



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM:O’KUBASU, WAKI & AGANYANYA, J.J.A)**

**CIVIL APPLICATION NO. NAI. 298 OF 2010 (UR. 209/2010)**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED .....APPLICANT**

**AND**

**KENYA SUGAR BOARD ..... 1<sup>ST</sup> RESPONDENT**

**BUTALI SUGAR MILLS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

***(An application for stay of execution from the ruling and order of the High Court of Kenya at Kisumu (Karanja, J.) dated 30<sup>th</sup> November, 2010***

**in**

**KSM. JUDICIAL REVIEW CASE NO. 17 OF 2010)**

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**RULING OF THE COURT**

1. Although the record of the motion before us runs into 12 volumes of documents, affidavits and authorities, and the submissions of counsel on all sides were intensive and extensive, it is really a short matter at this stage. The motion seeks an order under **rule 5 (2) (b)** of the Rules of this Court for an order: -

*“2. THAT there be a stay of execution of the ruling and order of the superior court at Kisumu in Judicial Review Case No. 17 of 2010 dated the 30<sup>th</sup> day of November, 2010 until the applicant’s intended appeal is lodged, heard and determined.”*

2. The guiding principles in considering such application are now well settled and learned counsel on all sides articulated them admirably. The onus is on the applicant to show, not only that the intended appeal is not frivolous or is arguable, even on a solitary ground, but also that if the order sought is not granted, the success of the intended appeal would be rendered nugatory. The court is also under a statutory duty spelt out in **Sections 3A** and **3B** of the Appellate Jurisdiction Act, to consider and apply the overriding objective of the Act to facilitate the just, expeditious, proportionate and affordable resolution of applications and appeals that come before the court. What is the background to the application?

3. The applicant is **West Kenya Sugar Company Ltd** (“WEKSCOL”). It is one of the three big sugar millers who, for a long time, have operated in Western Province of Kenya, the others being **Mumias Sugar Company Ltd.** and **Nzoia Sugar Company Ltd.** Wekscol commenced operations in 1979 in Malava, Kakamega and by the year 2010, it had invested over Shs.5 billion, employed over 1000 staff members and engaged over 50,000 farmers as

outgrowers for supply of sugarcane, covering about 20,000 hectares. It says there was an agreement with the relevant authorities in the year 2000 that all sugar milling zones be demarcated to cover a radius of 25 Kilometres of an existing sugar miller which would form the designated zone for that sugar mill. Wekscol is represented before us by learned counsel Mr. Kibe Mungai.

4. In the year 2005, a new kid in the name of **Butali Sugar Mills Ltd** (“Butali”) landed on the block and pitched tent on **LR. No. Kakamega/Malava/303 (plot 303)**. That was barely 10 Kilometres away from Wekscol’s milling plant. It applied to the Kenya Sugar Board (KSB) for registration as a sugar miller and KSB obliged and granted it on 13<sup>th</sup> April, 2005. **Section 16 (1)** of the Act provides for such registration thus:

**“16. (1) No person shall conduct the business of a miller unless he is registered as such by the Board and no such business shall be conducted at any premises other than the premises specified in the register.”**

The milling plant, whose foundation stone was laid with pomp and ceremony by none other than the President of Kenya in 2007, was constructed. Butali is represented before us by learned counsel Mr. Nowrojee and Mr. Ochieng Oduol. KSB is represented by Mrs. Oburu.

5. Wekscol furiously protested the registration of Butali as a sugar miller and went to court in **Hct. Misc. App. 1127/05** seeking an order of *certiorari* to quash the registration, and a prohibitory order to stop KSB from granting any fresh registration to Butali. The suit was subsequently settled and withdrawn after an agreement was signed between Wekscol, KSB and the Ministry of Agriculture on 21<sup>st</sup> June, 2006 that KSB would not grant a licence or entertain any application by Butali or any other person to operate or construct a sugar mill within a radius of 24 Kilometres mill to mill of the location of Wekscol’s plant. KSB then wrote to Butali in August, 2006 directing it to move its plant away from Wekscol’s designated zone and maintain a distance of 24 Kilometre radius between the two. Wekscol would in turn undertake to compensate Butali for the relocation. Butali rejected that arrangement as it was not a party to the agreement and filed suit against KSB and Weksol seeking damages in excess of Shs.590 million for delaying construction of the milling plant since 2005. The suit, **Nairobi H.C.C. 168/07**, is still pending in court. Butali then continued to expand development activities on plot 303, and negotiating contracts with Butali Sugarcane Outgrowers Company Limited, but in 2008, KSB warned it that it would revoke its registration if it continued to defy the directive to move. The threat was actualized on 3<sup>rd</sup> October, 2008 when KSB revoked the registration on plot 303 pending identification of a new site by Butali.
6. Butali protested vigorously, by insisting that it had offered to relocate upon payment of Shs.1.3 billion but the offer was ignored. It threatened filing another suit against KSB to challenge the revocation but KSB beat a retreat after carrying out research through the Ministry of Agriculture and considering the matter further. On 26<sup>th</sup> February, 2010, it wrote to Butali reinstating the registration. In its letter KSB referred to the substantial resources invested by Butali in cane development, relocation of schools/landholders and setting up the factory, and stated in part: -

*“Taking into account the potential adverse effect of a decision that could erode investor confidence, particularly within the context of the ongoing privatization process on state owned sugar mills; the National Vision 2030 and loss of potential socio-economic benefits, were the Board to enforce its decision to de-register Butali Sugar Mills communicated vide our letter dated October, 2008.”*

7. Six weeks later on 10<sup>th</sup> April, 2010 Butali applied for an operating licence to commence the milling of white sugar, brown sugar and molasses on plot 303. That is a requirement of **Section 14** of the **Sugar Act 2011** which provides:

**“14. (1) 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.”**

The qualifications required for issuance of a licence are spelt out in **Section 15** of the Act.

8. Before the application was considered, Butali went to the High Court in Kisumu and took out Judicial Review proceedings (**H.C. Misc. 17 of 2010**) seeking an order of mandamus to compel KSB to issue the milling licence on plot 303, and a prohibitory order to stop KSB from interfering with the sugar milling enterprise. It expressed the fear that KSB might delay and/or decline to issue the operating licence although Butali had satisfied all preconditions including construction of a sugar milling plant at a cost of Shs. 3 billion, and contracted over 21,000 out growers in Butali area who had ready sugarcane for harvest. Leave was granted to seek the Judicial Review orders and the grant of leave operated as a stay of any interference by KSB with the business operations, undertaking and enterprise of Butali. The motion was filed on 26<sup>th</sup> April, 2010.
9. Two weeks before Butali went to the High Court in Kisumu to seek leave on 14<sup>th</sup> April, 2010, Wekscol had gone before the High Court in Nairobi on 1<sup>st</sup> April, 2010 and filed **Civil Case No. 206/2010** against KSB seeking an injunction to restrain KSB from granting the licence to Butali or any other person to operate a sugar mill within a radius of 24 Kilometres of its plant in contravention of the agreement signed between them on 21<sup>st</sup> July, 2006. Butali was not enjoined in that suit. An interim order was issued *ex parte* on that day. Butali got wind of the suit in May, 2010 and applied to be enjoined as a party, which order was granted on 21<sup>st</sup> May, 2010. Both KSB and Butali opposed the application for injunction when it was heard *inter partes* before Koome J (as she then was). By her Ruling made on 17<sup>th</sup> September, 2010, the learned Judge struck out the application for injunction holding that the agreement upon which it was predicated was illegal and did not involve Butali. The court also lacked jurisdiction since the Sugar Act prescribes a Sugar Arbitration Tribunal for such disputes. There was no appeal against that decision.
10. As the Nairobi case (**206/10**) took its course, Wekscol sought to be enjoined in the Judicial Review proceedings in the Kisumu case (**17/10**) and filed a motion on 28<sup>th</sup> June, 2010. It cited the agreement dated 21<sup>st</sup> July, 2006, which in its view was enforceable against Butali, as well as statutory provisions under the Sugar Act, as entitling it to oppose the Judicial Review application. The application was heard before J.R. Karanja J who on 8<sup>th</sup> October, 2010 dismissed it in a considered Ruling. The learned Judge found that the application was incompetent as it was filed unprocedurally and that in any event it was not meritorious as the grievances of Wekscol against KSB were being addressed in a parallel suit. There was no appeal against that ruling.
11. Before the Ruling was delivered on 8<sup>th</sup> October, 2010 in Kisumu, Wekscol had on 3<sup>rd</sup> October, 2010 returned to Nairobi and filed a **Constitutional Petition No. 59/2010** against the Attorney General, KSB and Butali challenging the decision of KSB to reinstate the registration of Butali as a sugar miller and the allocation to it of some 19,000 hectares of cane which was already within the zone demarcated for Wekscol. In a chamber summons brought *ex parte* under certificate of urgency, it sought conservatory orders to stop the implementation of the decision made by KSB on 26<sup>th</sup> February, 2010, to stop the issuance of a sugar milling licence; to restrain Butali from offering extension services to cane out growers; and a mandatory injunction to compel the government to protect Wekscol from poaching of cane in its designated area. The Chamber Summons came up before Gacheche J on 8<sup>th</sup> October, 2010 (the same day Karanja J. was delivering his Ruling in Kisumu) and the conservatory orders including the mandatory injunction were granted *ex parte*. It is not clear when the orders of Gacheche J. were served on the

respondents, but it is contended that the orders were obtained without disclosing the existence of the Kisumu case which Wekscol was aware of. The Constitutional petition is still pending hearing and has since been amended substantially.

12. The Judicial Review application in Kisumu filed by Butali for issuance of a licence was opposed by KSB on the grounds, inter alia, that it was incompetent and premature. It was premature because Butali was aware of the multiplicity of suits which had been filed against KSB and orders issued thereunder which slowed down the process of considering the application for a licence in accordance with the provisions of the **Sugar Act 2001**. It was incompetent because such disputes ought to be resolved before the Sugar Arbitration Tribunal as the Act provided.
13. The application was due for hearing on 1<sup>st</sup> November, 2010 before Karanja J, but Wekscol and West Kenya Outgrowers Co. Ltd (WEKO), respectively placed affidavits on record on the same day citing their capacity as “*affected parties*”. They also appeared by counsel at the hearing to urge their side of the story. Counsel for Wekscol drew the attention of the court to the conservatory orders issued by the Nairobi court in the constitutional petition (59/10) on 8<sup>th</sup> October, 2010, and submitted that those orders ought to take primacy over the judicial review orders being sought. He also sought audience to be heard in the motion. Counsel for Weko, on the other hand raised a preliminary objection to the judicial review application for incompetence. Further submissions were made by counsel for Butali and KSB urging the court to declare that Wekscol and Weko had no *locus standi* in the motion and that the constitutional petition cannot prevent the hearing. The learned Judge considered all the submissions in totality and in a considered Ruling made on 12<sup>th</sup> November, 2010, he held that Wekscol and Weko were engaged in abuse of court process in the quest to prevent the issuance of a licence to Butali. That finding is best reproduced verbatim: -

*“This court must state herein that parties and their respective counsels should ensure that all necessary steps are taken to safeguard the integrity of the judiciary and to avoid actions likely to abuse its process.*

*Mr. Kemboy, rightly observed that it is litigants and advocates in conduct of cases similar to the present one who cripple the work of the courts and later starting complaining. It has always been the policy of the law to avoid a multiplicity of suits dealing with more or less similar subject matter and issues. This is not to say that any party with a grievance cannot approach the courts for a solution. However, in doing so a party must show that he is acting in good faith and not merely delaying a cause and wasting valuable judicial time. Bad faith may be imputed where a party tries to obtain orders similar to those sought in an earlier application or where a party brings several applications challenging the same thing. This would invariably be an abuse of the court process. Herein West Kenya Sugar Co. Ltd applied to be joined as party to these proceedings. No sooner had the application been dismissed, the company went for a Constitutional petition rather than exercise its rights of appeal against the unfavourable ruling. Even after obtaining conservatory orders in the Constitutional court, the company is here again seeking access to these proceedings under the brand “**affected party**”.*

*Prior to this application, West Kenya Sugar Co Ltd had been at the Milimani Court in Nairobi seeking temporary injunction orders against the respondent. It failed to achieve its objectives therein and sought to achieve the same objectives by being joined as an interest party in this application. It also failed herein to achieve the objectives and moved to the Constitutional court in Nairobi where it obtained conservatory orders. Notwithstanding the conservatory orders and the fact that the Constitutional reference is pending, the company herein is making a second attempt to be made a party to these proceedings even without the leave of the court. If the aforementioned conduct by West Kenya Sugar Co. Ltd is not a classic abuse of the court process what is it?*

The court added:

*“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 as doing so would be to encourage such abuse with the resultant effect of undermining the authority of the court. “**Locus standi**” signifies the right to be heard. West Kenya Sugar Co. Ltd has already lost the right to be heard further in this application by the dismissal of its application to be joined as an interested party in this matter.”*

14. In the end, the Court found there was no justification for Wekscol and Weko to be heard in the judicial review application and that the affidavits on record were placed there without leave of the court, and were thus not for consideration. As for the contention that the orders issued in the constitutional petition had primacy over other orders, the learned Judge held that there was no “Constitutional Court” properly so called which could issue orders that would take primacy over orders made by another High Court Judge. The orders were made by a court of coordinate jurisdiction which did not prevent him from proceeding with the Judicial Review application. The motion was set down for hearing on another day as Wekscol and Weko filed separate notices of appeal to challenge the Ruling.
15. Ultimately the Judicial Review application was heard on 18<sup>th</sup> November, 2010 when KSB advanced strong objections that the orders for mandamus and prohibition were sought prematurely since Butali was aware that the reasons for not considering its application as it should under **Section 15** of the Sugar Act, were beyond its control. It cited the multiplicity of cases filed especially by Wekscol, in relation to the registration and licensing of the new sugar mill, who ended up obtaining court orders in a Constitutional matter restraining KSB from acting on the matter. KSB also objected to the motion on the ground that there was a Sugar Arbitration Tribunal set up under the Act to deal with such matters. The suit, in their view, was therefore incompetent.
16. The learned Judge, Karanja J. analysed those submissions as well as those advanced on behalf of Butali and in a considered Ruling delivered on 30<sup>th</sup> November, 2010, he was persuaded that there was no valid reason why the licence should not be issued to Butali. He stated in part, thus: -

*“Since the year 2005, the respondent knew that it would eventually grant an operating license to the applicant and more so, upon completion of the applicant’s sugar milling factory. It did not have to delay the issuance of the license as if it was waiting for interference from other quarters. It was lawfully allowed and could issue such license even within a day after necessary application. It is instructive to note that the applicant’s quest to obtain an operating license commenced immediately after the grant of the registration certificate in the year 2005. Its formal application of the 20<sup>th</sup> April, 2010 was a mere formality and could have been acted upon immediately. The respondent did not have to wait for the applicant to seek the court’s intervention given the long history of the matter and the unnecessary controversy it has created.*

*The court’s most effective intervention would be by way of mandamus so that the respondent may be compelled to perform its statutory duty under the Sugar Act.”*

- 17 The court also considered the law relating to “mandamus” and was persuaded that the facts of this case gravitated towards grant of the order, again stating in part: -

*“Herein, all that the applicant was required 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 and required of it. And, from the underlying factors stated hereinabove, it is established that the respondent led and urged on the applicant to construct a milling factory for the purpose of milling sugar. A registration was issued. Therefore, the natural consequence of the registration and the construction of the milling factory was the issuance of an operating license which it would appear that the respondent is bent on not issuing yet there is no reasonable cause for such neglect. The issuance of the registration*

*certificate to the applicant and it being allowed to construct a milling factory gave it (applicant) a legitimate expectation that it will be treated in one way yet the respondent appears to be treating it in a different way.”*

The order was granted since there was no reasonable cause shown for withholding the licence, and in its extracted form, it compelled KSB to forthwith issue an Operating Licence to Butali to commence milling sugar at its plant located at LR. No. Kakamega/Malava/303.

The second prayer relating to an order of prohibition was, however, rejected on the ground that the complaints about interference were in the past and no material was introduced to show that KSB would interfere with the operations of Butali in future.

18. KSB was not satisfied with the ruling and filed a notice of appeal. So did Wekscol and Weko who referred to themselves as “Affected Parties” respectively. When Butali attempted to enforce the order of the court, KSB contended that it had been served with two court orders: - One from the Kisumu case (**17/10**) compelling it to issue a licence, the other from Nairobi in a constitutional matter (**59/10**) prohibiting the issuance. It was in a quandary. The statement further generated a general state of unrest and anxiety in the region particularly among the sugarcane outgrowers and other stakeholders. KSB sought advice from the Attorney General who advised that the final order of the court in Kisumu (**17/10**) be complied with since the Nairobi order (**59/10**) was interlocutory and both were made by Judges whose jurisdiction was coterminous. The Board of KSB met on 13<sup>th</sup> January 2011 and issued the licence to Butali.
19. As all that was happening, the application herein by Wekscol filed on 21<sup>st</sup> December 2010 seeking an order for stay of execution of the order was still pending. By the 13<sup>th</sup> of January 2011 when the licence was issued there was no order for stay, and it seems therefore that the application was overtaken by events. There followed a prolixity of Affidavits and annexures running into three volumes from Wekscol and Butali filed on 7<sup>th</sup> March 2011, 8<sup>th</sup> March 2011 and 20<sup>th</sup> May 2011. The Affidavits essentially chronicle the history of their dispute and the nefarious schemes hatched by each against the other to deprive them of their respective rights to property and the right to exploit the sugar milling potential in their exclusive areas of operation in Western Province. They both disclose respectively, the billions of shillings invested in their sugar mills; thousands of workers employed; thousands of contracts signed with sugarcane outgrowers; millions generated in revenue to the exchequer, as well as other socio-economic benefits they have generated.
20. At no time did Wekscol apply to amend the motion filed on 21<sup>st</sup> December 2010 to seek prayers which may undo the action of KSB in issuing out the licence on 13<sup>th</sup> January 2011. Instead it attempted to seek by way of affidavit what it referred to as “*a consequential order to suspend the licence*” and “*a consequential order of injunction*” to restrain Butali from milling any sugar. The supplementary affidavit seeking those remedies was filed on 8<sup>th</sup> March 2011. In submissions of learned counsel, Mr. Kibe Mungai, it was not necessary to amend the prayers since what had occurred was an illegality which the court ought to deal with peremptorily. That may well be so. But on 18<sup>th</sup> February 2012, Wekscol had returned to the High Court and amended its Petition (**59/10**) seeking orders to the same effect. That court is, of course, competent to consider and if found fit, to grant those prayers. The ogre of pursuing concurrent remedies before different courts of competent jurisdiction in apparent abuse of court process is as reprehensible as seeking to enforce an illegality in court. We shall, in the circumstances decline the invitation made by Wekscol to consider their plea for consequential orders in the manner presented herein.
21. The conduct of Wekscol in engaging parallel jurisdictions in our courts was indeed one of the frontal attacks made by Butali in the matter before us. In a lengthy address by their learned counsel, Mr. Nowrojee, we were urged not to give audience to a party who was plainly abusing the court process. Mr. Nowrojee referred to concurrent applications filed by Wekscol in Kisumu and Nairobi seeking the same or similar prayers; successive applications filed each time Wekscol

lost, using the device of different grounds even after Karanja J. found them contemptuous and there was no appeal; collateral attack on court rulings which had not been challenged on appeal; and breach of **Sections 3 A and 3 B** of the **Appellate Jurisdiction Act** by conduct which was unjust, not expeditious, disproportionately harmful, and costly to the parties. He cited various authorities in support of those submissions, which authorities we have perused.

In his view, Wekscol was merely engaged in the pointless exercise of stopping the operation of Butali's Sugar Mill and he called on us to make a finding that Wekscol was in abuse of court process.

22. In response to that issue, learned counsel Mr. Mungai contended that there can be no abuse of court process where the law allows parties free access to the courts to articulate their complaints. He defended Wekscol for filing a constitutional matter in Nairobi (**59/10**) even when there was an existing Judicial Review application in Kisumu (**17/10**). In his view, the two matters involved different parties, different processes, and different issues.

23. There is no doubt that the sugar war waged by the two protagonists herein is intense and the tactics used on both sides less than noble. There is every reason, therefore, for the courts to be on guard to avoid abuse of its process as one of those tactics. In this case, we think a full investigation ought to be carried out, certainly when the main appeal comes up for hearing, to ensure that the ogre of abuse of court process is kept at bay. The arguments laid before us may well be rehashed in the main appeal, but a decision thereon would bring finality to the issue. For that reason, we strongly recommend that the appeal be listed for hearing on priority basis. The less said on the issue at this interlocutory stage, therefore, the better.

24. There were lengthy submissions made for several hours on both sides on arguability of the intended appeal. Several of the intended grounds of appeal were raised in the affidavit in support of the motion and included a challenge on the refusal by Karanj J to accept the participation of Wekscol in the proceedings or even consider affidavits filed by Wekscol before that court; whether the Judicial Review application was proper in form and an abuse of court process; whether the orders issued by Karanja J on 30<sup>th</sup> November, 2011 were capable of issuance in view of existing conservatory orders granted before another court of equal jurisdiction; and whether the court can grant mandatory orders for issuance of a licence when the duty was thrust upon KSB by statute under **Section 14 and 15** of the Sugar Act.

25. The view taken by learned counsel for Butali, Mr. Ochieng Oduol was that there was nothing arguable in the intended appeal since the historical records of the dispute speak for themselves. Butali had a lawful registration as a sugar miller and had constructed a sugar mill on the strength of the registration. It had nothing to do with an agreement signed between Wekscol, KSB and the Ministry of Agriculture on relocation of the sugar mill. KSB knew it would grant a milling licence as a formality once the sugar mill was completed but was facilitating on account of unnecessary complaints raised by Wekscol as indeed confirmed in various court orders, hence the suit to compel it to comply with its duty. Mr. Oduol further submitted that this Court had no jurisdiction to grant the only prayer made in the motion under **Rule 5(2)(b)** as it had been overtaken by events; that the issue of Registration of the sugar mill was not an issue before Karanja J and cannot therefore be an issue before this Court; that the issue of licence was already before the High Court in a constitutional matter and it cannot therefore be argued twice over; that there was nothing arguable about the exclusion of Wekscol from the Judicial Review proceedings because they were given an opportunity to address the court and did not challenge the orders issued by that court; and that the jurisdiction of the High Court to supervise statutory bodies like KSB cannot be challenged and there was cogent material before the court to show that there was collusion between Wekscol and KSB to frustrate the issuance of the milling licence, hence the mandatory order.

26. KSB which was represented by learned counsel Ms. Oburu made no written reply to the motion but submitted that the board of KSB had met on 13<sup>th</sup> January, 2011 and agreed to implement the

judgment of the court in accordance with the advice given to them by the Attorney General. The licence was issued accordingly and it was for the court to decide whether the order sought in the motion should be granted.

27. We have anxiously considered the rival submissions of counsel and the authorities cited on arguability of the motion before us. There is, of course, the threshold issue on jurisdiction as to whether the order for stay can be granted when the order for mandamus has already been executed, as well as other jurisdictional issues raised by Butali. In view of the decision we have reached, however, that the intended appeal is not frivolous or is arguable, we shall leave the issue for determination by the court seized of the main appeal. The very fact that this motion was argued for hours on end puts it beyond triviality. We stated earlier that the application may be granted even on the basis of one arguable point and in our view the issue raised as to whether the High Court could have issued a mandatory order compelling the issuance of the licence or ought to have directed KSB to consider the issuance of the licence in accordance with the law is not a frivolous one. The first hurdle on the motion is, therefore, surmounted by the applicant.

28. Will the success of the intended appeal be rendered nugatory if the order sought is not granted?

Mr. Mungai argued forcefully that the refusal will affect the High Court constitutional case which challenges the registration of Butali as a miller; that Wekscol will be compelled to share the limited sugar production zone with Butali which will result in their imminent collapse and insolvency laying into waste their 5 Billion investment, lay off 1000 employees and decommission 50,000 farmers; that the court will be endorsing illegalities committed by Butali; that the court will be unjustly enriching Butali which would simply take over part of Wekscol's investment; and that the possible losses of Wekscol are incapable of quantification.

29. In response, Mr. Ochieng Oduol submitted that the fears about collapse and loss of colossal amounts were imaginary. He observed that Butali, has since the grant of its licence in January, 2011 continued to mill sugar in a peaceful and commercially viable environment. Wekscol was even expanding its production capacity as disclosed in their affidavits, since there was evidence on the ground that the capacity for sugar production in the area was enough for competition. He blamed the anxiety of Wekscol on their desire to have unjustified monopoly of sugar production in the sugar zone and submitted that competition was good for the people of western region and Kenyans generally.

30. We have once again anxiously considered this limb of the principles applicable as well as the statutory duty imposed on us by Section 3A and 3B of the Appellate Jurisdiction Act. In the end we have come to the conclusion that the refusal to grant the order sought would not render the result of the intended appeal nugatory. That is because at the centre of the dispute are two substantial commercial entities who, it is presumed, have records of their commercial transactions and are capable of determining their investments, losses and profits in accounting documents. We do not take it seriously therefore when the applicant submits that the losses which will be incurred are incapable of assessment. We also think the balance of convenience at this stage falls in favour of maintaining the status quo even assuming the licence was granted unprocedurally. Affidavits placed before us establish that the industry affects hundreds of thousands of employees and sugar out-growers apart from the disputing parties themselves and there must be some measure of balance to avoid social unrest or breach of the peace as the law takes its painful but sure course. At all events, we observe, as stated earlier, that the applicant has amended its petition before the High Court to pursue the same or similar remedies. It is not without a remedy.

31. The upshot is that the application fails and we order that it be and is hereby dismissed. The costs of the application shall abide the result of the intended appeal.

32. This ruling was drawn and delivered in accordance with **Rule 32(3)** of the Court of Appeal Rules 2010, owing to the retirement of the Hon. Mr. Justice Aganyanya, J.A. from the Judiciary with effect from 31<sup>st</sup> January, 2012.

**DATED and DELIVERED at NAIROBI this 17<sup>TH</sup> day of FEBRUARY, 2012.**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**