunction on the issue of exclusive zone, the Court found that there was no prima facie case established on the issue of exclusive zone. The court (**Honourable Justice Koome**) dismissed the application for injunction holding *inter alia* that there could be no jurisdiction for the ex parte Applicant herein to be granted an exclusive zone of 24 Km as sought, that that offended the rules of competition, and the ex parte Applicant as any other miller had to compete. In sum of this argument, this Court is barred from making any pronouncement on the issue of zone and indeed on any prayer that is founded on it.

127. According to Butali, the ex parte Applicant has put forward the orders issued in Petition 59 of 2010. However, this cannot also avail for the ex parte Applicant since the 1st Respondent is dealing with implementation of a writ of the Court of Appeal of Kenya. The writ of *Mandamus* from the Court Appeal **in Kisumu Civil Appeals 89 and 90 of 2011** which is a final order specifically directed to the Kenya Sugar Board (now 1st Respondent) to hear and determine the 1st Interested Party's application for licence dated 10th April 2010, within a reasonable time and does not invite or entertain interpretation as it is not provisional and has not been set aside nor stayed. It was contended that the ex parte Applicant is attempting to invite the High Court to interpret the Order of the Court of Appeal and curtail it using the orders issued in ***Petition 59 of 2010***, aforesaid which is untenable at law for three (3) fundamental reasons: Firstly, the Order/writ of *Mandamus*

is unequivocal, it is final and is active. It must be obeyed or else the 1st Respondent shall be in contempt of Court. Secondly, the Order of the Court of Appeal cannot be interpreted, qualified or curtailed by the High Court. Any issues regarding the Order needing revision, interpretation or qualification can only be done by the Court of Appeal. It is thus grossly without jurisdiction for the High Court to even attempt to do what the ex parte Applicant invites it to undertake. Finally, in issuing the order of *Mandamus*, the Court of Appeal was aware of the order of the High Court in **Petition 59 of 2010**. At paragraph 41 of the judgment of the Court of Appeal the Court took the interpretation that the orders in *Petition 59 of 2010* were interlocutory and lapsed hence the order of Court of Appeal was evidently issued, not ignorance of the order in **Petition 59 of 2010** but in the interests of justice.

128. To Butali, the import of the order of *Mandamus* is that it takes the licensing of the 1st Respondent from the realm of questions about its Registration certificate and enjoins the 1st Respondent to commence hearing on technical and raw materials qualifications, what was provided for under section 15 of the now repealed ***Sugar Act*** and what is now section 20 of the ***Crops Act***.

129. Butali therefore prayed that the Motion dated 11th November 2014, be dismissed with costs.

2nd Interested Parties' Case.

130. The 2nd interested parties herein, referred to as the Farmers, contended that a party that approaches the Court seeking ex-parte orders is under a strict obligation of material disclosure and relied on **Republic vs. President & 7 others Ex parte Wilfrida Itolondo & 4 others [2014] eKLR** where the Court stated;

“The law is clear that where a party, at the ex parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained.”

131. It was further contended that the issue was deliberated upon at length in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** and that the Applicant did not disclose that they had been licensed for the year by the same body, AFFA, on 5th August, 2014 whose constitution they were now challenging and that the previous litigation that is relevant to the matter herein. To the Farmers, the real intention of seeking the ex-parte orders was to derail the process of licensing Butali and thereby obtain a monopoly in the Butali catchment area.

132. The Farmers disclosed that immediately after obtaining the ex-parte orders herein, the Applicant quickly proceeded to file Kakamega Petition 26 of 2014 in which it argued that Butali was operating without a license but did not disclose to the Kakamega Court that it had injuncted AFFA in Nairobi. It was therefore contended that the Applicant is misleading various High Court benches at the same time owing to the fact that full disclosure would reveal its main and only intention of closing down Butali and that the Applicant only cares about the proper constitution of AFFA to the extent of Butali's continued operation. It was contended that when the Applicant approached this Court it was well aware that AFFA had begun developing regulations for the election of farmers' representatives to the Board. Further, that AFFA as a public body is required by Article 10 of the Constitution to subject its decisions to extensive public participation hence the delay in issuance of the Regulations is mainly due to county governments which have raised complaints about the same on the ground that Agriculture is fully devolved. Similarly, farmers of various crops across the country are also being consulted as the main stakeholders in the formulation of the Regulations. The Applicant had knowledge of all of the above information but failed to inform the Court in order to paint a picture of an AFFA uninterested in involving farmers' representatives in Board decisions. It is clear, it was contended, that the ex-parte orders were issued without full disclosure and it's only fair to the Respondents and farmers across the country for the same to be set aside and based on **Republic vs. Capital Markets Authority Ex parte Joseph Mumo Kivai & Another [2012] eKLR** this Court was urged to discharge the orders granted herein.

133. The position of the Farmers was that public interest in this matter favours the over 70% percent

of Kenyans who subsist on farming and that injuncting AFFA has and will continue to render all dealings with the eight scheduled crops, the dominant cash crops, illegal due to the lack of a functional regulator to issue licenses. It was averred that the law governing the sugar sector, the **Crops Act 2013**, does not provide for exclusive zones for sugar millers and their mills thereby allowing millers to operate within the same catchment area.

134. It was disclosed that Butali has been issued with a milling license by the 1st Respondent for 2014/2015 issued on 5th August, 2014 and has been a “continuing miller” for the last 3 years which licence was issued after application was made to the 1st Respondent by the Butali having complied with and satisfied all legal, statutory and technical requirements including payment of Kshs. 1 million licensing fees and that the issuance of licenses in the sugar industry, as it is with other regulated sectors like Advocates under the **Advocates Act** (Chapter 16 of the Laws of Kenya) and Banks under the **Banking Act** (Chapter 488 of the Laws of Kenya), is historically never done on time in as much as the intention of doing so in good time is there and that applications made by these other sector players do not stop them from conducting their practice and business during pendency of the issuance of the license. Whereas, the **Sugar Act**, 2001 (now repealed) and now the **Crops Act** (2013) provide that all mill licenses expire on the 30th of June and strict interpretation and application would mean all millers should have their licenses on the 1st of July, practically, however, mill licenses are sent out to all millers in early August and in this case 5th August 2014, and in the meantime millers, including the Applicant and Butali continued milling pending approval of their application. This is a practice that ensures continuity provided the millers have applied for the licenses and have duly complied with all requisites. A miller would then only be asked to cease operations if the application for the mill license is rejected. The above practice while not expressly provided for in law has created a legitimate expectation that any miller, including Butali, may enforce in a court of law. The Farmers cited **Lord Diplock’s** decision in **O’reilly vs. Mackman [1983] 2 AC 237**, as adopted in **Akaba Investments Limited vs. Kenya Revenue Authority [2007] eKLR**, that:

“Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

135. The farmers added that in looking at the overall objective of the **Crops Act** which is to facilitate development and trade on crops, licensing should not be used to technically knock out potential and current millers. It is because of this nobility in understanding the concept of licensing that existing millers are actually allowed to operate even when their licenses have expired as the Regulator considers their application for new licenses. It was disclosed that Butali has been regulated throughout its existence as a miller. In fact for the year 2014/2015 Butali duly applied for a mill license, the application was considered by the Kenya Sugar Board as any other miller and was approved. It is only on basis of the Judgement of the Court of Appeal aforesaid, that BSML’s application for license is being reconsidered. The application by Butali is already with the 1st Respondent and all requisites have been complied with; what remains is the consideration of the said application within the lawful process under the new licensing regime hence Butali has made a proper application and the same should be determined. To the Framers, sections 18 and 19 of the **Crops Act** requiring a party to mill only with a license cannot be interpreted mechanically, but reasonably, practically purposefully and fairly keeping in mind the prevailing circumstances. In their view, the Applicant will suffer absolutely no prejudice if Butali continues to mill pending consideration of its license application and it will be Constitutionally discriminatory under Article 27 to hold otherwise as other millers were and still are afforded the same privilege of operation pending determination of their licenses.

136. It was the Farmers’ view that the Court of Appeal at Kisumu in **West Kenya Sugar Company Limited v Kenya Sugar Board & another [2014] eKLR** misguidedly held that the High Court erred in issuing an order to KSB to issue a license to Butali yet the Constitution gives the High Court supervisory power and jurisdiction to issue any order or direction it sees fit under Article 165(6) & (7). Hence the decision of the High Court in JR 17 of 2010 **Republic vs. Kenya Sugar Board Ex Parte Butali Sugar Mills Limited**, in issuing an order for issuance of a license to

Butali, falls within the constitutional bounds of Article 165.

137. It was averred that after several years of litigation even after Butali begun operations, the Court of Appeal at Kisumu finally rendered judgment in **West Kenya Sugar Company Limited vs. Kenya Sugar Board & another [2014] eKLR** in which it directed the AFFA to sit down and determine the milling license application of Butali in the shortest period possible. By filing these proceedings after that decision which was in the applicant's favour, the applicant was approbating and reprobating. Having obtained conservatory orders in this Court barring the 1st Respondent from determining Butali's license application on the ground that AFFA's Board was not properly constituted owing to the lack of rules pertaining to the election of eight farmers' representatives, it was quite malicious for the Applicant to then in Kakamega Petition 26 of 2014 seek mandatory orders compelling AFFA to exercise its statutory duty of ensuring that Butali does not operate without a license. AFFA cannot be improperly constituted for the purpose of determining Butali's application for a license in Nairobi application but properly constituted to prevent Butali from operating without a license in Kakamega application. Based on the opinion of **Justice S. Bernard Goodwyn** in ***Kathy Matthews, Et Al vs. Ingeborg D. Matthews*** a decision of the Circuit Court of Spotsylvania County, it was submitted that:

“Judicial estoppel forbids a party “from assum[ing] successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory.”

138. It was contended that the Applicant is a frivolous and vexatious litigant who should be recognized as such by this Court and that vexatious litigation occurs when a person repeatedly abuses the judicial process, using it for frivolous or malicious purposes hence the courts have an inherent ability to manage vexatious litigants to preserve the proper functioning of the court system. The Court was urged not allow itself to be used to derail the execution of AFFA's licensing mandate by the filing of different versions of the same claim in numerous courts and suing AFFA's officials in their personal capacity in a bid to intimidate them. By continually filing suits which it later abandons on obtaining conservatory orders, it was averred that the Applicant is abusing the court process.

139. According to the Farmers, public interest in this Application tilts in favour of the Respondents and the Interested Parties since if AFFA is enjoined indefinitely, the Applicant will be effectively granted a monopoly in the Kabras Zone to the disadvantage of the Interested Parties who stand to lose the most in the process. The fundamental economic and social rights which comprise basic needs of farmers are threatened and the economic viability of their communities will be irreversibly destroyed if the Court grants the injunctions sought since most of the Interested Parties are signed up to deliver sugar cane to Butali and will be unable to earn a living as they won't be able to supply their cane to another miller without breaching contract. The Interested Parties solely depend on the operations of Butali as their only source of livelihood and suspension of the same will lead to destitution, crime and local economic collapse. It was averred that in **West Kenya Sugar Company Limited vs. Kenya Sugar Board & another [2012] eKLR** the Court of Appeal rightly held;

“We also think the balance of convenience at this stage falls in favour of maintaining the status quo even assuming the licence was granted unprocedurally. Affidavits placed before us establish that the industry affects hundreds of thousands of employees and sugar out-growers apart from the disputing parties themselves and there must be some measure of balance to avoid social unrest or breach of the peace as the law takes its painful but sure course.”

140. According to the Farmers, in any case, it is clear that the Applicant is asking this Court to sit as a Court of Appeal over AFFA's decision to commence Butali's licensing process and not strictly the decision making process itself and judicial review orders are only available to prohibit administrative authorities from exceeding their powers or misusing them and not to bar them from performing their public and statutory duties as the Applicant seeks. The orders of Prohibition and Certiorari herein sought seek to bar AFFA from performing his statutory functions and duties as

- provided by the *AFFA Act* hence the Court was urged to find that the totality of the Applicant's Application is malicious, reckless and an abuse of the court process and ought to be dismissed.
141. However, in the remote chance that the Applicant proves that they are entitled to the orders sought, the Courts have held that judicial review orders being discretionary may be denied even where the requisite grounds exist and reliance was placed on **Jocinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] EKL.R.**
142. Issuing the orders sought, it was asserted, would cause administrative chaos in the entire agricultural industry yet AFFA has done all that it can to fulfil its duty under the *AFFA Act* by developing the draft regulations for election of farmers to the AFFA Board. Any delays caused by ensuring the widest stakeholder and public participation does not amount to failure to discharge statutory obligation. To the Farmers, the remedy that is the most efficacious in the circumstances obtaining is not indefinitely prohibiting AFFA's operations through the orders sought but instead ordering it to finalize public participation and issue the Regulations.

Determinations

143. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.
144. According is established under section 3 of the *AFFA Act* and section 4 thereof provides as follows:

The Authority shall, in consultation with the county governments, perform the following functions—

(a) administer the Crops Act, and the Fisheries Act in accordance with the provisions of these Acts;

(b) promote best practices in, and regulate, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural and aquatic products excluding livestock products as may be provided for under the Crops Act, and the Fisheries Act;

(c) collect and collate data, maintain a database on agricultural and aquatic products excluding livestock products, documents and monitor agriculture through registration of players as provided for in the Crops Act and the Fisheries Act;

(d) be responsible for determining the research priorities in agriculture and aquaculture and to advise generally on research thereof;

(e) advise the national government and the county governments on agricultural and aquatic levies for purposes of planning, enhancing harmony and equity in the sector;

(f) carry out such other functions as may be assigned to it by this Act, the Crops Act, the Fisheries Act and any written law while respecting the roles of the two levels of governments.'

145. It is agreed by all the parties that following the repeal of the *Sugar Act*, the AFFA is the licensing authority pursuant to section 20 of the Crops Act. Section 18 of the *AFFA Act* prohibits any person from manufacturing or processing a scheduled crop except under and in accordance with the licence issued under the said Act.

146. Section 5 of the *AFFA Act* provides for the composition of the AFFA as follows:

(1) The management of the Authority shall vest in a Board which shall consist of—

- a. ***chairperson appointed by the President with the approval of the National Assembly;***

- b. *the Principal Secretary in the Ministry responsible for agriculture;*
- c. *the Principal Secretary in the Ministry responsible for finance;*
- d. *the Principal Secretary in the Ministry responsible for matters relating to county governments;*
- e. *the Principal Secretary in the Ministry responsible for lands;*
- f. *the Principal Secretary in the Ministry responsible for environment;*
- g. *the Principal Secretary in the Ministry responsible for co-operatives;*
- h. *a representative of the National Land Commission;*
- i. *eight persons, being farmers' representatives, elected by the farmers to represent the major crop subsectors in Kenya;*
- j. *the Director General who shall be the secretary to the Board and chief executive officer of the Authority; and*
- k. *the Chairperson of the Transition Authority or his representative.*

147. It is the applicant's case section 5(1) of the **AFFA Act** provides for the composition of the Board of the Authority and it includes eight persons, being farmers' representatives, elected by the farmers to represent the major crop subsectors in Kenya. By dint of section 5(2) the Cabinet Secretary is required to make rules for election of the members of the Board to represent the farmers which rules, the Second Respondent has not made. Consequently, the 1st Respondent has been operating without a Board despite the provisions of section 7 of the **AFFA Act**. It was further contended that though under Section 10 of the **AFFA Act** the Director General is the chief executive officer of the Authority and discharges his functions subject to the direction of and in consultation with the Board, in view of the non-existence of the Board, the 1st – 4th Respondents cannot lawfully exercise the registration and licensing powers under Parts III and IV of the **Crops Act, 2013**. To the applicant, the **Crops Act, 2013** and **AFFA Act, 2013** are not being administered in accordance with the laws hence pursuant the provisions of section 20 of the **Crops Act, 2013** the Respondents have no powers either severally or jointly to consider and determine the application by Butali, for an operating licence.

148. It was therefore the applicant's case that the 2nd Respondent has refused, neglected or otherwise failed to discharge his statutory duty in relation to the lawful and proper administration of the **Crops Act, 2013** and the **AFFA Act, 2013**. The applicant's position was that the decisions and actions of the 3rd and 4th Respondents are illegal in view of the fact that under the **Crops Act, 2013** they are not the licensing authority hence no steps can be lawfully taken by the Respondents in connection with an application of Butali for an operating licence. It was further contended that the decisions, actions and omissions of the Respondent requiring the Applicant to submit objections to the application of Butali for an operating licence are unreasonable because the Board of AFFA is not yet constituted.

149. The 1st, 3rd and 4th respondent's conceded that AFFA is yet to be fully constituted. However, it was the respondents' position that in law AFFA is deemed to have the necessary mandate to discharge its statutory mandate as if it was fully constituted. In their view, the instant Application on the Authority's Board is because of numerical vacancy. However, the law is very clear regarding the effect of a defect in the membership or composition of the Board on a decision made by it since section 53 of the **Interpretation and General Provisions Act** provides that the powers of a board cannot be affected by anomalies in its membership.

150. It was submitted on behalf of the 2nd respondent by their Learned Counsel, **Mr Ateka** that the law is very clear regarding the effect of a defect in the membership or composition of the Board on a decision made by it as section 53 of the **Interpretation and General Provisions Act, Cap. 2** provides that the powers of a board cannot be affected by anomalies in its membership. Its decisions therefore retain their full legal effect notwithstanding the defect in membership or composition. It was submitted that though the Board of the AFFA is yet to be constituted as required by the provisions of section 5 of the **AFFA Act**, this does not mean that the decisions of the AFFA are affected, or that AFFA is completely crippled.

151. On the strength of section 52 of the same Act, it was submitted that the 2nd respondent appointed the 3rd and 4th respondents to ensure AFFA is functional pending the full constitution of the Board. To the Respondents, the legislative rationale of the above provision was that there cannot be a vacuum and that situations such as is presently before the court were contemplated by the

drafters of the Act and the purpose of this provision is to allow the appointment of temporary directors, and that the actions of a director later found to have been improperly in office will still be deemed valid.

152. Section 53 of the *Interpretation and General Provisions Act* provides:

Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by—

(a) a vacancy in the membership thereof; or

(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof

153. In this case, it is clear that some members of the Board have been appointed. The applicant however contends that section 53 above only applies to vacancies occurring after the full Board has been constituted and does not apply where no Board has been constituted. This, in my view is a very attractive argument as it ought to be the ideal situation. However, the argument fails to appreciate that the various members of AFFA represents different constituencies with distinct provisions for their appointments. For the Farmers' representatives, for example, regulations have to be enacted guiding their appointments to the Authority. It cannot therefore reasonably be expected that the appointments of the Farmer's representatives will happen at the same time as that of the other members. With respect to chairperson of the Authority, his appointment is by the President and is subject to approval by the National Assembly.

154. The Farmer's representatives however play a very crucial role in the Authority. I agree with the applicant that in the light of the new constitutional dispensation the role of AFFA is vital to the smooth implementation of the respective functions of the National Government and County Governments set out in the Fourth Schedule of the Constitution in so far as Agricultural Policy and Agriculture are concerned. Under Article 10 of the Constitution of Kenya, 2010, sharing and devolution of power and participation of the people constitute some of the values and principles of governance which state officers are bound by in inter alia making or implementing policy decisions, a task entrusted to AFFA. Therefore even without an express provision requiring the consideration of the said values and principles State Officers are under an obligation to as much as possible infuse these principles whenever they make or implement policies.

155. In this case however, this requirement is given statutory underpinning by the very manner in which AFFA is to be constituted. These requirements, in my view are not mere wishful thinking but are at the core of our system of governance. One of the objectives and principles of devolved government under Article 174 of the Constitution is to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them. In my view the object of incorporation of Farmer's representatives in AFFA is to ensure that the farmers who are the major stakeholders in the Agriculture industry participate in the process of decision making in the said industry. I therefore agree that to deliberately lock them out in the constitution of the AFFA would amount to a perpetuation of an era long discarded by Kenyans when they retired the former Constitution. That scheme of things is unacceptable in the current constitutional dispensation and where it is shown that due to inaction on the part of the executive, the values and principles under Article 10 of the Constitution are being brazenly disregarded this Court is entitled to step in and protect the said principle hence such decision ought not to be termed as interference with the mandate donated to AFFA.

156. I surmise this is what informed the decision in **Jacqueline Resley vs. City Council of Nairobi [2006] eKLR** where it was held that:

“The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is

only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

157. In my view what the Court was saying is not that the public interest plays no part in enforcing the law, but that the Courts will not shirk from their constitutional mandate of ensuring that the law is followed. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as held in **Republic vs County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR:**

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the constitution and the law as the rule of law is one of the national values of the constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest inconsistent with the rule of law ...”

158. The ***AFFA Act***, is clearly an Act of Parliament which was promulgated with the principle of devolution in mind. In other words it reflects the constitutional principle of devolution. In my view an Act of Parliament or provisions of an Act of Parliament which is promulgated with the provisions of the Constitution in mind reflects the sovereign will of the people expressed in the spirit of the Constitution. Such will and spirit cannot be trashed under the guise of public interest since public interest is presumed to be captured in the Act and the Constitution and any action which goes contrary thereto cannot be justified under the guise of public interest.

159. Therefore the executive is under an obligation to ensure that the provisions meant to advance devolution are expeditiously adhered to and this Court will not tolerate situations where the executive by its omissions take actions meant to perpetuate the old order of things long buried with the retired Constitution. The respondents took the position that since the Court of Appeal compelled them to consider Butali’s application their action was in compliance therewith. In its judgement the Court of Appeal sitting in Kisumu in Civil Appeals Nos. 89 of 2011 and 90 of 2011 - **West Kenya Sugar Co. Ltd vs. Kenya Sugar Board and Butali Sugar Mills Ltd** expressed itself as hereunder:

“The Act shows that the original licence expires after one year but is subject to renewal upon application. Parliament vested the power to grant a licence and a renewal of the licence to KSB. If the application for an order of mandamus is not based on lawful grounds upon which the court can exercise jurisdiction as in the present case or if it unlawfully usurps the jurisdiction vested on the decision making body by the Parliament, as in this case, the court in granting an order of mandamus has acted outside its jurisdiction and the order of mandamus is invalid...KSB has never exercised its statutory discretion to grant a license nor to consider an application for renewal based on original license issued by it. The original license was essentially issued by the court and the subsequent renewals spring from or rest on the court order. The effect of court order being void for lack of jurisdiction is that there has never been a license capable of renewal within the ambit of the Act...For the above reasons we allow both appeals, set aside the orders of 12th November, 2010 and 30th November, 2010 respectively. In place of the order of mandamus compelling Kenya Sugar Board to issue an operating licence, we grant an order of mandamus compelling Kenya Sugar Board to hear and determine the application for a license by Butali Sugar Mills

Limited dated 10th April, 2010 within a reasonable time and according to the law giving the Appellant a right to be heard in opposition.”

160. Although the Farmers contended that the Court of Appeal was misguided in its decision, with due respect, that submission is clearly misconceived and stems from the failure to appreciate the role of a judicial review Court. As was held in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”

161. Clearly, therefore the High Court had no power to compel the Board to issue licence to Butali. The farthest it could go was to compel the Board to consider the application otherwise the Court would itself be guilty of usurpation of power.

162. It is clear that the Court of Appeal did not direct the respondents to proceed in a particular manner. In fact it was the Court’s appreciation that it had no jurisdiction to do so that it allowed the appeal. What the Court of Appeal did was to compel the respondents to exercise the discretion placed upon them in accordance with the law. However, as the law had changed, the respondents, as rightly submitted by them, had to construe the decision of the Court of Appeal in light of the changed legal position. It had to comply with the prevailing legal position one of which was that Butali’s application had to be considered by the AFFA under the prevailing legal regime. It had to comply with the *Crops Act* and any violation of the provisions of the said Act cannot be excused on the basis that the respondents were complying with the decision of the Court of Appeal. To the contrary to ignore the provisions of the Act would be a violation of the decision of the Court of Appeal which enjoined the respondents in considering the Butali’s application for licence to do so in accordance with the law and the law contemplated by the Court of Appeal in my view was not the repealed law but the law current at the time of the consideration of the application.

163. The importance of the devolved system of governance was appreciated by the Supreme Court in Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR in which Mutunga, CJ expressed himself as follows:

“The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority

established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state...”

164. The learned President of the Supreme Court continued:

“Given Kenya’s history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the “constitutional commitment to protect”; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d’être* of the Senate as “to protect” devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities.....National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act*.”

165. It is therefore my view that section 53 of Cap 2 is an exception to the norm and is meant to cure the exigencies occasioned by vacancies in the Board or Authority which in my view ought to be of temporary rather than permanent nature. Where the vacancy is of permanent nature, the Board or Authority cannot operate without the statutory numbers in perpetuity. To do so would amount to an illegality. In my view this was the position the Court found itself in **Kenya Commercial Bank vs. Kenya National Commission on Human Rights [2008] eKLR**, when it expressed itself as follows:

“The Applicant contends that at the first appearance for hearing, they were informed that the hearing would be presided over by one arbiter. We have considered Regulations 27 (1) & (2) and 35 (2). The chairperson establishes the hearing panel under Regulation 27 (1 & 2) which comprises the presiding Commissioner, and others appointed by the chairperson, legal counsel and members of the Legal Services Department. That Regulation envisages a panel consisting of more than one Commissioner, legal Counsel and other staff. Regulation 35 (2) comes into play during the course of the hearing when for good reason, there is need to replace the absent Commissioners. There is no provision for the sitting of one Commissioner on the panel. Regulation 35 (2) does not apply here because right from the onset, only one Commissioner was appointed to preside over the dispute and the issue of replacement does not arise. The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes Regulation 27 (1) & (2) and is unlawful. It is the

duty of the Respondent to ensure that the requirements of the panel's composition are met i.e. Regulation 27. They cannot constitute the panel contrary to provisions of the law. In that regard, we do agree with the decision of the court in EQUATOR INN VTOMASYAN (1971) EA 405 that the properly constituted quorum started hearing a dispute where one was seeking a refund of rent. The chairman purported to visit the premises alone and on appeal, the court held that the Chairman of the Rent Restriction Board sitting alone had no power to order a refund of excess rent paid and had no power to hear and determine the application. In this case we find that Mr. Godana had no power to sit alone on the panel presiding over the dispute between the Applicant and the 1st Interested Party, as it offends clear provisions of the law. The Respondent purported to rely on Regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any direction of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that Regulation 36 cannot remedy that omission because the composition of the Panel having been specifically provided for is a fundamental Provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this court by way of judicial review.”

166. In other words where the executive sets out to constitute a Board or Authority other than in the manner decreed by the law, such Board or Authority as constituted is illegal and its actions are a proper candidate for quashing by an order of certiorari. Similarly where the authority tasked with the constitution of a Board drags its feet in order to micro-manage the Board by having his cronies in position of authority for an unnecessarily long period, this Court will step in to bring to an end such abuse of power. As this Court held in Republic vs. Cabinet Secretary for Ministry of Interior & Co-ordination of National Government & 2 Others Ex-Parte Patricia Olga Howson (supra):

“A power which is abused should be treated as a power which has not been lawfully exercised... Thus the Courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens... the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations... A public authority must not be allowed by the Court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the ex-parte Preston where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg. vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and small Business Ltd* [1982] AC 617 that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers”. Abuse of power includes the use of power for a collateral purpose, as a set out in ex-parte Preston, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further, find as in the case of *R (Bibi) vs. Newham London Borough council* [2001] EWCA 607, [2002] WLR 237, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the Courts

intervention in assuming jurisdiction and giving the necessary relief.”

167. With respect to the obligation to exercise administrative power expeditiously, Article 47(1) of the Constitution provides:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

168. This position was appreciated in **Republic vs. Cabinet Secretary for Ministry of Interior & Co-ordination of National Government & 2 Others Ex-Parte Patricia Olga Howson** (supra) where this Court held:

“The Respondents have contended that the applicant is among many other applicants who are still undergoing security vetting by the National intelligence Service to determine their suitability. They have however not stated for how long this security vetting has been going on. What is known however, is that the applicant has been waiting for her application for eight months while the National Security Intelligence continues to babysit the same. That state of affairs cannot be tolerated as it clearly goes contrary to Article 47 of the Constitution. Whereas there is specific timeline within which the application for citizenship ought to be considered Article 259(8) of the Constitution provides that if a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. Eight months delay in considering an application for citizenship without informing the applicant at what stage such application has reached is clearly unreasonable. I wish to reiterate the sentiments made by Warsame, J in Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010 that the security arms of this country have not tried to understand and appreciate the provision of the new Bill of Rights and that the yester years impunity are still thriving in our executive arm of the government.”

169. This however, is different from a situation where the full Board or Authority is in the process of full constitution and the process has not come to an end. This position was appreciated **Kenya Coffee Producers and Traders Association & Another vs. Coffee Board of Kenya & 6 Others [2013] eKLR**, where the court observed and held based on section 53 aforesaid as follows:

“The petitioners’ argument that the rules were made in contravention of a court order issued on 25th May 2012 invalidating the appointment of the CBK Board and that therefore, the Minister cannot be said to have promulgated the rules ‘after consultation with the Board.’ as required under section 44 of the Act cannot hold water for three reasons. The first reason, which is factual, is that the court order did not invalidate the entire Board membership but only those appointed by the Minister under section 4(a) of the Act. In any case, and I agree with the respondents and interested parties, that by the time the court order was granted, consultations leading to the formulation of the rules had already began a year earlier...The second reason that the argument fails is that the Board is a body corporate under section 3(2) of the Act and is therefore a separate legal entity from its directors. The law is very clear regarding the effect of a defect in the membership or composition of Board on a decision made by it. I therefore do not agree with the petitioners’ assertion that the rules ought to be invalidated on account of a deficiency in the constitution of CBK Board.”

170. The respondents further relied on section 52 of the ***Interpretation and General Provisions Act*** which states:

Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, a person who is by that written law empowered to appoint any or all of the members thereof may—

(a) appoint one or more duly qualified persons to be alternate members, and any one alternate member may attend a meeting when a substantive member is temporarily unable to attend;

(b) appoint a duly qualified person to be a temporary member in the place of a substantive member who is precluded by illness, absence from Kenya or other cause from exercising his functions, and, when attending a meeting of the board, commission, committee or similar body, the alternate or temporary member shall be deemed for all purposes to be a member thereof.

171. In my consideration of this provision, it applies to situations where there are substantive members but they are either temporarily unable to attend or are precluded by illness, absence from Kenya or other cause from exercising their functions. With due respect none of these situations apply to the instant case. The persons who are acting as officers of AFFA in this case are not doing so because the substantive holders of these offices are unable to exercise their mandate. The position here is simply that the substantive holders thereof have not been appointed. These acting officials, however, are Acting Interim Head of Sugar Directorate and Director General and the CEO of the Authority.

172. It is contended that by Gazette Notice No. 4003, the 2nd Respondent appointed as members of the Board of Directors of the Authority with effect from the 2nd June, 2015 the Principal Secretary, State Department of Agriculture; Principal Secretary, National Treasury; Principal Secretary, State Department of Devolution; Principal Secretary, State Department of responsible for Lands; Principal Secretary, State Department of Environment; Principal Secretary, Ministry of Industrialization and Enterprise Development; and **Abdulkadir A. Khalif**, National Land Commission; and Chairman, Transition Authority. It is not contended that these persons were not appointed in accordance with the law. True, these appointees, whom the applicant refers as bureaucrats, were largely appointed by virtue of their official positions and status rather than individual competencies but that is what the law stipulates. However, the respondents' case is that besides these persons the Cabinet Secretary Ministry of Agriculture appointed an Interim Director General under section 5(1)(j) of the **AFFA Act**, to ensure continuity hence there are nine (9) members of the AFFA and there is remaining an election of eight (8) farmers' representatives and the chairperson and the Rules envisaged under section 5(2) have been made in draft and await Parliament's approval while the place of chairperson awaits vetting. It is however true that an appointee to the position of Director General of AFFA is by virtue of section 5(5) of the **AFFA Act** required to be appointed through a competitive appointment process. However under section 37 of the **Interpretation and General Provisions Act**:

Where, by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister;

and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.

173. In this case, it is clear that the office of the Director General of AFFA was vacant at the time of the appointment of the 3rd respondent. From the foregoing provision, it is clear that the CS had power to appoint the 3rd respondent and having been so appointed he was empowered to undertake his mandate as a member of the Board subject to his conditions of appointment. From the foregoing it is clear that the Authority is composed of 9 members. It was submitted that the 1st

Respondent is established and operationalized, it has 9 members and no contrary intention appears from statute barring it from functioning until all the 18 members are constituted since under rule 1(4) in the Second Schedule to **AFFA Act**, the quorum of the AFFA Board is one half of all the members which is 9 members and this quorum is met by the members so far appointed.

174. In my view, the appointment of the members so far appointed to the Authority cannot be faulted as their appointment is supported by the relevant legislation. It is not contended that they cannot form a quorum and transact the business of the Authority pending filling of the remaining vacancies which vacancies have to go through the due process. In this case, it is not contended by the applicant as was the case in **Kenya Commercial Bank vs. Kenya National Commission on Human Rights** (supra) and **Republic vs. Complaints Commission, Media Council for Kenya & 2 Others** (supra) that there is no intention of appointing the remaining members of the Authority. To the contrary it was appreciated that at the time of writing the Cabinet Secretary had circulated among select stakeholders various sets of regulations including the ***Crops (Sugar Crop) Regulations, 2015*** which proposed regulations providing, *inter-alia*, for objects and functions of the Sugar Directorate; procedure for Licensing and registration of sugar millers; conditions for registration and licensing of sugar millers; form of applications for registration and licensing of sugar millers; the designation and assignment of mill command zone (geographical sugar cane growing zone) by the Authority; and role of County Governments in registration and licensing of sugar millers. This position was expounded on by the respondents who averred that the Rules envisaged under section 5(2) have been made in draft and await Parliament's approval while the place of chairperson awaits vetting. It is therefore clear that the Respondents are taking actions towards the operationalisation of a fully constituted AFFA and the process ought to be permitted to come to fruition despite having taken an appreciable longer time.

175. This Court must however support rather than stultify the due process of the law. It was the need to avoid stultification of the law that, in my view, the Court **Okiya Omtatah Okoiti & 3 Others vs. Nairobi City County & 5 Others (2014) eKLR** expressed itself as follows:

“The 1st respondent cannot purport to select the directors of the 5th Respondent, a company which, though wholly owned by the 1st Respondent, exists for the purpose of providing water services to the residents of the County. Its directors cannot be pre-selected and imposed on the residents. They must be appointed in a manner that takes into account stakeholder interests, that is open and transparent, and that gives an opportunity to anyone interested to seek appointment. Further, even the Articles of Association of the 5th Respondent, properly applied, cannot be said to countenance a situation where one person pre-determines the persons to be ‘elected’ as directors. It would be to abuse the provisions of the Articles of Association and the Companies Act, and a travesty of the Concept of elections. For the above reasons, I find and hold that the appointments made to the 5th Respondent’s Board of Directors on 26th March, 2014 were not made in accordance with the Constitution, the Water Act, the Companies Act or the 5th Respondent’s Articles of Association.”

176. The second ground for faulting the intended consideration of Butali’s application was that section 20(6), (7) and (8) of the ***Crops Act*** was being flouted or not adhered to. The said provisions provide as follows:

(6) The licensing authority shall, at least thirty days before granting a licence under this Act, give notice of the proposed grant in the Gazette and in such other manner as the authority may determine.

(7) 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.*

(8) The licensing authority may after considering the objections, if any, made under this section, grant the licence applied for, subject to such terms and conditions as may be specified therein.

177. To the applicant, the board of the licensing authority has not convened in order to make a proposal to grant an operating licence to Butali. Secondly, if and when such a proposal is made by the Board then, at least thirty days before granting a licence, the licensing authority shall give notice of the proposed grant in the Gazette and in such other manner as the authority may determine, to *inter-alia*, invite objections to the proposed grant of licences and as no such notice has been published in the Kenya Gazette so as to invite the objections, the non-compliance therewith enjoins this Honourable Court to quash the decision of the 4th Respondent contained in the letter dated 15th October, 2014 which required the Applicant to submit its written objection or memoranda to the Authority in connection with Butali's application for an operating licence.
178. The respondents on their part retorted that the *ex-parte* Applicant's Application is rather premature as no final determination as to the licensing of Butali Sugar Mills Limited has been made by the 1st Respondent since the letters were merely to commence the process. To the CS, the issuance of the letters 26th September 2014 and 15th October 2014 was in fact being undertaken in compliance with the order of the Court of Appeal in **Kisumu Civil Appeal No. 89 and 90 of 2011 West Kenya Sugar Company limited vs. Kenya Sugar Board and Butali Sugar Mills Limited**, where the Court of Appeal issued a writ of *Mandamus* compelling Kenya Sugar Board to hear and determine the application for license by Butali dated 10th April 2010 within a reasonable time and according to the law. By extension, the order required Kenya Sugar Board to invite any person (especially the Applicant herein) to submit objections. Pursuant thereto, AFFA did invite all stakeholders in the sector to a meeting on 6th October 2014 at Malava including the Applicant to take views on the matter of licensing of Butali. This course was adopted because given the numerous stakeholders it was impractical to effectively review written memorandum of thousands of people, within the timeframe contained in the order of the Court of Appeal. In their view, the decision to call for the meeting of stakeholders at Malava on 6th October 2014 and to invite the Applicant to be heard was lawful since section 20(6) of the **Crops Act** provides that the licensing authority shall give notice of the proposed grant in the Kenya Gazette and in such other manner as the authority may determine at least thirty days before granting the licence. In their view, taking into account the limited timeframe ordered by the Court of Appeal in the said **Kisumu Civil Appeal No. 89 and 90 of 2011** and considering the peculiar nature of participation in the sugar sector for the longest period now, the discussion and communication to the stakeholders was done through meetings and invitation to submit views.
179. In their view, since the above law, besides enjoining issuance of a Gazette notice also enjoins issuance of notice in other manner that the 1st Respondent may determine, the decision to utilize a meeting of stakeholders at Malava on 6th October 2014 and to call the Ex parte Applicant to be heard was lawful as this course was taken considering the peculiar nature of the sugar sector that for the longest period now, discussions and communication to the stakeholders has been through the meetings. It was submitted that the 1st Respondent is still enjoined to issue the Gazette notice and if at all it decides to issue the licence to on the application dated 10th April 2010, then such licence can only issue 30 days after publication hence the allegations in the Notice of Motion of breach of procedures are completely misconceived.
180. That this provision is problematic is not in doubt. However, that is an issue that cannot be blamed on the respondents. It is for Parliament to correct that anomaly. Suffice it to say that there is no indication as to when the AFFA intends to issue the subject licence to Butali. However, if and when that intention becomes certain, as readily admitted by the respondents, a notice under the aforesaid provision will have to be given. At this stage it would be premature to find that the said provision has been or is likely to be flouted.
181. Butali dwelt on the huge investments it has undertaken in its venture and referred to several philanthropic activities similarly undertaken by it for the benefit of the residents and its

contribution to the national development. It must, however, be remembered that Kenya is a country governed by the rule of law and any such philanthropic activities and the development of the country must be anchored in the rule of law and where such activities do not pass the legality test, the Court will not turn a blind eye thereto as to do so would amount to sacrificing the rule of law at the altar of philanthropy and benevolence.

182. Whereas those activities are laudable, they, without more cannot justify the Court in ignoring express provisions of the law and if this Court was to find that the AFFA was not legally constituted, Butali's intentions however noble, cannot be a basis for the Court to rubberstamp illegalities. As was held in **Githunguri vs. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838**, this is a court of law not of morals and if the applicant's contentions are well founded in law, the court's clear duty is to give effect to them. The primary duty of this Court is to do justice in accordance with the law rather than to enforce morals. The mandate of enforcing morals is reserved to other institutions such as churches and mosques. We have no justification for imposing what we perceive as our morals on others if such perceptions are not supported by the laws of the land.

183. I further wish to disabuse the Butali of the notion that the mere fact that the process of law-making is long and tedious would be a justification for permitting an entity to operate outside the guidelines set out by the law.

184. It was contended that by granting the orders sought herein this Court will be guilty of egregiously violating fundamental rights of Butali and will thus be the agent oppression and violation of fundamental rights. With due respect, such submission is moot. To contend that by issuing an order in determination of a matter placed before the Court, the Court is an agent of oppression and violating a party's fundamental rights amounts in my view to a thinly veiled threat which this Court will not bow to. On this point I can do no better than cite the decision in **Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146** where it was held:

“For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law.”

185. It has been said that the Courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the Heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. See **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400.**

186. To the respondents, it would be a travesty of justice and a sad day in the realm of justice should this Honourable Court proceed to grant the judicial review orders sought herein by the *ex-parte* Applicant without taking into consideration a multitude of factors amongst them the far reaching consequences of the orders sought as weighed with the dictates of public interest.

187. It was submitted that it is incontestable that, the 1st Respondent is the entity empowered by law to administer the provisions of the ***Crops Act*** and those of the ***Fisheries Act***. By operation of the law and as provided for in the transitional provisions it is deemed to be vested with the necessary functional and operational mandate assigned to it by statute. Any argument to the contrary, it was submitted, would create an artificial vacuum not contemplated by the legislative intent. According to the respondents, the effect of the operationalization of AFFA by dint of section 1 of the ***AFFA Act*** and the ***Crops Act*** in January 2014 and 1st August, 2014 respectively was that the agricultural sector in the Republic of Kenya had no agencies to operationalise its different segments other than those created by the said Acts. The two Acts, it was contended abolished all the hitherto existing agencies and consolidated their functions into a single apex authority and all Directorates in the agriculture sector in the country exist as delegates of the AFFA, under section 11 of the ***AFFA Act***. Absence, dysfunction, or staying the operation of AFFA, correspondingly means that the functioning of the several named Directorates is equally stayed.

188. It was their position that granting the orders sought herein would result in crippling and completely paralyzing all Government functions in the agriculture sector. Besides calling into question and indicting the decisions of the Authority and the Directorates already taken and in course of implementation, it invites enormous irreparable consequences. Further, the granting the orders sought would mean total cessation of regulation of the agriculture sector: cessation in issuing permits for importation and exportation of all scheduled crops, cessation of issuance of licences for all the scheduled crops, cessation of auctions of tea and coffee, cessation of regulation of exportation of fish stock, among other critical functions and for the said reasons, it cannot be lawful interpretation that section 5 (1) of the *AFFA Act* demands complete constitution of the Board before conduct of the business of the Authority can commence.
189. To the extent that the law took notice of the process of subsidiary law making under Part III of the *Interpretation of General Provisions Act*, it cannot be the intention of the law to keep a Government sector unregulated for months and if the court was to adopt this interpretation of the law, it would similarly mean that the Applicant and all other agricultural producers must stop operations because they would not be having valid licenses. It was therefore pertinent for the urgent and immediate constitution and operationalization of the Authority's Board and the decisions connected therewith were made *inter alia* in the public interest. It was further averred that all Directorates in the agriculture sector in the country such as the Sugar Directorate, Tea Directorate, Fisheries Directorate and so on exist as delegates of the Authority under section 11 of the *AFFA Act* and absence, dysfunction, or staying the operation of the Authority correspondingly means that the functioning of the several named Directorates is equally stayed. It was submitted that it is in the public interest that the decisions of AFFA complained of in this application and all other decisions be declared as validly issued. It was reiterated that granting the orders sought herein would result in crippling and completely paralyzing all Government functions in the agriculture sector. Besides calling into question and indicting the decisions of the Authority and the Directorates already taken and in course of implementation, it invites enormous irreparable consequences. Granting the orders sought would mean total cessation of regulation of the agriculture sector: cessation in issuing permits for importation and exportation of all scheduled crops, cessation of issuance of licences for all the scheduled crops, cessation of auctions of tea and coffee, cessation of regulation of exportation of fish stock, among other critical functions. It was submitted that if the orders sought in the instant application are granted, the legality of all other decisions and actions previously made by AFFA will be impugned. Subsequently, AFFA which by virtue of section 4 of the *AFFA Act* is the sole institution responsible for Kenya's agricultural sector, will no longer be able to operate hence the application ought to be dismissed.
190. I have considered the issues raised herein above. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in *Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270*:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and

in retrospect by declaratory orders.” [Emphasis added].

191. The factors enumerated hereinabove clearly militate against the grant of the orders in the manner sought herein. The reliefs sought herein in the nature of quashing order, if granted transcend the interests of the parties in dispute. The grant of the same would lead to monumental consequences not only in the Sugar industry but to the whole of the agricultural sector in this Country and agriculture it cannot be gainsaid is the backbone of Kenya’s economy. To grant the orders sought herein will in my view bring the economy of this great nation to its knees literally. That decision would crush the backbone of Kenya’s economy thus incapacitating the country and rendering it frail, feeble thus transforming the country into an invalid. That cannot be the intention of any judiciary worth its name. The judiciary ought not to abet an action whose effect is to place the economy of the Country in a bedridden state for an indefinite period. As stated in *Halsbury’s Laws of England* (supra) relevant factors in determining whether or not to grant judicial review include whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order as well as the conduct of the applicant.

192. This position was reiterated by this Court in Jocinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others (supra) where it was held that:

“... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

193. This Court is perfectly entitled to withhold the gravity of the order where the public body has done all that it can be expected to do to fulfil its duty. In this case, the Respondents are not in control of the appointment of the chairperson of the AFFA and they have reasonably explained the steps they have taken to operationalise the AFFA. Further the Court may withhold the remedy where it would cause administrative chaos and public inconvenience. To bring the agricultural sector to its knees in this Country will surely result into such a catastrophe.

194. In my view such a decision would violate the sovereignty of the people. In other words, it would not be in the public interest to grant the orders sought herein. I associate myself Nyamu’ J’s views in Kenya Guards Allied Workers Union vs. Security Guards Services & 38 Others, Misc. 1159 of 2003 that:

“Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist -Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts...”

195. This Court is also entitled to consider the conduct of the applicant. The applicant is a beneficiary of the very process it is now challenging. From the records, after obtaining the orders of stay herein it instituted legal proceedings in Kakamega High Court seeking orders to compel the AFFA, a body whose legality, it challenges to halt the operations of Butali. I agree that the applicant is approbating and reprobating at the same time. As was appreciated by **Ringera, J** (as he then was) in **Showind Industries Ltd. vs. Guardian Bank Ltd & Another Nairobi HCCC No. 273 of 2002 [2002] 2 KLR 378; [2002] 1 EA 284**, a court of equity cannot countenance approbation and reprobation. In this case it would seem that the main motive for instituting these proceedings was to incapacitate Butali. I cannot countenance any reason why an Applicant would genuinely opt for a remedy whose effect would likewise cripple its operations and the country as a whole unless such action is meant to achieve some collateral considerations rather than a genuine desire to uphold the Constitution and the rule of law. I agree that the applicant is guilty of gross abuse of judicial process. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

- i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
- ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
- iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.**
- iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.**

[Emphasis mine].

196. As was held in **Mitchell and Others vs. Director of Public Prosecutions and Another (1987) LRC (const) 128**:

“ ...in civilized society legal process is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties .It can be used properly ,it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties”

See also Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009

197. Similarly **Kimaru, J** in Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005 held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

198. I associate myself with the holding in Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235 that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.

199. I cannot however fail to express my indignation at the number of cases the applicant and Butali have instituted in respect of the issues surrounding their operations. The parties herein have persistently engaged in an unhelpful litigation geared towards championing protectionist interests in a manner reminiscence of the old imperialist tendencies to the detriment of the people who toil to ensure their industries thrive. They have turned the Courts of this country into the legal drama theatres bordering on circuses to the detriment of the farmers’ interest. This course cannot be perpetuated by this Court. The applicant and Butali must learn to co-exist in an atmosphere of civilized competition without resorting to Machiavellian tactics with the legal process as the go-between. Parties ought not to hog the judicial process by instituting a multiplicity of suits one after another thus denying other litigants of the opportunity to have their grievances addressed. This practice is inimical to the overriding objective set out in sections 1A and 1B of the **Civil Procedure Act**. One of the principle aims of the objective is the need to allot appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. When the same parties engage in incessant litigation one after another without any end in sight, such conduct does not augur well for the administration of justice and does amount to an abuse of the court process. See Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999.

200. Before I conclude, I wish to put the respondents on notice that they are under a constitutional duty to ensure that AFFA is fully constituted and operational. Any unjustified delay in doing so may well amount to violation of Article 10 of the Constitution and may well justify the Court in making such declaration with attendant consequences. That is all I want to say at this point in time.

201. Before I depart from this judgement I wish to express my gratitude to counsel who appeared in these proceedings for the well-researched submissions which I found very useful and which I have considered. If I have not expressly referred to each and every authority cited it is not out of disrespect or lack of appreciation for their industry.

202. I have said enough to show that the Notice of Motion dated 11th November, 2014 lacks merit. It

is accordingly dismissed with costs to the respondents and interested parties.
203.Those shall be the orders of this Court.

Dated at Nairobi this 4th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Alusiola for Mr Kibe Mungai for the Applicant

Mr Ambala for the 1st, 3rd and 4th Respondents

Mr Kamunya for the 2nd Respondent

Mr Bwire for the 1st interested party and holding brief for Mr Wanyama for the 2nd interested party

Cc Patricia