



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, ONYANGO OTIENO & KANTAI, JJ.A)

CIVIL APPEAL NO. 89 OF 2011

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT

AND

KENYA SUGAR BOARD.....1ST RESPONDENT

BUTALI SUGAR MILLS LIMITED2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Kisumu (J .R. Karanja, J.) dated 30th November, 2010

in

JUDICIAL REVIEW NO.17 OF 2010)

CONSOLIDATED WITH

CIVIL APPEAL NO. 90 OF 2011

WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT

AND

KENYA SUGAR BOARD.....1ST RESPONDENT

BUTALI SUGAR MILLS LIMITED2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Kisumu (J. R. Karanja, J.) dated 12th November, 2010)

JUDGMENT OF THE COURT

[1] The two appeals were heard one after the other on different dates. Civil Appeal No. 90 of 2011 was heard first followed by Civil Appeal No. 89 of 2011. After the hearing of appeals the two appeals with the

consent of the respective counsel were consolidated for purpose of judgment with the result that this judgment relates to the two consolidated appeals. Civil Appeal No. 90 of 2011 is against the ruling of the High Court (**J.R. Karanja, J.**) delivered on 12th November, 2011 whereby the High Court excluded the West Kenya Sugar Company Limited (**WKSC**) the appellant in both appeals and another body - West Kenya Outgrowers Company Limited (**Weko**) from participating howsoever in Judicial review application No. 17 of 2010. On the other hand, Civil Appeal No. 89 of 2011 is against the order of mandamus granted in the judicial review application on 30th November 2010 without the participation of West Kenya Sugar Company (**WKSCO**) compelling the Kenya Sugar Board (**KSB**) to grant an operating licence to Butali Sugar Mills Limited (**BSM**).

[2] By an *ex parte* application dated 14th April 2010, Butali Sugar Mills Limited (**BSM**) applied for leave to apply for an order of mandamus and an order of prohibition to compel Kenya Sugar Board (**KSB**) to issue an operating licence to BSM to commence milling sugar at its plant located at LR. No. Kakamega/Malava/303 and to direct KSB to desist from unduly interfering with Sugar milling enterprise of BSM respectively. The applicant also sought an order that leave, if granted, do operate as a stay of further interference with the business, operations, undertaking and enterprise of the applicant. The application was supported by a statement and a verifying affidavit as required by the rules.

The application was heard on the same day and leave and order of stay were granted *ex-parte*.

[3] In or about 26th April 2010 BSM filed the application for orders of mandamus and prohibition pursuant to the grant of leave. The respondent (KSB) filed a notice of preliminary objection after which the application was listed for hearing for 30th June 2010. Before the date scheduled for hearing, WKSC filed an application on 28th June 2010 seeking leave to be joined in the proceedings as interested party. The notice of motion specified the grounds on which WKSC was relying in support of the application. The application was also supported by an affidavit of **Jagwant Singh Rai**, a director of WKSC to which he annexed several documents. BSM filed a replying affidavit sworn by **Sanjay Jayantlal Patel** opposing the application. Several documents were annexed to the replying affidavit.

[4] The relevant facts and the chronology of events relating to both the application for judicial review and the application for joinder as they emerge from the respective affidavits and accompanying documents are set out below.

The Kenya Sugar Board is a body corporate capable of suing and being sued. It is established under the Sugar Act No. 10 of 2001 (**Act**) and its functions include licensing of sugar mills. The WKSC averred that it was licensed by Ministry of Agriculture to operate a mill in South Kabras, Western Kenya under the old legal regime – Crop Production and Livestock (Sugar Factory) Rules made under the Crop Production and Livestock Act, Cap 321 Laws of Kenya which required, *inter alia*, that a factory should be set up at least 25 kilometers from the location of an existing sugar factory. Subsequently, by a letter dated 11th October 2000 the Ministry demarcated the WKSC sugar zone which included parts of Malava Division, Kakamega District. WKSC further averred that by a letter dated 7th July 2004, KSB reaffirmed the WKSC's sugar zone and by a letter dated 23rd September 2004 authorized it to proceed with expansion of its factory to increase milling capacity on the assurance that no other white sugar mill would be allowed to be installed in the designated WKSC sugar zone. BSM was incorporated on 23rd August 2004. Sometime in the month of October 2004, BSM made an application to KSB for licence to set up a sugar mill within about 10 kilometers of WKSC's factory but the application was rejected on grounds of proximity to WKSC's factory and the applicant was advised to look for an alternative location. WKSC averred that three similar applications by BSM were rejected but the fourth application was approved and BSM was given a Certificate of Registration on 13th April 2005 to construct a sugar mill on LR Kakamega Malava 1303.

In the light of new development, WKSC filed a judicial review application Misc. Civil Application No. 1127 of 2005 for an order of certiorari to quash the decision of KSB to register BSM and for an order of prohibition prohibiting KSB from entertaining or granting fresh application to BSM to construct or

operate a sugar mill within WKSC's sugar zone. BSM who was named as a 2nd interested party subsequently filed an application to set aside the grant of leave. Both the application to set aside leave and the substantive application were heard together. However, before the proceedings were completed, WKSC on 27th July 2006 withdrew the application for judicial review with the consent of all parties intimating that it had reached a settlement with KSB and Ministry of Agriculture. By the agreement which was dated 21st July 2006 KSB, amongst other things, undertook that it would not grant to BSM nor entertain any application from it or from any other corporate body a license to operate or construct a sugar mill within a radius of 24 kilometres mill to mill of the present location of WKSC's mill.

[5] Aggrieved by that agreement BSM filed a suit - HCCC No. 168 of 2007 at Nairobi Milimani Commercial Courts against WKSC and KSB claiming Shs. 590,630,441 as loss of business resulting from the agreement. On 3rd October 2008 KSB revoked the Certificate of Registration of BSM to operate on LR. No. Kakamega/Malava/1303 and advised BSM that its registration would only be considered once it identified a new location at least 24 kilometres radius from WKSC's factory. Efforts to bring WKSC and BSM to an agreement to relocate the factory and to have WKSC compensate BSM for the costs of relocation failed. Eventually KSB reviewed its decision and by a letter dated 26th February 2010 reinstated the registration of BSM on conditions that it undertook to remove KSB as a party in the suit pending in court and would not in future enjoin KSB in any other action in connection with matters touching on its registration. That decision precipitated another suit HCCC No. 206 of 2010 by WKSC against KSB for breach of previous agreement. It averred in the suit, amongst other things, that it had already invested capital in excess of shs. 3.5 billion in the establishment, development and expansion of the sugar mill; that KSB had already advanced a loan to it in excess of Kshs. 423,000,000 to finance the development of 670 Hectares of Sugarcane belonging to outgrowers; that it had entered into 57,346 cane farming contracts with farmers for supply of sugarcane to satisfy its milling capacity, that there was barely enough sugarcane and that by licensing BSM within its exclusive zone, the sugar mill would no longer be commercially viable and sustainable and would inevitably collapse. The main relief sought in the suit was a permanent injunction to restrain KSB from entertaining and granting an operating licence to BSM or to any other operator within 24kms radius of the location of its mill. An interlocutory application for injunction was also sought by a separate application. BSM successfully applied to be made a party in the suit. The application for interlocutory injunction was ultimately heard interpartes and dismissed by Koome, J. (as she then was) on 17th September 2010. By an application dated 10th October 2010 BSM made a formal application to KSB for operating licence to commence milling of sugar.

[6] The application for joinder of WKSC was mainly made under Rule 3(2), 3(3) and 3(4) of Order LIII Civil Procedure Rules (CPR) (now renamed Order 53 Rules 3(2), 3(3) and 3(4)).

Rule 3(2) provides, *inter alia*, that the application for judicial review shall be served on all persons directly affected. Rule 3(4) gives the High Court power at the hearing of the application to adjourn the application and order any person who ought to have been served whether or not he is a person who ought to have been served as person directly affected under Rule 3(2). WKSC claimed in essence that as a miller who had been previously licensed and operating a sugar mill in the same region, and which had accrued contractual rights and an exclusive zone and also as an entity, which has previously opposed the registration of BSM and involved in previous litigation relating to the grant of licence to BSM with KSB and BSM, it was directly affected by the application and should have been served with the application. The application was opposed by BSM on the grounds, amongst others, that the agreement between WKSM and KSB were void; that there was no court order in existence which could prevent the grant of licence and that the joinder of WKSM would not serve any purpose. Although KSB did not file a replying affidavit, it nevertheless opposed the application saying in effect that the application was defective as the application could only have been made under Rule 6 of Order LIII; that the application was between BSM and KSB and WKSC as a competitor could not tell the court not to grant the orders sought in the application and that the facts relied on by WKSM were irrelevant and had been considered in previous litigation.

On October 8th 2010 the High Court, after considering the respective lengthy submissions, dismissed the application with costs and made findings that, the rules did not provide for a formal application for an

affected party to be joined, that the application would not also be founded on Rule 3(2) or 3(4) and that if a person desired to be heard the appropriate application had to be made under rule 6 of Order LIII at the hearing of the judicial review application. The court also considered the merits of the application and made a finding that WKSC was a “spoiler” in a matter essentially between BSM and KSB and that the WKSC had not shown good faith and sufficient cause for it to be joined as a party.

[7] A week before the Ruling of 8th October 2010 WKSC had, unknown to BSM, filed a lengthy constitutional petition No. 59 of 2010 in the High Court at Nairobi which was accompanied by a chamber summons. The respondents in the constitutional petition were the Attorney General, KSB and BSM. In the petition WKSC averred, amongst other things, that, before the Sugar Act No. 10 of 2001 came into effect it was licensed by Ministry of Agriculture to operate a sugar milling factory in 1979 within a radius of 24 kilometres known as Mill Command Area (zones); that under the Sugar Act, KSB has no power to license two or more millers to operate within one mill command area, that the registration of BSM on 13th April 2005 to operate a mill within about 10 kilometres from WKSM’s factory and within the WKSM designated mill command area constituted breach of the specified provisions of the Sugar Act and the specific Articles of the Constitution; that KSB in performance of its statutory powers had no power under the constitution to share out between WKSM and BSM the raw material within the designated mills command area and that the impending licensing of BSM to operate within the WKSM mill command areas would violate and adversely affect the WKSM’s constitutional rights concerning the security and viability of its investment and access to raw materials in its designated mill command area. The petition was based on various Articles of the Constitution relating, *inter alia*, to protection of the law, right to fair administrative action, right to protection of property and vested rights to property and arbitrary and unfair treatment.

The petition sought numerous declaratory orders, prohibitory orders; mandatory injunction and other reliefs including a declaration that the decision to reinstate registration of BSM by a letter dated 25th February 2010 was null and void; an order of certiorari to quash the registration; an order of prohibition against the granting of an operation licence; a mandatory injunction to compel BSM to relocate its sugar mill and an order of injunction to restrain BSM from commissioning operations of its sugar mill. The accompanying application sought conservatory orders pending the hearing of the petition.

On 8th October, 2010 the High Court issued five orders including:

“2. A conservatory order of stay to stop the implementation or operation of the second respondents (i.e. KSB) decision to reinstate the registration of Butali Sugar Mill contained in the letter dated 26th February, 2010 pending the hearing of this application interpartes on 21st October 2010.

3. A conservatory Order ... prohibiting the second respondent – the Kenya Sugar Board – from issuing to Butali Sugar Mills Limited a license to operate a sugar mill factory within the petitioner’s mill command area (zone) pending the hearing of this application interpartes on 21st October 2010.”

[8] The application for judicial review was ultimately fixed for hearing for 1st November 2010. On 29th October 2010, **Erick Ng’eno** Legal Officer of KSB filed a replying affidavit to the judicial review application. WKSC also filed a replying affidavit. On or about 7th November, 2010 another entity, West Kenya Outgrowers Company Limited (**Weko**) filed a replying affidavit sworn by Simon Jomo Indwale in opposition to the judicial review application on behalf of 58,000 sugar cane farmers. It also filed a notice of preliminary objection.

At the hearing of the judicial review application on 1st November 2010 **Mr. Kibe Mungai**, learned counsel for Weko also holding brief for **Mr. Kihonge** for WKSC brought to the attention of the court the existence of the conservatory orders granted in the constitutional petition which according to him was extended on 24th November 2010. He asked the Court to defer the application to avoid the possibility of conflict that may arise if the application succeeded, as the two matters related to the same issue. He however stated that he was ready to proceed with the application.

Mr. Shah and **Mr. Otieno**, learned counsel for BSM opposed the “application” for WKSC and Weko to be heard. They submitted that the application was a flagrant abuse of court process as the court had on 8th October 2010 dismissed the application by WKSC to be heard. They also submitted that the matter was res judicata; that the constitutional petition was a gross abuse of the court process and the court can so rule; that WKSC and Weko had no locus standi and that they should be allowed to proceed with the application on the basis that WKSC had no locus standi. **Mr. Kemboi** learned counsel for KSB also objected to WKSC and Weko being heard although he appreciated that they had raised legal issues regarding the grant of license. He submitted that the court retained the discretion to allow or refuse a party to be heard but that Weko could not be an affected party in the matter relating to issuance of a licence. He admitted that the order of the constitutional court had created a lot of confusion

Mr. Kibe Mungai in reply asked the court to uphold the right to be heard under rule 6 of order LIII saying that there is no limit to the application of the rule. He distinguished the issues in the other litigation from the issues raised in the application and contended that the dispute had never been resolved to the satisfaction of the parties. He further contended that the issue of licensing of BSM was an independent issue; on locus standi he submitted that the jurisdiction of the court was statutory under Section 8(5) of the Law Reform Act and that the right to be heard is cardinal under judicial review. He also relied on Article 50 of the Constitution on the right to fair hearing. He also referred to Section 2 of the Sugar Act which refers to interested parties and submitted that Weko had explained why it had locus standi. Lastly, he submitted that whether a party is bona fides cannot be determined at the commencement of the hearing but during the hearing.

[9] The High Court by a Ruling dated 12th November, 2010 made findings that:

- (i) WKCS was in flagrant and deliberate abuse of the process of the court by filing a multiplicity of suits dealing with more or less similar subject matter and issues; by co-opting Weko in the application and by filing replying affidavits without court’s sanction.
- (ii) As regards locus standi, WKSC had lost the right to be heard further in the application by dismissal of its application to be joined as an interested party in the matter.
- (iii) It was a misconception by both WKSC and Weko to think that they could be affected or aggrieved by a decision which has not been made.
- (iv) The issue relating to the licensing or otherwise of the applicant (BSM) by respondent (KSB) essentially revolved around themselves such that WKSC and Weko would be deemed to be strangers in the matter and that they should exhibit more faith in the justice system of this country by awaiting the verdict of the court in the various pending suits and thereafter take the necessary steps as by law established.
- (v) Ultimately there was no proper justification for WKSC and Weko to be heard in this matter as affected parties.
- (vi) Order LIII rule 6 CPR would come to their aid at the instance of the court.
- (vii) The attempt by WKSC to participate in the proceedings was not res judicata as res judicata does not apply to judicial review.
- (viii) The Court was not bound by the orders obtained in constitutional petition No. 59 of 2010 and deems it fit that the judicial review application should proceed notwithstanding the said petition.
- (ix) In any event, should the petition succeed, it would be doubtful whether the respondent (KSB) would be in a position to implement any orders made against it in relation to the Sugar Act 2001. If the powers conferred on the respondent by the Sugar Act are declared unconstitutional, it would be impossible for the respondent to carry out its functions which include the grant or refusal of various licences required by those in the sugar industry.

The court then concluded:

“The purported affected parties ...be and hereby excluded from participating howsoever in the application as doing so would be in furtherance of their abuse of the court process and tantamount to their being acknowledged as having the necessary ‘locus standi’”.

That decision is the subject matter of Civil Appeal No. 90 of 2011.

[10] Thereafter the application for judicial review was heard as between BSM and KSB on 18th November 2010. By a Ruling delivered on 30th November, 2010 the application was allowed with costs and the order of mandamus granted. The decision is impugned in Civil Appeal No. 89 of 2011.

[11] It is convenient to deal with Civil Appeal No. 90 of 2011 first, as it relates in essence to an interlocutory order made before the hearing of a judicial review application and before the final order of mandamus was granted. The appeal raises an important issue of the right to be heard in opposition to judicial review application. It is significant to state at the outset that the appeal is by WKSC and not by Weko and that the appeal is against the ruling delivered on 12th November 2010 excluding WKSC and Weko from further participation in the judicial review application. The ruling delivered on 8th October 2010 dismissing WKSC’s application to be joined and served with the application for judicial review as an interested party has not been appealed against.

Although there are twenty five (25) grounds of appeal they in summary challenged the finding of the court as summarized above and the legality of the decision to deny WKSC a right of hearing in the judicial review application in the circumstances of the case.

[12] In a nutshell **Mr. Kibe Mungai** for the appellant submitted in support of the appeal that, WKSC was part and parcel of the dispute to be litigated in the judicial review application, that WKSC only sought direction and did not make an oral or formal application to be heard; that there was no application challenging WKSC’s locus standi; that WKSC and BSM were parties in previous disputes; that it is the only dispute where WKSC was excluded; that no court has, in a final decision decided whether exclusive sugar zones exist, that the right to be heard in both constitutional and statutory; that the Sugar Act names a miller as an interested party; that it was not within the province of the Judge to determine who should be heard if the dispute shows the parties involved; that there is no law to stop a party in a dispute from joining in another dispute; that WKSC was neither acting in abuse of process of court nor committed contempt of the court; that decision to reinstate registration gave rise to a fresh cause of action and, lastly, that if there was improper exclusion of WKSC the subsequent proceedings were null and void *ab initio*.

[13] On his part **Mr. Kemboi** for KSB traced the history of the dispute and submitted thus. By a ruling dated 17th September 2010, Koome, J. had found that the agreement entered on 21st June 2006 relating to exclusive zones was illegal and unenforceable; and in the absence of appeal from the ruling of 8th October 2010 arguments on the right to be heard cannot be entertained. The Ruling of 12th October 2010 did not determine whether WKSC and Weko were parties or whether they had a right to be heard; that the right to be heard is not limited and for the appellant to succeed in the appeal it has to show that it was not abusing the court process.

[14] **Mr. Pheroze Nowrojee** and **Mr. Ochieng’ Oduor** for BSM made both written and oral submissions. The written submissions dealt at length with the issue of unenforceability of the agreement dated 21st July 2006 conferring exclusive zone to WKSC on account of breach of rules of natural justice and illegality. The written submissions also deal with issue of locus standi and abuse of judicial process. BSM submitted through both counsel amongst other things thus:

BSM had legitimate expectations that an operating license would be issued after registration as a miller. The application by WKSC to be joined as an interested party was based on the agreement on exclusive zones which Koome, J. found to be illegal and unenforceable. The Sugar Act has no provision for hearing millers before registration and before an operating licence is issued and WKSC had no interest on the

issue of registration and licensing. The appellant is abusing the process of the court and that substratum of the appeal has gone after the order of mandamus was complied with.

[15] We now turn to the applicable law. The appellant (WKSC) filed an affidavit and appeared by counsel at the hearing of the application for judicial review on the footing of **Rule 6 of order LIII** (now renamed **Order 53**) [CPR] which provides:

“On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person shall be heard notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.”

Rule 3(2) provides that a notice of motion shall be served on all persons directly affected and Rule 3(4) provides:

“If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this Rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.”

[16] The **Sugar Act No. 10 of 2001 (Act)** has also been cited. Its object as stated in the preamble is to provide for the development and promotion of sugar industry; to provide for establishment and powers and functions of the Kenya Sugar Board and for connected purposes. The objects and functions of KSB are specified in S.4 which includes, to regulate, develop and promote sugar industry; co-ordinate the activities of individuals and organizations within the industry; facilitate equitable access to the benefits and resources of industry **by all interested parties** and to licence sugar mills. (*Emphasis added*)

The phrase “**interested parties**” is defined by s. 2 of the Act as meaning “**the Government, millers, growers or out grower institution**”. The roles of institutions in the sugar industry – that is KSB, Kenya Sugar Research Foundation, outgrower institutions and the miller are specified in part 2 of the second schedule. By section 16(1), a miller is required to be registered by the Board and by S. 14(1) a miller is required to obtain a current licence from KSB to operate a sugar mill.

Lastly, S.15(1) prohibits KSB from issuing a licence unless the three conditions stipulated therein have been met.

[17] Although the validity of the judicial review application by BSM was neither an issue in the High Court nor an issue in this appeal, it is necessary for determination of this appeal to compare the criteria for granting leave to apply for judicial review and the criteria for hearing a party in opposition to judicial review application under Rule 6 of Order 53 CPR. By order 53 Rule 1(1) and (2) CPR, leave to apply for order of judicial review has first to be sought through an ex parte application.

The rule does not however contain any limitation to the grant of leave and the matter is left to the discretion of the court. The relevant English Rule is different. Order 53 Rule 3(5) of Supreme Court Rules provided:

“The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.”

That provision has been retained in England in section 31(3) of the Senior Courts Act 1981. The purpose for leave was explained by **Lord Scarman** in **Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Limited** [1982] AC 617 at page 653 para G thus:

“If (applicant) fails to show, when he applies for leave a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if court granted leave. The curb represented by the need for the applicant to show when he seeks leave to apply, that

he has such a case in an essential protection against abuse of legal process. It enables the court to prevent abuse by busy bodies, cranks, and other mischief makers.”

Lord Diplock in that case at p. 642 paras F, G: elaborated on the application of new rule S.3 thus:

“The procedure under the new order 53 involves two stages (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former or “threshold” stage is regulated by rule 3. The application for leave to apply for judicial review is made initially *ex parte* but may be adjourned for persons or bodies against whom relief is sought to be represented.... Rule 3(5) specifically requires the court to consider at this stage whether “it considers that the applicant has a sufficient interests in the matter to which the application relates”. So this is a “threshold” question in the sense that the court may direct its mind to it and form a *prima facie* view about it upon the material that is available at the first stage. The *prima facie* view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.”

The **Inland Revenue Commissioners** case was followed by this Court in **Mirugi Kariuki v. Attorney General**, Civil Appeal No. 70 of 1997.

In **Bivac International SA (Bureau Veritas) [2006] 1EA 26**, the High Court of Kenya (Nyamu, J.) expressed the same principle at p. 32 para e f:

“It is important to appreciate the principle or the philosophy behind the two stages in the judicial review jurisdiction and that the principle that the whole purposes of the rules require that leave should first be obtained to make the application for judicial review it would be defeated if the court were to go into the matter in any depth or on the merits at that stage. If on a quick perusal of the material availed under a certificate of urgency as is usually the case, the court is of the view that a matter discloses what might on further consideration turn out to be an arguable case in favour of the granting the relief claimed, it ought in exercise of its judicial discretion give the applicant leave to apply for that relief. At the second stage the court is again called upon to exercise yet another discretion but it is a different discretion in that at the second stage all the evidence and arguments are availed by all parties and the matter is fully heard on the merits. For a judge to be required to embark on a serious inquiry at the threshold stage would give rise to serious prejudice and a miscarriage of justice to the parties and to the case.”

That is a correct statement of the principle except as it relates to reliance on material availed under certificate of urgency. An application for leave is a formal application supported by an affidavit and a statement. At the first stage the court can only consider the material disclosed by the affidavit and statement.

In **Njuguna v Ministry of Agriculture [2000] 1 EA 184** at p. 186 this Court said:

“Leave should be granted if on the material available to court it considers without going into the matter in depth that there is an arguable case for granting leave.”

[18] In our view, those principles apply with necessary modifications and adaptations to the consideration of the right to be heard in opposition to the application for judicial review under Order 53 Rule 6 CPR. In the absence of rules regulating the procedure, a person who is not a party to the judicial review application and who intends to oppose the application can approach the court in any manner of approaching the court permitted by the law.

He can file an affidavit giving reasons why he considers himself to be a proper person and the grounds on which he intends to oppose the application. In the absence of rules, leave of the court to file such affidavit is not required. Further, a requirement for leave would mean that an application for leave has to be heard and determined before the hearing of the application which may result in unnecessarily protracted proceedings. The affidavit should be served on all parties in good time before the hearing of

judicial review application. In this case, such an affidavit was filed and served. The learned judge, erroneously in our view, considered the filing of an affidavit without leave as act of abuse of process of the court. At this stage and where the issue is a simple one, the court can on perusing the affidavit and replying affidavit or upon hearing brief arguments and without going into the merits, determine on *prima facie* basis whether or not a person intending to be heard is a proper person. If the decision is in favour of the person applying, the court should in the second stage consider the grounds of opposition on the merits at the appropriate time.

[19] The phraseology “*and appears to the High Court to be a proper person*” in rule 6 of Order 53 necessarily raises the question of *locus standi* in the same manner as the phrase “*it considers that the applicant has a sufficient interest*” under the English rule. In **Inland Revenue Commissioners** case (supra) the House of Lords held in essence that, except in simple cases where it was appropriate at the earliest stage to find that the applicant for judicial review has no interest at all or sufficient interest, it was wrong to treat *locus standi* as a preliminary issue and in such cases the question of sufficient interest must be taken together with the legal and factual context of the application. In **Inland Revenue Commissioner** case, Lord Wilberforce put it this way at p. 630 in:

“There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application, then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications.

But in other cases this will not be so. In these it will be necessary to consider the powers and duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases be considered in the abstract, or as an isolated point. It must be taken together with the legal and factual context.”

From what we have said above, those words apply with equal force to the case of a person seeking to be heard as a proper person in opposition to application for judicial review. It follows that where the case is not so obvious the final determination of the question whether a person seeking to be heard in opposition is a proper person should be made after the judicial review application has been heard on the merits and after his grounds of opposition have been heard.

Furthermore, from close reading of rule 6 of order 53 together with rule 3(2) and 3(4) it seems that the phrase “*proper person*” is wider in scope of class of persons than the phrase “*all persons directly affected*”. We say so because although the application ought to be served on “*all persons directly affected*”, rule 3(4) gives court discretion at the hearing to order service on any other person “*whether or not he is a person who ought to have been served under the foregoing provisions of this rule.*”

[20] The legal principle on *locus standi* has also changed with time and the restrictive technical rules of *locus standi* are now considered in England as outdated (see Speech of Lord Diplock in *Inland Commissioner’s* case at page 644).

In particular whereas the remedy of mandamus was previously only available to persons with direct financial or legal interest, the courts have now granted individuals with a genuine grievance liberal access and adopted a more generous concept of *locus standi* especially to persons seeking to enforce a public right. In Kenya, the change in legal policy is reflected in Article 22 of the Constitution 2010 which gives “*every person*” access to High Court to enforce Bill of Rights including persons acting in public interest. The right to fair hearing in Article 50 of the Constitution is part of the Bill of Rights and the High Court can, under Article 23 enforce the bill of rights by an order of judicial review. Similarly, Article 258 of the Constitution gives *locus standi* to every person including a person acting in public interest to institute proceedings relating to the contravention of the constitution. The substantive right to apply for judicial review and the attendant right to be heard in opposition are embedded in Common Law and in the Law Reform Act with Order 53 regulating the procedure. The rigours of restrictive concept of *locus standi* has further been eroded by Article 159(2) (d) of the Constitution which ordains that justice shall be

administered without undue regard to procedural technicalities. Thus today, the High Court should be guided and ought to have been guided in this case by the liberal constitutional philosophy in the exercise of the discretion whenever the issue of locus standi arises in judicial review proceedings and generally in public law. (See **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others – Civil Appeal No. 290 of 2012**).

[21] That analysis of the law leads us to the consideration of the appeal. By the Ruling of 8th October 2010 the High Court found the application by WKSC (appellant) to be joined and served as an interested party mainly made under Rule 3(2) and 3(4) of order 53 to be incompetent but nevertheless stated:

“It is clear from the foregoing that even if a person desires to be heard and thus becomes party to a judicial review application the appropriate application has to be made at the hearing of the judicial review motion”.

The appellant claims that it attended the hearing of the judicial reviews application through counsel pursuant to that finding and under its statutory right to be heard in opposition. Although the court in its ruling of 12th October 2010 said at the beginning that the appellant has already lost the right to be heard further in the application for judicial review by the dismissal of its application to be joined as an interested party, it later rejected the contention that the appellant’s second attempt to be heard was res judicata and made a finding that res judicata does not apply to judicial review. The court also reconsidered the provisions of rule 3(4) and made a finding that it would come to applicant’s aid during the hearing of the application but only at the instance of the court.

Further, the court reconsidered rule 6 of order 53 and made similar finding that the rule would come to the aid of the appellant with the sanction of the court. The court made a finding thus:

“The issue relating to the licensing or otherwise of the applicant by the respondent essentially revolves around themselves such that West Kenya Sugar Company limited and West Kenya Growers Co. Limited would be deemed to be strangers in this matter.”

The court in addition said that the two entities should await the verdict of various pending suits and thereafter make necessary steps. The court also made a finding in essence that the two entities cannot be affected by a decision which has not been made. There is yet another finding that a party who abuses the court process with such vigour and intensity should not expect the court to grant it a right of hearing a second time. The court ultimately made a finding that there was no proper justification for the appellant and Weko to be heard as affected parties. The previous application was not dismissed because of abuse of process of court in the manner stated in the second ruling.

[22] We have revisited those findings because it was submitted by Mr. Kemboi that the court did not in the ruling of 12th October 2010 determine whether the appellant was a party or that he had a right to be heard and also because the respective counsel for KSB and BSM laid great emphasis on the fact that as there was no appeal against the ruling of 8th October 2010 it was binding. However, it is apparent from the ruling of 12th October 2010 that the court appreciated that its previous ruling did not preclude the appellant from being heard and made a fresh determination of *locus standi* under rule 6, and in its discretion ruled that there was no proper justification for hearing the appellant and Weko. By partly relying on its previous ruling, the court indirectly imported into the second ruling the grounds on which the *locus standi* was denied in the first place.

In addition, the history of the dispute and the facts on the basis of which *locus standi* was denied in the first place were argued at length by all counsel. In particular the agreement dated 21st July 2006 between the appellant and KSB relating to exclusive zones was challenged at length by the respective counsel for KSB and BSM. It was submitted that the agreement did not give the appellant *locus standi* as it was an illegal contract and therefore unenforceable. It was also submitted by the counsel for KSB and BSM that the Sugar Act did not create exclusive zones or give the appellant a right to be heard in opposition to an application for a licence. So the entire factual and legal spectrum upon which the court found that the

appellant had no locus standi in the judicial review application has been made the subject of the appeal. It is the finding of lack of locus standi in the judicial review application which is the focus of the appeal.

The question of legality of the agreement of 21st July 2006 and whether or not it is *ultra vires* the Act has not been conclusively determined in any judicial proceedings. In any case, the appellant claimed that the agreement only recognized existing rights. The interlocutory ruling of **Koome, J.** (as she then was) dated 17th September 2010 in Milimani HCCC No. 2006 of 2010 which is heavily relied on by respective counsel for the respondents has been misunderstood. In that ruling the learned Judge was dealing with an interlocutory application by the appellant to restrain KSB from granting BSM a licence to operate or construct the sugar mill pending the hearing of the suit. It is apparent that in paragraph 12 where it is stated that the agreement was illegal, *ultra vires* and unenforceable, the Judge was only referring to the submissions of Mr. Kemboi. This is clear from paragraph 30 where the Judge indicates what the Judge had recorded before was a summary of salient issues. The decision of the learned Judge starts from paragraph 21. It is clear from paragraph 25 that she left the issue of legality of the agreement for determination by the trial court. All that the Judge did was to dismiss the application without determining the issues raised in the suit. The Judge recognized that she had no jurisdiction to determine the issues at an interlocutory stage. As the learned Judge did not determine the substantive issues, J.R. Karanja, J. with respect misunderstood the ruling when he said in the Ruling of 8th October 2010 that he could not sit on appeal against the decision of Koome, J.

[23] Moreover, the High Court made a fundamental error of law in its ruling of 12th November 2010 by finding summarily that the issue of licensing revolved around BSM and KSB; and that the appellant was a stranger in the matter. The Kenya Sugar Board is an administrative body with statutory powers. The power of licensing is a public duty. The judicial review application sought performance of public duty of licensing. The remedy of mandamus has a public law characteristic and any person affected by the decision or who has a genuine grievance could intervene at the discretion of the court. The question of *locus standi* could not have been properly decided in abstract as a preliminary issue. It had to be decided having regard to legal and factual context of the dispute.

The question of abuse of process which the High Court used in the ruling of 12th November 2010 to deny the appellant a right to be heard is also a question of mixed fact and law. The dispute about the registration and licensing of BSM has not been judicially determined in any civil proceedings. The court had also to consider whether the two pending suits H.C.C.C. No. 2006 of 2010 and constitutional application No. 59 of 2010 would be rendered futile if the judicial review application succeeded. There is also the legal question whether, if the appellant allowed the judicial review application to proceed without raising an objection and if the application succeeded the appellant could later raise the issue of licensing in the two pending suits. These were some of the matters to be considered before the court could tell the appellant, as it did, to await the verdict of the court in the other proceedings and before it arrived at a decision that the appellant should be denied a right of hearing for the reason of abuse of court process.

The issue of *locus standi* was not a simple and straight forward matter that could have been properly and finally determined independently of judicial review application. The court was led astray by lengthy submissions by respective counsel which mixed the issue of *locus standi* with the merits and which erroneously led to the determination of the merits of the appellant's case outside the judicial review application and thus without hearing the appellant on the merits within the judicial review application.

This was a fundamental error. The court should have first decided whether the appellant had a prima facie case on *locus standi* and if satisfied should have allowed the appellant to be heard on the merits in opposition to the judicial review application.

[24] On analysis of the factual and legal context of the dispute and without deciding the legality of the agreement of 21st July 2006 or whether, indeed, the appellant abused the court process, the appellant had *locus standi* for the following reasons:

1. The judicial review application sought the performance of public duty by an administrative

body.

2. The appellant had built a sugar mill long before BSM built its sugar mill and had been advanced shs. 423 million by KSB for development of sugar cane farming by the farmers who would supply the mill with sugar cane. This fact was admitted by KSB in its defence in HCCC No. 2006 of 2010
3. The appellant as a miller was an interested party in the sugar industry as defined in the Act, and had in addition specified statutory duties including maintaining and developing adequate milling capacity.
4. BSM had constructed a sugar mill close to the appellant's sugar mill.
5. The registration of BSM was controversial and KSB had foscillated the dispute. The Certificate of Registration of BSM given on 13th April 2005 was revoked on 3rd October 2008 and reinstated on 26th February 2010.
6. The appellant had consistently opposed the registration of BSM maintaining that its registration would lead to its sugar mill being rendered economically unviable, unsustainable and eventually to its collapse.
7. The appellant had instituted proceedings – High Court judicial review case No. 17 of 2005 which was withdrawn after KSB agreed not to register BSM and later HCCC No. 2006 of 2010 to stop the restoration of registration of BSM which was still pending.
8. The issue of registration and licensing of BSM had not been judicially determined in any judicial proceedings.

On the basis of those factors, the appellant was closely connected with the licensing of BSM and the appellant was a proper person to be heard in opposition to the judicial review application in the context of Rule 6 of Order 53. The determination of the merits of the appellant's case, including locus standi, after the hearing of the application on the merits was a different matter.

In conclusion we are satisfied that the High Court did not exercise its discretion judicially. It misapprehended the law on judicial review and the applicable test and ultimately reached a decision which is plainly wrong. The decision to deny the appellant a hearing in a matter which the appellant was so closely connected vitiated the subsequent proceedings.

[25] The second appeal is against the order of mandamus granted on 30th November 2011.

By the application for judicial review dated 20th April 2010, the BSM sought an order for mandamus to compel KSB to issue to it an operating licence to commence milling at its plant and an order for prohibition to direct KSB to desist from unduly interfering with the milling enterprise. The High Court granted the order of mandamus but dismissed the application for order of prohibition.

The applicant (BSM) averred in the statement amongst other things, that it had completed a sugar mill at sum in excess Shs.3 billion but it could not commence to mill sugar without a licence; that granting a licence is an expected and sequential enterprise after construction; that it had made an application for an operating licence and had satisfied all the conditions under S.15 for the Sugar Act and that KSB has no lawful reason to decline to grant the operating licence. In the statement to support the application for leave, BSM had stated in paragraph (h) that it was;

“apprehensive that Kenya Sugar Board, might delay and or decline to issue an operating licence to the applicant.”

The application for a licence for a sugar mill made by BSM to KSB dated 10th April 2010 and the

Certificate for Registration dated 13th April 2005 was annexed to the application for leave.

As already stated, Erick Ng'eno filed a replying affidavit to the application in which he explained the powers and functions of KSB the history relating to registration and the previous litigation including the conservatory orders given in constitutional petition No. 59 of 2010 which he said were still in force. He averred in para 21 partly thus:

“...as the respondent (i.e. KSB) was preparing to deliberate on the aforesaid application for an operating licence pursuant to Section 15 of the Act and in particular to ensure that the condition necessary for issuance for operating licence have been met by the applicant, West Kenya Sugar Company Limited sought to be enjoined in these proceedings.”

He deposed in paragraph 23 that the delay to consider the application was caused by matters beyond the control of KSB and in paragraph 24 that the court lacked jurisdiction to grant the reliefs sought in the application as drawn and filed. The KSB also filed a notice of preliminary objection to the application. Mr. A.B. Shah and Mr. P. Otieno for BSM submitted in the High Court in support of the application that there was no reason for KSB not granting the licence; that it had been established that there was no exclusive zones; that it was wrong for KSB to have entered into agreement of 21st July 2010 with WKSC; WKSC had abused court process by filing the constitutional petition and obtaining conservatory orders, the constitutional court cannot gag the court; having allowed registration of BSM, it had legitimate expectations to obtain a licence and that the reasons given should not stop the court from granting a licence.

Mr. Kemboi submitted in the High Court on the competence of the application on the main grounds that there was no legitimate complaint against KSB and that the application was premature. He contended that KSB had not made any decision nor abused its discretionary powers and in absence of proof of abuse the court should not take the responsibility of KSB. He further contended that for as long as no action has been taken and the failure to act has not been caused by deliberate refusal to perform its duties, mandamus cannot issue. He also drew to the attention of the court that the order of mandamus would create problems to KSB on how to exercise the duty under the Act.

The learned judge described the scope for mandamus thus:

“All that the applicant is requested to do to satisfy the grant of an order of mandamus was to show that the respondent has distinctly determined not to do what is demanded of it.”

In granting an order of mandamus, the learned judge reasoned thus: the quest for a licence began in 2005 when BSM was granted the certificate for Registration; that the application for licence on 10th April 2010 was a mere formality and could have been acted upon immediately; that BSM had legitimate expectation that licence would be granted; that KSB cannot hide behind the cloak of court cases as it was responsible for that state of affairs and that KSB had not shown a reasonable cause for not issuing a licence and that BSM has satisfied all conditions for grant of licence.

[26] The appeal raises four main grounds, namely lack of jurisdiction by High Court to entertain application for, and to grant an order of mandamus and to compel KSB to grant a licence, usurping the duties of KSB, violating and compromising the applicants rights to secure a fair administration action by KSB under S.47 of the constitution by directly granting an order of mandamus and lastly denying the appellant an opportunity to be heard.

Mr. Kibe Mungai contended, *inter alia*, that the jurisdiction of the High Court was to supervise decision making process; that until KSB had considered the application the High Court lacked jurisdiction to grant an order of mandamus, and the issue was not justifiable, that High Court made a fundamental error of law by failing to appreciate that it could only compel KSB to expeditiously consider the application for a licence as KSB had a statutory discretion to consider other factors; on the basis of the material before him, the High Court could not properly and lawfully decide whether BSM had complied with requirements of S.15 and 16 of the Act to justify an order to compel KSB to issue a licence and that the

order of mandamus was null and void.

Mr. Kemboy opposed the appeal and submitted that the appeal is worthless as the order of mandamus has been complied with and the licence renewed for the 4th time; that the issue of jurisdiction could only have arisen if court had directed KSB to issue a certificate of registration and that the granting of licence under S.15 of the Act does not require prior consent of competing miller.

The appeal is also opposed by Mr. Nowrojee who has revisited the history of the entire saga in his written and oral submissions. He contended that, as the appellant was not a party in the judicial review application it has no locus standi in the appeal; that issue jurisdiction does not arise as granting mandamus was an issue for discretion; that there was constructive refusal to grant a licence; that the judge found the conduct of KSB unreasonable; where there is a refusal express or constructive and where there is unreasonableness the court has power to correct by order of mandamus; appellant has no right to be heard by KSB as millers are represented in the Board and that the matter has been overtaken by events as the licence is an annual licence.

[27] Section 14(1) of Sugar Act provides that no person shall operate a sugar mill or a jaggery mill unless he is a holder of a current licence issued by the Board for that purpose and section 15(1) provides:

“The Board shall not issue a licence under the Act unless:

- a. ***It is of the opinion that the applicant is a fit and proper person to hold such a licence; and***
- b. ***It is satisfied that the applicant has sufficient knowledge, experience and capacity to enable him conduct business or that he has amongst his staff a person with such knowledge and experience:***

Provided that the issuance of a licence to an applicant under this section shall not be withheld without reasonable cause.”

Further, section 15(5) of the Act provides:

“An application for renewal of a licence shall be made to the Board not later than the 1st June in the year in which the current licence is due to expire.”

[28] It is convenient to deal first with two issues whether it was lawful to deny the appellant an opportunity to be heard in opposition to the application for judicial review and whether it has a right of appeal against the order of mandamus.

In the previous appeal – that is Civil Appeal No. 90 of 2001 we have already held in essence that the right to be heard and the merits of grounds of opposition are two separate issues which should be disentangled from each other. We have also held that the appellant had *locus standi* to be heard in opposition to the application in the circumstances of the case. So the issue of the right to be heard has already been decided in favour of the appellant. The correctness of our decision is reinforced by the fact that even after the appellant was excluded from participation some of the facts on which the appellant’s right to be heard were based were not only re-argued and reconsidered by the High Court but have been resurrected in this appeal. The denial of the opportunity to be heard in opposition to the judicial review application vitiated the judicial review proceedings and rendered the order of mandamus invalid.

[29] The fact that the appellant sought to be heard in judicial review application and was denied the opportunity gives it a right to appeal against the resultant orders of mandamus given without hearing by virtue of s.8(5) of the Law Reform Act which provides:

“Any person aggrieved by an order made in exercise of the civil jurisdiction of the High Court under this section may appeal to the Court of Appeal.”

The phrase “any person aggrieved” is not restrictive like the phrase “persons directly affected” used in

Rule 3(2) and apparently covers a wider class of persons. Indeed the courts have been progressively adopting a more generous interpretation of who is a person aggrieved - (see **Cook v Cathed Borough Council [1990] 2 QB1**). The appellant considers that the order of mandamus has prejudicially affected its economic interests and in context of this case, is a person aggrieved by the order.

In any case Mr. Nowrojee has cited the case of **Kamlesh M. D. Pattni vs Starwood and Resorts World Wide Inc. & Others** – Court of Appeal application No. NAI 330 of 2001 where it was held in essence, that a person who is not a party to the suit in the High Court but is directly affected by the appeal within the meaning of Rule 76(1) Court of Appeal Rules [now rule 77(1)] has a right to lodge a notice of appeal and be heard by the court.

[30] The two questions framed as jurisdictional issues are indeed jurisdictional in nature. Although the High Court has jurisdiction to entertain judicial review application and grant judicial review orders, it can only do so with the narrow judicial review jurisdiction. If the application for mandamus is not based on legitimate grounds on which judicial review jurisdiction is exercised and the complaint is not justifiable the question of jurisdiction arises. And if the High Court instead of supervising the decision making process indeed usurped the statutory discretion of KSB and exercised jurisdiction that it did not in law have a question of jurisdiction to grant an order of mandamus in the form it did necessarily arises.

It is however a question of discretion if the High Court acting within its judicial review jurisdiction exercised its discretion to grant or not grant an order of mandamus.

The two questions have to be determined on the basis of the provisions of the Act and the relevant facts.

[31] This court in **Kenya Examination Council v Republic - Exparte Geoffrey Gathenji Njoroge & 9 others**, Civil Appeal No. 266 of 1996 (unreported) enunciated the law on the scope of judicial review including the remedy of the order of mandamus.

In **REX v The Licensing Authority for Goods Vehicles for Metropolitan Traffic Area – Exparte B.E. Barret LD (1949) 2 KB 17 Lord Goddard C.J. said at p. 22:**

“For a certiorari, where jurisdiction is in question the court must be satisfied that there was either an absence of jurisdiction or an excess of jurisdiction, and to allow an order for mandamus to go there must be a refusal to exercise the jurisdiction. The line may be very fine one between a wrong decision and a declining to exercise jurisdiction”

As **Birketh, J.** explained in the same decision at page 30, a refusal may be conveyed by an absolute refusal in terms or may be by conduct amounting to a refusal.

In **Chief Constable V Evan [1982] 3 All ER 141 Lord Hailsham at page 143** explained the remedy of judicial review under RSC Order 53 as intended to protect an individual from abuse of power and said:

“It is not intended to take away from authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.”

In a frequently quoted passage **Lord Brightman** said in the same case at page 154 para d.

“Judicial review is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power”.

In the **Kenya National Examination Council** (supra) the court quoted from **Halsbury’s Laws of England, 4th Edition Vol I** at page 111 para 90 which says in part:

“where a statute, which imposes a duty leaves a 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 that duty in question to be carried out in a specific way”.

Further in the same case the Court said;

“The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence. The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence.”

In licensing cases where the abuse of licensing power is refusal to exercise the licensing duty the licensing authority is usually commanded by an order of mandamus to hear and determine according to the law (See **The Queen V Cotham (1895) 1QB 805, R v Manchester Corporation, [1911]1 KB 560, Regina v Secretary of State for Home Department ex parte Phansopkar (1976)1 QB 606**).

[32] The Constitution has expressly expanded the scope of judicial review in relation to breach of fundamental right or freedom in the Bill of Rights as by Article 23(3)(f) the High Court can grant an order of judicial review as a relief for breach of fundamental right or freedom. The determination of the question of breach of fundamental right or freedom is likely to involve the merits of the decision of a statutory, or public officer or State Officer and not merely the decision making process which is the confine of judicial review under the Law Reform Act and Order 53 CPR. Article 258 of the Constitution is silent as to reliefs the High Court can grant for contravention of other provisions of the Constitution particularly whether the High Court can grant an order for judicial review. The decision whether orders of judicial review are available for general contravention of the Constitution under Article 258 rests with the superior courts and we have to await their decision.

If the decision is about the decision making process and the application is made under Law Reform Act and order 53 CRP as in the present case, the jurisdiction of the court is exercised within the narrow limits of judicial review jurisdiction – the decision making process.

[33] Turning to the instant case, the Act is explicit that KSB has a duty to licence sugar mills. It is implicit from the proviso to S.15(5) that the application for a licence has to be made. It is also clear that although KSB has a duty to grant a licence, the Act has left the discretion whether to grant or refuse to KSB. However, in exercising that discretion it cannot reject an application without reasonable cause. It is thus implicit that KSB has to give reasons for rejecting an application. KSB is prohibited from issuing a licence unless the conditions specified in Section 15(1) (a) and (b) have been satisfied.

The application for a licence by BSM is dated 10th April 2010. The application for judicial review was made on 14th April 2010 – four days thereafter. The application which appears to be in a prescribed or printed form contains various information which the applicant had to provide including the name of directors of BSM, source of power, type of sugar products to be manufactured, technology to be applied, brief description of the manufacturing process to be employed, quality of the sugar products, source and availability of sugarcane. Further the applicant was required to demonstrate that the miller’s operations are economically and technically viable, that all contractual obligations to the grower or outgrower institutions can be met as provided in the Act. No doubt in exercise its discretion KSB is intended to promote the policy and object of the Act. The decision whether or not the conditions in section 15(1) (a) and (b) have been met solely rests with KSB. Further, the discretion whether or not a licence should be granted is left to the discretion of KSB.

[34] The true basis of the application for mandamus was that BSM was “*apprehensive that (KSB) might delay and or decline to issue a licence.*” BSM also averred in the statement and supporting affidavit that KSB had “*no lawful reasons whatsoever to decline to grant a licence*”. The ruling of the High Court dealt with the duty to grant a licence as opposed to the duty to hear and determine the application for a license. It was ruled that the granting of a licence was a matter of course. Mr. Kemboy made strong submissions in the High Court on the legitimacy of the application for order of mandamus but had not filed a cross appeal. The issue of justiciability of the application for mandamus has been taken over in this appeal by Mr. Kibe Mungai. It is apparent that the application for order of mandamus was grounded on events

which had not occurred. Where a statute imposes a duty on a statutory body but gives the statutory body discretion on how to execute its duty, the correct test before a mandamus can be applied for is whether the statutory body has determined the matter according to law and, if there is no determination, whether it has unreasonably refused to exercise its discretion.

Demand and refusal are necessary prerequisites. It follows, and we hold that in this case the application for order of mandamus did not fall within judicial review jurisdiction. The complaint was not justiciable. It was incompetent and the High Court lacked jurisdiction.

[35] Although BSM did not claim in the application that the appellant had either delayed or refused to grant a licence the learned Judge considered the issue of delay and said:

“It is instructive to note that the applicant’s quest to obtain a licence commenced immediately after grant of the registration certificate, in the year 2005. It’s formal application of 10th April 2010 was a mere formality and could have been acted upon immediately.”

It has also been submitted that there was constructive refusal to grant a licence. Where the statute does not stipulate the time within which the action or the decision should be made, the statutory duty must be performed without unreasonable delay. (See S.58 of the Interpretation and General Provisions Act). Unreasonable delay is considered as an abuse of power.

Refusal can be express or can be implied from the conduct (for direct refusal, see the **King v London County Council**. ‘**Exparte Corrie [1918] 1KB 68**, **Regina v Secretary of State for Home Department ex parte Phanson P Ker** (supra) and for refusal by conduct- see **Regina v. Tower Hamlets London Borough Council – ex parte Kyne Lavenson Ex parte [1975] 1 QB 75**).

Delay which can be tantamount to refusal should be computed from the time demand was made. In this case, demand for a licence was made by an application dated 10th April 2010. As already stated the application for an order of mandamus was made four days later. It was factually wrong for the learned Judge to say that a search for a licence started in 2005 and to limit the time to one day when the application for licence should have been granted. After the certificate of registration was issued BSM had to construct the sugar mill which it says was completed in 2010 without indicating the specific time. KSB could not reasonably be blamed for inaction before the application for a licence was made and received.

Erick Ng’eno has explained in the replying affidavit that delay by KSB to consider the application for a licence was caused by matters beyond its control. He has particularly referred to the ex parte order of injunction given on 1st April 2010 in HCCC No. 206 of 2010 restraining KSB from entertaining an application for licence or granting the licence within 24kms of the appellant’s mill which order was lifted on 17th September, 2010. By a letter dated 4th May 2010 KSB notified BSM – that it was unable to take action on the application immediately as it had been served with the said court order. BSM was aware of the court order when it made the application for mandamus as it had applied to be joined in the suit and had made an application to set aside the order. The KSB could not have considered the application without being in contempt of the court order. In these circumstances, KSB neither delayed nor refused to consider the application for a licence. It was, by no means, not in abuse of its discretionary power. Even if there was delay or refusal to consider the application for a licence, the lawful relief was to order KSB to hear and determine the application according to the law.

[36] It has been submitted that the High Court usurped the discretionary power by granting an order of mandamus compelling KSB to grant a licence . When the application for judicial review was made, BSM knew that the appellant could not grant a licence for the reason of the existence of an order of injunction. The grounds on which the application was based indicates that what BSM was seeking was in truth a mandatory injunction in the guise of mandamus. The impugned ruling shows that the learned Judge adjudicated on the rights of BSM to a grant of licence and granted the order of mandamus because BSM was entitled to it on the merits.

We say so because in granting the order the High Court took into account the fact that the KSB had

already issued a certificate of registration, that the granting of licence was a mere formality; that BSM had legitimate expectations to be granted a licence; that it had not been shown that BSM was unqualified to hold a licence; and that no reasonable cause had been shown for withholding a licence.

In the words of Lord Hailsham in **Chief Constable v. Evans** (supra) judicial review is not intended to take away from a party (in this case KSB) the power and discretions properly vested in it by law and to substitute the High Court as the body making the decision. The obiter dictum in **Kenya National Examination Council** (supra) in effect that the High Court cannot through mandamus compel the licensing court to either grant or refuse to grant a licence has already been referred to.

[37] Mr. Nowrejee relied on three authorities from the High Court to support the order of mandamus two of which were relied on by the High Court. The three authorities are only persuasive. Each case depends on its own facts and the statutory provisions governing the duty and the exercise of duty.

In **Republic v. Cabinet Secretary for Ministry of Interior and National Government & Another - High Court Misc. Application No. 324 of 2013** an order of mandamus was issued to compel the Cabinet Secretary and the Director, Department of Immigration to issue relevant documents for registration of the applicant therein as a Kenya citizen. The applicant's application for registration had not been considered for eight months. She alleged that her constitutional right under Article 57 of the Constitution to a fair administrative action had been contravened. The High Court ruled that the refusal to consider the application for a long time was an abuse of power and a breach of Article 47. That case is distinguishable. It involved enforcement of Bill of Rights under the Constitution. The application was in essence for enforcement of Bill of Rights except in form. A judicial review can be granted as a relief in constitutional proceedings for enforcement of Bill of Rights. The true construction of Article 23(3) (f) as read with article 22(1) and 22(3) is that proceedings for enforcement of Bill of Rights may be instituted in the High Court in accordance with Rules made under Article 22(3) but in those proceedings the High Court is free to give a remedy for contravention of Bill of Rights by way of an order of certiorari, prohibition or mandamus. Judicial review under Law Reform Act and order 53 CPR is not a proper procedure for enforcement of Bill of Rights.

In **Republic v Director of Fisheries – exparte Wananchi Marine Products (Kenya) Limited [2006] 1 KLR (E&L) 503**, the report shows that the Director of Fisheries was bound by statute to issue Fish Export certificate and Fish Health certificate but had unreasonably refused to issue a Fish Health certificate after the applicant had already exported fish. The report does not show that the Director of Fisheries had a statutory discretion. That case is distinguishable from this case as there was a refusal to issue a certificate and the statute did not give the Director discretion.

In **Republic v. Attorney General, exparte Kamu & Another [2006] 1 KLR (E&L) 441**, the Commissioner of Police was compelled to deploy police officers to perform duties under section 14(1) of the Police Act of, *inter alia*, maintaining law and order.

That case is also distinguishable on the footing that the section of the Police Act relied on did not impose specific duties on the Commissioner of Police nor give him discretion. The order was made on the basis that the function of the police was broad enough to allow police to intervene and aid individuals in protection of proper rights. It was really a case of compelling the executive to perform its general duties.

In cases where a state officer or public officer has free discretion, the court in exercise of judicial control jurisdiction has limits. As long as the executive power is exercised reasonably the court cannot substitute its own views for views of the decision maker as to what is a reasonable exercise of power for the decision maker is alone charged and authorized by Parliament to exercise a discretion (see *R. vs. Secretary of State for Trade and Industry Exp. Lonrho PLC* [1989] 1 WLR 525 at p. 535 B-C. In such cases the court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. (**R v. Boundary Commission Exp. Foot** [1983] Q.B. 600 at p. 626 E-F (See also **Mumo Matemu's** case (supra).

[38] The High Court was ill equipped to decide whether or not the conditions for granting a licence had

been met; some of the information provided in the application for a licence was of a technical nature. Condition stipulated in section 15(1) (b) of the Act refers to technical experience and capacity. Those factors could only have been properly evaluated by persons well versed in matters pertaining to sugar industry and the application of the policy of the Act. The factors that the High Court took into consideration were some of the matters that the KSB could have taken into consideration in dealing with the applicant for a licence or could have been considered in subsequent proceedings had KSB considered and rejected the application.

From the foregoing we are satisfied that KSB had not abused the power of licensing and that the High Court made a fundamental jurisdictional error of law by usurping the licensing discretion of the licensing authority and substituting it with its own decision. It had no jurisdiction to do so.

The appellant contends that the usurpation of power of KSB by the High Court contravened its constitutional right under Article 47 to a fair administrative action. The respondent on the other hand contended that the Act does not give a right to any party to be heard by KSB in opposition to the application for a licence. The Act is a pre-constitution legislation. By sub-Article 8(1) of the sixth schedule – the transitional provisions, the existing law has to be construed with the alterations, adaptations, qualifications, and expectations necessary to bring it into conformity with the Constitution. Article 47 gives every person a right to a fair administrative action which includes a right to lawful and procedurally fair action. KSB is an administrative body entrusted with public duties which are to be exercised for the benefit of the public. If by Article 22(2) a person acting in his own interest or in public interest has locus standi to institute proceedings in the High Court for enforcement of a right to a fair administrative action, it follows that by necessary adaptation such a person has a right to be heard in opposition to application for a licence under the sugar Act. For the same reasons that gave the appellant standing to be heard in the High Court (which we have already stated) in opposition to the application for judicial review the appellant had a right to be heard by KSB in opposition to the application for a licence. The usurpation of discretionary powers of KSB by the High Court took away the appellant's right to fair administrative action before KSB.

[39] The appellant is also aggrieved by refusal by the High Court to consider the existing order in the petition No. 59 of 2010 restraining the appellant from granting a licence. It is submitted that, in view of the existing order it was not proper, prudent and in the best interest of administration of justice to grant the orders. Mandamus does not lie as a matter of right or course. There may be genuine bars which may prevent the court from exercising its discretion (see **The Republic v. Director – General of East African Railways Corporation- exparte Kaggwa (1976 -80) KLR 654**). It was submitted in the ruling dated 12th November, 2010 that the order in the constitutional petition was obtained in abuse of the process of the court.

The High Court held that it was not bound by the orders of the constitutional court and speculated that if the petition succeeded the orders might not be enforceable. The validity of the order of injunction could only have been determined in the constitutional petition itself. The fact is that by the time the High Court issued an order of mandamus KSB was not capable of obeying it without committing a contempt of the court.

The consequences of the order of mandamus is illustrated by the record and by the ruling of 17th February, 2012 in Civil application No. NAI 298 of 2010. The ruling is in respect of an application for stay of execution of the order of mandamus pending appeal. The record shows that BSM instituted contempt of court proceedings against KSB. The ruling shows KSB had problems in complying with the order as it was faced with two conflicting orders from courts of cognate jurisdiction. It had to seek the advice of the Attorney General who advised that the order of mandamus being final and the order in the constitutional petition being interlocutory the order of mandamus should be complied with. It was not a proper exercise of discretion to grant an order of mandamus which contradicted a previous order of a court of cognate jurisdiction and which was incapable of immediate compliance without committing contempt of court.

[40] It has been contended by the respondents that the appeal has been overtaken by the grant of

subsequent annual licenses.

On its part, the appellant contends that if there was no jurisdiction to grant the order of mandamus, the order is null and void and anything done in pursuance of the order is also null and void. The appellant also contended that the application for licence is still pending and that if the original licence is invalid any subsequent renewal is invalid.

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 licence nor to consider an application for renewal based on original licence issued by it. The original licence 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 licence capable of renewal within the ambit of the Act.

[41] There remains the question of reliefs. The appellant is seeking an order that the order of mandamus be set aside and substituted with an order dismissing the application for mandamus. The order of mandamus has to be set aside in fidelity to the law. The powers of this Court are spelt out in s. 3(2) of the appellate Jurisdiction Act and Rule 31 of Court of Appeal Rules. The court has power to exercise jurisdiction vested in the High Court and has power to vary the orders of mandamus.

The interlocutory order of injunction given in the constitutional petition was of a limited duration pending the hearing of the interlocutory application interpartes and we assume that it has expired by effluxion of time. It is just in the circumstances that the KSB should be compelled to hear and determine the pending application.

Regarding Civil Appeal No. 90 of 2011 the appropriate order would be to order rehearing of the application for orders of mandamus with the participation of the appellant. That would not be necessary as there is a finding that the High Court had neither jurisdiction to entertain the application for mandamus nor to usurp the powers of KSB.

[42] We have reached this decision with much regret that the issue of licensing which could have been determined quickly by KSB, the Ministry of Agriculture and the Sugar Arbitration Tribunal with the goodwill of the parties was allowed to blossom into a court battle of big magnitude.

[43] 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 licence 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.

The appellant is entitled to costs of the two appeals and to the costs in the High Court.

Those are the orders of the Court.

Dated and delivered at Kisumu this 19th day of September, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

SANKALE ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR