



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT BUNGOMA

BUNGOMA PETITION NO. 6 OF 2016

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED.....PETITIONER

VERSUS

BUSIA SUGAR INDUSTRIES LTD.....1ST RESPONDENT

AGRICULTURAL FOOD

AND FISHERIS BOARD.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY.....3RD RESPONDENT

J U D G M E N T

[1]. On 28th September 2014, a consent was entered by the parties herein, that among other things any point raised in the preliminary objection to the petition shall be argued as part of the response during the hearing of the petition.

Petitioner's submissions.

[2]. In the petitioner's submissions, it claims that the petition simply seeks to reveal that the registration of the 1st respondent as a sugar miller was illegal, perpetuated by fraud and should be revoked. It also seeks for the cancellation of Environmental Impact Assessment licence No. 0020469 that was issued to the 1st respondent without any EIA being done. The petitioner urges that it is imperative that the law be upheld, respected and defended by all parties and above all by the Court. The petitioner submits that they are the 2nd miller after Mumias Sugar Company Ltd to start operations and development of sugar cane by financing farmers and aiding farmers by supplying them with raw material and or/buying sugarcane at its trans loading station at Olepito.

[3]. It is the petitioner's case that it expressed interest to the Kenya Sugar Board to be allowed to set up a sugar factory in Busia. It urges that the 2nd Respondent invited bids for setting up a factory in Busia County. The petitioner applied and so did another company: African Polysack Ltd (APL). They submit that they were approved and registered and allowed to set up Sugar factories in Busia County pending their licensing as per the Sugar Act 2001. It also submit that African Polysack Ltd's application was rejected by the Kenya Sugar Board (KSB).

[4]. The petitioner also alleges that despite there being no right of appeal and procedure for appealing the decision of the Sugar Board, the 1st respondent appealed to the Ministry of Agriculture who in excess of their powers wrote to the Kenya Sugar Board with instructions to approve the application of African Polysack and register it to put up a factory in Busia County. As such it contend that African Polysack was registered as a miller unprocedurally on 20th July 2012. It is the petitioner's case that this registration was transferred to Busia Sugar Industries Ltd a company incorporated on 9th September 2011.

[5]. The petitioner urges that the said transfer is a nullity and the registration should be cancelled as registration is not transferrable per paragraph 61 of Alfred Busolo's Affidavit.

The petitioner asserts its factory at Olepito was constructed after due process had been carried out: NEMA issued an EIA licence to it to construct the sugar factory on 14th October, 2013. It submits that the 1st respondent sponsored some individuals to lodge a petition with the aim of showing that the factory was constructed without due process being followed. However, after investigations were done by the Parliamentary Committee on Environment and Natural Resources, the petition was dismissed as it was established that due process had been followed.

[6]. The petitioner submits that the 1st respondent neither undertook an EIA study nor made an application for an EIA licence but it was granted EIA licence No.0020469 on 19th December, 2013. It contends that this denied it the right to participate or be heard in objection to granting of that licence. It adds that the 2nd respondent has stated that they have never seen an EIA study report conducted by the 1st respondent as captured in paragraph 53 of the replying affidavit of Alfred Busoro. The petitioner submits that the 3rd respondent have alleged that the 1st respondent did an EIA study but in support of this position, they have produced an EIA study report that had been done by APL and that the said report indicated that there was enough sugarcane to sustain all the millers in the region. It is the petitioner's case that this information is not accurate. The petitioner contends that the Ministry of Agriculture by letter dated 2nd December 2013 opposed the construction of the 1st respondent's sugar factory since there was insufficient sugar cane to support two or more millers.

[7]. The petitioner claims that the 1st respondent was soon faced with the reality of sugar shortage and filed *Busia High Court Petition No.2 of 2016, Mohammed Omar Bajaber & Busia Sugar Industry Ltd V AFFA & West Kenya Sugar Company Ltd* seeking conservatory orders in the nature of injunctions to restrain the petitioner from operating its mill due to the fact that there was insufficient sugarcane. The petitioner concurs with the 1st respondent that the sugarcane is insufficient to sustain two millers and it is only fair that the 1st respondent as the late entrant to be relocated to another region.

[8]. The petitioners contend the following: Whether APL and Busia Sugar Ltd (BSL) are one and the same legal entity or are they two different legal persons.

The petitioner contends that they are two distinct legal persons with limited liability restricted to their ownership.

The petitioners contend that it was procedurally incorrect for APL to appeal to the Ministry of Agriculture after the Kenya Sugar Board had rejected its application and the only recourse open to it was to challenge the decision through judicial review proceedings. It adds that the permanent secretary in the Ministry of Agriculture had no powers to usurp the authority of the Board and order or direct the Board to issue a registration to African Polysack when it had already declined to register them. It buttresses this argument with the Court of Appeal's decision in *KSM CA Civil Appeal No.89 and 90 of 2011 West Kenya Sugar Company Ltd V Butali Sugar Mills ltd & Another*.

[9]. The petitioner urges that the transfer of registration was illegal, not premised on any conditions, against the policies of the Board; an administrative action and should be cancelled by this Court.

[10]. It is also the petitioners case that the 1st respondent never undertook an EIA study in compliance

with section 58 of EMCA before being granted EIA licence 0020469 and therefore should be cancelled as it was issued irregularly and fraudulently. It is their contention that a license cannot be transferred to a proponent who did not carry out an EIA study as was done in this case.

[11]. The petitioner urges that the registration certificate was issued unprocedurally under the instructions of the permanent secretary in the Ministry of Agriculture. The petitioner urges that the 1st -3rd respondents have violated

Article 10,20,21,27,47 and 50 of the Constitution.

[12]. The reliefs sought are:

1. The declaration that the registration of the 1st respondent as a miller by the 2nd respondent and the subsequent start of their sugar factory in Busia County is unconstitutional and violates the petitioner's constitutional right.
2. A declaration that the issuance of the EIA license NO.0020469 to the 1st respondent by the 3rd respondent was issued illegally, irregularly without following down the laid procedure under section 58 of EMCA therefore it ought to be quashed.
3. A permanent injunction restraining the 1st respondent, its agents, employees and or representatives from in any way constructing a sugar factory on land parcel number Bukhayo/Ebusibwao/927 and or in any other area within Busia County.
4. Compensation and costs of the petition.

1st respondent's submissions.

[13]. It is the first respondent's case that part of the substratum of the petition is sub judice, res judicata and this Court lacks jurisdiction. It submits that the original entity to be registered by the 2nd respondents and subsequently issued with an EIA licence was APL. It subsequently incorporated a Special Purpose Vehicle to undertake the business of milling sugar known as Busia Sugar Industry Limited (BSIL). The 1st respondent then requested the 2nd respondent and 3rd respondent for the change of name on the registration and the EIA certificates to the SPV, which request was granted. It is urged that it was registered by the 2nd respondent on 20th July 2012, obtained an EIA licence for construction of its sugar plants on property known as Land Reference Number Bukhayo/Ebusibwabo/3179, 927 and 1274 which are all adjacent to each other. It urges that although the EIA licence indicated that it is for Olepito Village, it does not indicate the Land Reference number hence there is no proof that the same is for the existing location.

[14]. The 1st respondent asserts that the petitioner was registered by the 2nd respondent to construct its sugar plant at Bukhayo/Matayos/3947 & 2961 on 20th July 2012 however they constructed a factory on Land Reference number Teso/Angoroma/6242 without registration or authority from 2nd respondent whose official have acknowledged that such construction is illegal.

[15]. It is the 1st respondent's case that this Court lacks jurisdiction to hear and determine issues relating to the registration of the 1st respondent as a sugar miller by the 2nd respondent. It urges that the process of licensing, transfer or revocation of licenses do fall within the confines of statute as contemplated by the Constitution or the Environment and Land Court Act.

[16]. The 1st respondent urges that the Crops Act repealed the Sugar Act under which the registration of the 1st respondent was done. In accordance to section 38 of the Crops Act, the High Court is expressly conferred with jurisdiction to hear and determine matters that fall within the Crops Act. As such this Court has no jurisdiction to entertain this matter.

[17]. The 1st respondent submits that with regard to the issue of the EIA licence, the proper forum is the National Environmental Tribunal (NET) pursuant to section 129 of the Environmental Management and Coordination Act (EMCA). It urges that it is now normative that where an alleged infringement can be redressed within a legislative framework, the course to follow is to take out proceedings under the framework and not the Constitution. They reinforce this contention with the decision in *National Assembly v Njenga Karume (2008) 1KLR 425*.

[18]. It is the 1st respondents case that the matter herein is res judicata with regards to the EIA licence which has been excessively and substantially litigated upon and other than the petitioner everything else is substantially the same. He submits that this has been done by Tuiyott J in *Busia Petition No.1 of 2014*, this Court in *Busia Petition Number 8 of 2014* and *NET Appeal number 150 of 2016*.

[19]. The 1st respondent claims that this matter is sub judice per section 6 of the Civil Procedure Act and this court is estopped from proceeding with the petition. He submits that Korir J is currently seized of the 1st respondent's Busia Petition number 2 of 2016 wherein both the 1st respondent and the petitioner are parties and the issue of the registration of the 1st respondent's registration by the second respondent is subject to judicial process. The 1st respondent submits that the issues of the EIA licence are subject to appeal proceedings before Kaniaru J in *Busia ELC Appeal number 17 of 2016*. He asserts that factually, the petitioner's advocates are part of the Appellant's legal team in the aforementioned appeal.

[20]. It is the 1st respondent's case that this petition is an abuse of the court process. It urges that the petitioner has invoked the jurisdiction of this court while there are parallel statutory remedies that exist. It urges for this Court to be persuaded by the decision in *C.A No.84 of 2004 Damian Belfonte v the Attorney General of Trinidad and Tobago and Emukule J's decision in Fort Hotels Limited t/a Coast Car Park & Amusement Centre v Tourism Finance Corporation & another (2016) eKLR*. It also submits that the petitioner herein has been declared a vexatious litigant by Odunga J in *Judicial Review Application number 426 of 2016* and this petition is just another example of how the petitioner herein is in the habit of abusing the court process.

[21]. The 1st respondent submits that if the court is still inclined to delve into the merits of the petition, then the petition must fail on the basis that it is not supported in law. It is the 1st respondent's case that the African Polysack Ltd was issued with the EIA licence by NEMA on 18th December 2013 which was subsequently transferred to the 1st respondent on 19th December, 2013. The petition herein was filed in June 2016, more than three years after the issuance and transfer of the EIA licence.

[22]. It contends that the petitioner's claims in regard to the EIA licence are estopped by virtue of being time barred by virtue of section 129(1) EMCA and Regulation 46 of the Environmental (Impact Assessment and Audit) Regulations, 2003. These provisions are to the effect that anyone who has any grievances with regards to licenses must raise the same within 60 days of the issuance of the licence.

[23]. The 1st respondent submits that it followed due process and procedure in obtaining the EIA licence from NEMA as provided under sec 58 of the EMCA. Further, that the transfer of the license from APL to the 1st respondent was done in due regard to the law. It contends that whilst petitioner has alleged fraud in its petition, it has not proved or specifically narrated it. It is submitted that this is contrary to section 109 of the Evidence At. The 1st respondent also asserts that the averments made are mere speculations that should be shunned by this Court. He buttresses this contention with the decisions in *Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR* where the judges quoted in agreement the case of *Vijay Morjaria v Nasingh Madhusingh Darbar & another (2000) EKLR*.

[24]. The 1st respondent contends that the registration by the Sugar Board under the Sugar Act (now replaced) was valid. It contends that under section 16(2)(3) of the Sugar Act (now repealed), what was contemplated not to be transferable in relation to the registration, is the premises and not the proponent. As such, the petitioners claim that the transfer of the licence from APL to the 1st respondent as illegal is not hinged on law. It also urges that the Sugar Board as it then was, fell under the Ministry of Agriculture

under the then minister. The Minister had supervisory powers to intervene in the affairs of the Board including but not limited to, the issue of registration. It contends that if the petitioners were aggrieved by the decision of the Minister, they had the option of referring the matter to Judicial Review then. It urges that as 3 years have lapsed, the petitioner is estopped from raising the issue of registration by virtue of the doctrine of laches.

[25]. It urges that the petitioners assertion that the 1st respondent's licence is due for cancellation is made in miscomprehension and/or misapplication of the law.

In light of all the above, the 1st respondent asks; that the petition be dismissed, for costs and that the petitioner be found liable to pay the 1st respondent for damages due to the losses incurred as a result of the conservatory orders issued against the 1st respondent.

2nd respondent's case.

[26]. The 2nd respondent submits that the Kenya Sugar Board invited bids for the construction and operation of sugar factories in Busia County. The petitioner expressed interest. Several companies including APL applied. The petitioner was approved for registration. APL was registered by the KSB to set up a sugar factory of 3000 TCD on Title Number Bukhayo/Ebusibwao/927 on 20th July, 2012. The 2nd respondent submits that the petitioner was registered by the Kenya Sugar Board to construct a 1250 TCD mill at Matayos on title numbers Bukhayo/Matayo/2946 and 361. The petitioner was notified on 20th June 2012. The 2nd respondent submits that from the letter it was clear that the petitioner had been registered as a miller in the said certificate.

[27]. The 2nd respondent points out that the Agricultural Fisheries and Food Act (AFFA) was assented to on 14th January 2013 with a commencement date of 17th January 2013. It points out too, that the Crops Act was assented to on 14th January 2013 with a commencement date of 1st August 2013. With the commencement of these two statutes, the power and function of the KSB were taken over by the Agriculture Fisheries and Food Authority and placed under its Sugar Directorate. It is submitted that the registration and licensing of a sugar mill is provided for by the Crops Act, 2013 in Section 16(1) (2) as read with section 18(1).

[28]. The 2nd respondent asserts that on 28th May 2013, APL applied to the Kenya Sugar Board for a correction of name of the registered company APL to BSIL. The applicant also wished for two additional titles Bukhayo/Ebusibwabo/3179 and 1274 to be included in the Certificate of Registration. They submit that this was essentially an application for amendment or rectification of the certificate of registration which was done in a certificate dated 20th July 2012 and the same forwarded to the Managing Director of APL vide the 2nd respondent's letter dated 30th May 2013. The 2nd respondent asserts that the current certificate of registration shows the 1st respondent as the registered entity and business sites as Title Numbers Bukhayo/Ebusibwabo/927, 3179 and 1274.

[29]. The 2nd respondent submits that it received information that the petitioner was in the process of construction of a sugar mill at Olepito a different site from that approved and registered in the 2nd respondent's letter dated 20th July, 2012. They urge that it is however factual that the petitioner had applied to be a miller Busia County.

[30]. The 2nd respondent submits that on 8th April 2015 the sugar directorate of Agricultural Fisheries and Food Authority (AFFA) issued an order for the petitioner to stop the construction until approval was sought and granted by the AFFA. It did not however rule out that the site could be registered and eventually licence issued for operation of a sugar mill. However, the petitioner failed to heed the AFFA stop Order and were also in contravention of section 16 and 18 of the Crops Act.

[31]. The 2nd respondent asserts that the petitioner wrote a letter to the Acting Director of the AFFA

seeking to be allowed to transfer the location of their sugar mill from Bukhayo/Matayos/3946 and 3961 to South Teso/Angoroma 6242 and 8343 (Olepito). The request was based on health issues that would arise due to water pollution of river Sio and the contention that the new site had all the relevant approvals. However, the 2nd respondent duly notified that petitioner that the location was not transferrable. They were asked to submit a fresh application for registration for the new site at Olepito. It is submitted that the petitioner nevertheless completed the construction maintaining that it was within the law, legal and had the requisite NEMA approvals.

[32]. The 2nd respondent submits that the 1st respondent has commenced construction of a sugar factory at the approved site at Ebusibwabo but is far from complete. Thus, the petitioner's sugar factory at Olepito, which is complete is the first sugar factory to be built and completed within Busia County.

[33]. On whether the 1st respondent's registration is illegal, unreasonable or unfair, the 2nd respondent submits that he who alleges must prove pursuant to section 107 of the Evidence Act. As such, the petitioner must show what wrong the 2nd respondent did. The second respondent contends that it had the power to amend or rectify its own Certificates of Registration.

The 2nd respondent urges that the onus is on the 1st respondent to prove that it was APL if not, the petitioner has a legitimate concern that the 1st respondent's registration as a miller is unlawful and the amended certificate therefore was issued wrongfully and is void. It submits that based on the both certificate of incorporation, they seem to be two separate companies.

[34]. The 2nd respondent contends that it acted in good faith. That the registration of the petitioner and 1st respondent as sugar millers with authority to construct sugar mills in Busia County was done in good faith and for the benefit of stake holders in sugar subsector. However any party that obtains any favourable outcome from the 2nd respondent through falsification of documents is liable to lose such registration upon proof of such falsification or deception by the party making such allegations. That the second defendant believed that the amended certificate of registration issued in the name of Busia Sugar Industry Limited was issued on basis of misrepresentation and is for cancellation.

[35]. It is the 2nd respondent's case that the petitioner has to prove that the 1st respondent proceeded without feasibility report or an EIA and the 1st petitioner needs to counter the same with evidence. The 2nd respondent urges that it has acted in good faith in documents submitted by APL and the 1st respondent and any deficiency in the documentation is for the 1st respondent to explain. The 2nd respondent urges that it has not breached the petitioner's constitutional rights and has acted in good faith all along. The 2nd respondent submitted itself to the jurisdiction of this court.

3rd Respondent.

[36]. Mr Gitonga Learned Counsel for the 3rd respondent in his submission to the court said that proceedings to challenge an EIA licence should be challenged in EMCA Tribunal. However, that he is aware that where proceedings seek other reliefs like in this case, and where those reliefs are not within the ambit of the tribunal, that, this court may address itself to the issue of and EIA licence. In other words it submitted to this court's jurisdiction. NEMA contends that contrary to the allegations of the petitioner, the EIA of L.R No.Bukhayo/Ebusibwabo.1240 was submitted to NEMA on 18th October 2013 by the APL. NEMA submits that the report was furnished to the relevant authorities and a notice to the public to submit comments on the proposed project published in the Standard newspaper on 15th November, 2013. NEMA contends that the petitioner never submitted any comments on the same.

[37]. These being the issues raised by the parties herein, the salient issues for determination can be listed as follows:

- (a) Whether this court has jurisdiction to hear this matter.

(b) Whether this matter is res judicata

(c) Whether this matter is subjudice.

(d) Whether the licence No. EAI 0020469 issued to Africa Polysack Limited could also be used by Busia Sugar Industries Limited the first defendant herein.

(e) What orders should be made?

Jurisdiction.

[38]. The 1st respondent has raised the issue of jurisdiction and submitted at length on the same stating that this court has no jurisdiction and that the jurisdiction belongs to National Environment Tribunal established under Section 125 of the Environment and Management Co-ordination Act Cap 387 as read with Sec 129 of the EMCA.

The relevant part of EMCA provides as follows:

Sec 129

(1) *Any person who is aggrieved by-*

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder:

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder;

May within 60 days after the occurrence of the event against which he is dissatisfied appeal to the Tribunal in such a manner as may be presented in the tribunal.

[39]. This argument that this court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the constitution. The National Environment Tribunal does not have mandate to deal with constitutional violations that relate to environment. That is a preserve of this Court. A look at the mandate given to the National Environment Tribunal under section 129 of EMCA aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with licence and licensing.

[40]. The 2nd defendant submitted to the jurisdiction of this court while the 3rd respondent stated that where the petitioner includes not only the prayers under Sec 129 of EMCA but has other prayers then this court has jurisdiction and it therefore through its counsel Mr. Gitonga also submitted to the jurisdiction of this court.

In Nakuru Constitution Petition no.13 of 2015 the Court (Munyao J) faced with a similar argument had this to say;

“There are some objections raised to the veracity of this petition that I would first wish to address. It has been stated that this court has no jurisdiction to entertain this suit for if the petitioners were not happy with the EIA licences issued, they ought to have filed suit before the National Environmental Tribunal (NET). That argument is fatally flawed and is made without comprehension of the nature of the suit and the forum upon which it is filed. The case before this court is a constitutional petition alleging violations of various rights enshrined in the Constitution, including a violation of the right to a clean and healthy environment provided for in Article 42 of the Constitution, and the right to property provided for in Article 40 of the Constitution. Of course part of the argument that the right to a clean and health environment has been violated is anchored on the EIA licences issued. But that does not change the character of the suit, which is a Constitutional petition and the NET does not hear Constitutional petitions. Its mandate is only to hear appeals on NEMA decisions. But even if this was suit based purely on a NEMA decision, it does not mean that this court has no jurisdiction. The jurisdiction of this court as given in Article 162(2) (b) and Section 13 of the Environment and Land Court Act, 2011, means that the court can hear any matter related to environment and land and this is one such matter. I see no need to say more as such argument was adequately addressed in the case of Ken Kasinga vs David Kiplagat & 5 Others, Nakuru ELC, Petition No.50 of 2013 (unreported).

[41]. There were also issues raised by the 1st respondent that under Sec 8 of the Crops Act no.20 of 2013 which succeeded the Sugar Act the Court is said to be the High Court and that therefore the proper forum to file this case is the High Court and not the Environment and Land Court. I am afraid to say my perusal of Sec 8 of the Crops Act does not say so.

[42]. This court was established by article 162(2)(b) of the Constitution of Kenya 2010. One of its mandate therein is to determine the environment and the use and occupation of and title to land. The issues herein deal with the environment use and occupation of land. The argument that the jurisdiction herein belongs to the High Court is misplaced. I hold that this case is before the right court. This court has jurisdiction to determine the issues raised herein.

Are the issues herein resjudicata?

[43]. The first respondent argued that the issues raised herein are resjudicata in view of petition NO.1 of 2014 filed by Joseph Macharia and Aggrey Hilka Sikala against Africa Polysack Limited and Government of Busia and also in view of petition no.8 of 2014 Joseph Ojwang OMolo versus NEMA, Africa Polysack Limited and Busia Sugar Industries with Water Resources Management Authority, Lake Victoria North Water Board County Government of Busia, Kenya Sugar Cane Growers Association, Bukhayo Council of Elders and Hon. Amos Wako the Senator of Busia all coming in as interested parties.

[44]. In the first petition, the petitioners challenged the two respondents for developing a sugar milling company in Busibwabo Location Matayos Sub County prior to the issuance of an EIA licence. They alleged that their Constitutional rights under article 40 of the Constitution were violated and prayed for an order of prohibition. They succeeded in part and failed on the other part. It should be noted that Busia Sugar Industries the 1st respondent herein was not a party to that petition.

[45]. In petition No.8, the prayers were exactly the same as those of petition number 1 of 2014. I conducted hearing of that petition and held that the issues raised therein had been decided by Tuiyott J in petition no.1 of 2014. Both petitions were public spirited. The petition herein as filed is not public spirited. The petitioner avers among averments that the registration of the 1st respondent as a sugar miller is illegal. That it violates its rights under article 40 of the Constitution and it seeks declarations under articles 10,20,21,27,47 and 50 of the Constitution. It argues that the use of the EIA issued to Africa Polysack Limited by the 1st respondent is illegal. That the construction of a sugar mill in Busibwabo Location Matayos Sub County was based on misrepresentation of material facts in regard to availability of cane and it contravenes Sec 145 of the Sugar Act 2001 and Sec 16 and 18 of the Crops Act as read with articles 27,40 and 67 of the Constitution and finally that the EIA licence issued to the first respondent is illegal etc.

[46]. The issues raised by the petitioner herein were not litigated in earlier petition no 1 of 2014 or petition 8 of 2014. They are different and of particular personal economic and environmental interest to the petitioner. It cannot be reasonably argued in law, that the Constitutional issues raised by the petitioner are res judicata. I hold that they are not resjudicata.

Subjudice

[47]. The 1st respondent also raised the issue of subjudice. He argued that there is a similar matter before the Busia High Court as petition no.2 of 2016 where the petitioner and the 1st respondent are parties and that the issues are similar to the petition herein. The 1st respondent did not supply the pleadings in that petition to the court. The court is in the dark as to the contents of that petition. However the 1st respondent attached in his list of authorities the ruling of justice Korir in petition number 2 throws right on to the issues therein. He stated;

“What is before the court is an application by the petitioners that the 2nd respondent is constructing a sugar factory at Olepito without the necessary permit from licensing authorities. The first respondent is one of those authorities but is yet to make its stand known. At the moment I cannot for sure say that the action by the 2nd respondent (petitioner herein) are illegal. The 2nd respondent has said that its actions are lawful. It has disclosed to the court that the order that had barred its activities were discharged by NEMA. Its evidence that the construction of the said mill is at an advanced stage if it wishes to continue with construction despite the risk that its work may amount to nothing then, I do not see why it should not do so. There is another reason why the conservatory orders should not issue. The second defendant is engaged in an economic activity and it would go against the people of the County of Busia to stop an activity that is likely to uplift their standards of living”.

[48]. The court rejected the conservatory orders. From the excerpts of that Ruling, it is quite clear that, should petition no.2 aforesaid be allowed, the court has clearly spelt out the consequences that may befall the petitioner herein. The court clearly says that there would be no prejudice to be suffered by the 1st respondent herein. The fear of prejudice to the 1st respondent urged herein by its counsel is therefore misplaced.

[49]. A fundamental issue that arose in this matter is the relationship of Africa Polysack Ltd and the 1st respondent herein Busia Sugar Industries Ltd. Africa Polysack Limited (APL) Sugar Company is not a party to this petition. However, from the petition and the documents produced herein, it is the one which applied to the Kenya Sugar Board and was registered by the Board in accordance with part III Section 14 of the Sugar Act 2001 on 20th July 2012. This was pursuant to an invitation by the Kenya Sugar Board for bids from interested companies to build sugar factories in Busia County of Kenya. The Kenya Sugar Board accepted the bids of West Kenya Sugar Company Limited (The petitioner) herein, Polysack Africa (APL) Sugar Company Limited and Cherry Sugar Company Limited. Africa Polysack Co. Ltd was registered to set its sugar mill at L.R No. Bukhayo/Ebusibwabo/972 to set up a 300TCD factory in the said land.

[50]. Previously Africa Polysack (APL) Sugar Company Ltd had been incorporated in Kenya on 11th December 2011 under Certificate Number C107163. The same is annexed to the documents filed herein.

[51]. On being allowed by the Sugar Board to set its factory it prepared an EIA report pursuant to Sec 58 of EMCA It did so as a proponent. The licence was duly given after the stake holders were consulted. Any licence given under Sec 58 of the EMCA act is site specific. In this case the site was LR NO.Bukhayo/Ebusibwabo/972. Africa Polysack (APL) Sugar Company was all ready to go and to set up its factory.

[52]. However, something strange happened on 28th May 2013 and this has been the genesis of this petition and a myriad of other petitions. Africa Polysack (APL) Sugar Industries wrote to Sugar Board

requesting the Board to change its name and to change the certificate of the registered Miller to Busia Sugar Industries Limited the 1st respondent herein. The Kenya Sugar Board asked Africa Polysack Limited to surrender the initial certificate in the name of Africa Polysack (APL) Sugar Industries Limited to enable them to issue a new certificate in the name of Busia Sugar Industry Limited. The same was done on the same day. The certificate given to Africa Polysack Limited was returned and afresh certificate was on the same day issued in the name of Busia Sugar Industries Limited. However, there was another variation, the letter returning the certificate in the name of Africa Polysack Limited had a request that two other sites be included. These were Bukhayo/Ebusibwabo/3179 and Bukhayo/Ebusibwabo/1274. They were so added in the new certificate now given to Busia Sugar Industries Limited. The changed certificate was forwarded to AG Ahmed Taib the Managing Director of Africa Polysack Ltd of P O Box 18869-00500 Nairobi. This process of change of names is what presently irks the petitioner herein among other Constitutional grievances.

[53]. I will deal with this issue, which to my mind will settle most of the issues herein.

[54]. Busia Sugar Industries Ltd was incorporated on 9th September, 2011 under certificate number CPR/2011/55905.

During the hearing of this petition counsel for the 1st respondent called the 1st respondent a special purpose vehicle for Africa Polysack (APL) Sugar Company Ltd to carry on their sugar milling activities in Busia at Bukhayo/Ebusibwabo/921. It was argued for the petitioner that Africa Polysack (APL) Sugar Company Ltd and Busia Sugar Industries Ltd were two different legal persons. That they were distinct from their Directors and shareholders. That this is a dictum that was espoused in the celebrated case of *Salmon Vs Salmon* [1895-9] ALL ER 33.

I have no doubt in my mind that this is a proper legal argument. Produced in these proceedings are certificates of incorporation of both companies. They are different legal persons. In the case of *Otman V Brougham Lord Wensbury (1918) AC 514*. It was stated that the existence of a company will remain invariable even if there were some/fraud/omission of information/unfulfilled formalities etc. at the time of formation/registration of the company and the ending of the company will only be possible with the certificate of incorporation. In the case of *RC Ausra Lasian Mining Co (1983) WN 74 Lord Harport* stated that a certificate of incorporation cannot be challenged by any court or tribunal on any grounds whatsoever. The issuance of a certificate of incorporation is proof that a company is a legal personum.

[55]. A change of name under the companies Act Cap 486 is allowed under Sec 20. This may be done by a special resolution and with the approval of the registrar signed in writing. Where a company changes its name under Sec 20 it shall within 14 days give the registrar a notice thereof. The registrar shall enter the new name on the register in place of the former name. He shall issue to the company a certificate of change of name. He shall notify such change in the gazette.

[56]. The 1st respondent never produced any document on the change of name in compliance with Sec 20 of the Companies Act Cap 486 aforesaid to wit the registrar of companies, letter of authority or any notice by the Kenya Gazette. M/s Africa Polysack (APL) Sugar Company Ltd never produced any such documents to the Sugar Board for the Board to change the certificate from itself to the 1st respondent herein. The process under which two companies changed their names in one day in the offices of Kenya Sugar Board from Africa Polysack (APL) Sugar Company Limited to Busia Sugar Company Ltd is unknown to law. It was not only illegal it was unlawful. What is more, the Environmental Impact Assessment done by Africa Polysack (APL) Sugar Company Limited under Sec 58 of EMCA in which stake holders took part was site specific. The site was Bukhayo/Ebusibwabo/921.

[57]. When an exchange of certificate was issued on the basis that Africa Polysack had changed its name to Busia Sugar Industries Limited, two other sites Bukhayo/Ebusibwabo/ 3179 and Bukhayo/Ebusibwabo/1274 were added. Those sites were not subjected to Environmental Impact Assessment. They are not compliant to Sec 58 of EMCA no EIA licence was issued in respect of those sites. The petitioner is right when he said that its Constitutional rights under article 10,20,21,27,47 and

50 of the Constitution were infringed. It was an interested stake holder in the Sugar Industry. It was not accorded an opportunity to oppose the construction of the 1st respondents factory in Bukhayo/Ebusibwabo/3179 and 1274. A factory has been constructed on the two sites where an EIA licence has not been issued. A serious breach of the law has been committed. It should be noted that the Busia Sugar Factory is being built by the 1st respondent and not Africa Polysack (APL) Sugar Factory Limited.

[58]. During the hearing of this petition, the issue of transfer of licence arose. The court was told by counsel for the 1st respondent that EIA licences are transferrable under Sec 65 of EMCA. This is correct. But in this case was there a transfer of licence? No there was not. No one ever asked or applied for a transfer. What was purportedly done was a change of name. all the documents that were sent to Sugar Board by Polysack Ltd were all for change of name. No licence was ever transferred. In any case, there was no EIA licence in respect of Bukhayo/Ebusibwabo/1379 and 1274 that were issued. None could therefore be transferred to Busia Sugar Company Ltd. M/s Africa Polysack (APL) Sugar Company Limited is not a party to this petition. It now has no registration from the Sugar Board or its successors AFFA and the Crops Act. It has exited the scene. It is no longer a player in the unfolding scenario. That leaves the legal person known as Busia Sugar Industries Limited the first respondent on its own to carry the cross of compliance with statutory requirements in the construction of the Sugar factory at Bukhayo/Ebusibwabo/927, 1379 and 1274. It has not complied with the requirements of Sec. 58 of EMCA, and AFFA and the crops Act aforesaid.

[59]. I am not unmindful of the fact that Busia Sugar Company Ltd built at a lot of expense is for the good of the people of the County of Busia. But I am also bound by the Constitution and the law. The law must be followed. This project has been done by the 1st respondent without complying with the Sugar Act now AFFA, Crops Act and EMCA Act in as far as licensing and the environment is concerned. The mandate of Environmental Impact Assessment is for EMCA. The licensing of sugar factories is now for AFFA and crops Act.

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

[61]. Under Section 16 (1) and (2) and Sec (2) of the Section 8(2) of the Crops Act aforesaid, the 1st respondent must obtain the necessary licenses. He shall comply with Section 58 of EMCA. AFFA and the crops Act. The first respondent shall therefore stop its activities in the factory subject to this petition forthwith and apply for the licences as required by law. The EMCA and Crops Act shall deal with all the issues of licensing raised herein by the petitioner. Those authorities will decide the fate of the 1st respondent. The petitioners petition shall succeed to that extent. No damages to the respondent were proved before me by the petitioner. I will therefore not award any. The petition against the 2nd and 3rd respondents is dismissed with no order as to costs. The costs of the petition shall be to the petitioner paid by the 1st respondent.

Judgment read in open Court before Counsels.

Dated at Bungoma this 10th day of March, 2017.

S. MUKUNYA

JUDGE

In the presence of:

Court Assistants - Joy/Chemtai

Miss Odeke - For Olando for the applicant for Ashioya for the
Defendant.