West Kenya Sugar Company Ltd v Agriculture and Food Authority & 3 others (Constitutional Petition E430 of 2018) [2024] KEHC 243 (KLR) (Constitutional and Human Rights) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E430 OF 2018

AC MRIMA, J

JANUARY 25, 2024

BETWEEN

WEST KENYA SUGAR COMPANY LTD .... PETITIONER

AND

AGRICULTURE AND FOOD AUTHORITY .... 1ST RESPONDENT

THE HON ATTORNEY GENERAL .... 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3RD RESPONDENT

BUSIA SUGAR INDUSTRIES LIMITED .... 4TH RESPONDENT

JUDGMENT

1. The Petitioner, West Kenya Sugar Company Limited, is a sugar manufacturing factory carrying out some of its operations in Busia County. It is aggrieved that the 1st Respondent, Agriculture and Food Authority, (hereinafter interchangeably referred to as 'the 1st Respondent' or 'the Authority' or 'AFA'), issued a sugar milling licence to the 4th Respondent, Busia Sugar Industries Limited illegally.
2. Through Gazette Notice No. 2196 dated 6th March 2018 (hereinafter 'The Gazette Notice') the Petitioner learnt that the 1st Respondent was in the process of granting the 4th Respondent the milling licence and in fulfilment of Section 20 of the *Crops Act*, had invited members of the public to lodge any objections.
3. Through its letter dated 23rd March 2018 addressed to the 1st Respondent, the Petitioner objected to the issuance of the milling licence to the 4th Respondent.

4. Subsequently, the 1st Respondent invited the Petitioner and the 4th Respondent for hearing of the objection.

5. It is the Petitioner's case that on the hearing date, the 1st Respondent did not avail documents it had requested for to enable it prosecute its case.

6. Apprehensive that the 1st Respondent would issue the licence, the Petitioner sought Court's intervention through Nairobi Constitutional Petition No. 153 of 2018, West Kenya Sugar Company Ltd. -vs- Agriculture and Food Authority and 3 Others (hereinafter 'Petition No. 153' of 2018').

7. On 9th November 2018, Petition No. 153 of 2018 was dismissed on the basis that the dispute before the 1st Respondent had to be heard and determined in the first instance before the Court's jurisdiction could be invoked.

8. By a letter of even date, the 1st Respondent's Committee created to inquire into the Petitioner's objection communicated to the 4th Respondent that it had unanimously formed an opinion that there was reasonable cause to withhold issuance of licence.

9. In the same letter, the 1st Respondent attached the Committee's report on the proposed grant of sugar milling licence to the 4th Respondent

The Petition

10. Through the Petition dated 30th November 2018, supported by the Affidavit of Teejveer Singh Rai, the Petitioner's Managing Director deposed to on a similar date, the Petitioner sought to contest the constitutionality of the award of sugar milling licence to the 4th Respondent.

11. The Petitioner averred that in Bungoma Environment and Land Court Petition No. 6 of 2016 West Kenya Sugar Co. Ltd -vs- Busia Sugar Industries Ltd & 2 Others, (hereafter 'the ELC Case') it challenged the validity of the registration of the 4th Respondent and in its judgment, the Court observed that the registration process through which Africa Polysack (APL) Sugar Company changed names to Busia Sugar Company Limited was illegal and unknown in law.

12. The Petitioner averred that an appeal against the decision in the ELC case is pending hearing at the Court of Appeal.

13. The Petitioner further claimed that the Gazette Notice was issued illegally and in contempt of the judgment in the ELC Case that cancelled the registration certificate issued to the 4th Respondent and ordered it to make a new application registration as a miller.

14. The Petitioner pleaded that to-date, the orders issued in the ELC Case have never been set aside but in flagrant breach of the said orders, the 1st Respondent gazetted the 4th Respondent in breach of Sections 16, 18 and 20 of the *Crops Act*.

15. The Petitioner claimed that despite being a regulator in the sugar industry, the 1st Respondent never participated in any Environmental Impact Assessment as directed by the Court in the ELC Case.

16. With respect to the failure by the 4th Respondent to avail documents to the Petitioner for purposes of prosecuting its objection, the Petitioner averred that it denied them the opportunity to scrutinize them with their technical experts.

17. The Petitioners contended that from the read only access they had to the application during the hearing of the objection, it was clear that the 4th Respondent had used the cancelled Kenya Sugar Board

registration certificate No. KSB-MREG-0016 in their application in contravention of the judgment in the ELC Case.

18. The Petitioner further asserted that during the objection hearing, it was confirmed that the 1st Respondent had not carried out an evaluation process before issuing the Gazette Notice.

19. The Petitioner posited that when the objection hearing was adjourned, it wrote to the National Environmental Management Authority, 3rd Respondent herein, through its letter dated 12th April 2018 seeking to confirm the status of the Environmental Impact Assessment licence (EIA) of the 4th Respondent but never got a response.

20. The Petitioner impugned the validity of the milling licence by reference to the Replying Affidavit of Prof. Geoffrey Wakhungu from the 3rd Respondent where he deposed that the claim by the 4th Respondent that it had an Environmental Impact Assessment licence was in fact not an EIA licence and that it had not been issued it with the Licence.

21. Further, the Petitioner pointed out that during the objection hearing Prof. Wakhungu deposed that the 4th Responded had never applied to be issued with an EIA licence despite being issued with one on 19th December 2013 pursuant to an application by Africa Polysack Company Ltd which was annulled in the ELC Case.

22. From the foregoing, the Petitioner posited that the 1st Respondent issued a manufacturing licence to the 4th Respondent unlawfully and in contravention to the rules of natural justice and the proper procedure envisaged under Section 20 of the *Crops Act* and Section 4 and 5 of the Fair Administrative Actions Act as read with Article 47 of *the Constitution*.

23. The Petitioner posited that the 1st Respondent conduct violated his right to non-discrimination and equal benefit of the law as provided for in Article 27 of *the Constitution*.

24. It also was its case that its right to information was infringed upon by the Respondent by the failure to furnish it with documents necessary to exercise and protect its constitutional right to due process, vested rights and fair hearing.

25. The Petitioners claimed further that the issuance of a milling licence to the 4th Respondent despite knowledge and concession by the 1st Respondent that there was not enough sugar cane in Busia County was a derogation of its right to property provided for in Article 40 of *the Constitution*.

26. On the foregoing factual and legal basis, the Petitioner prayed for the following reliefs;

    a. A declaration be issued to declare that the decision of the First Respondent to issue a sugar manufacturing licence to the 4th Respondent as communicated by the 1st Respondent vide its letter dated 9th November 2018 to the Petitioner is illegal and contravenes section 20 of the *Crops Act* 2013 and section 58 of the Environmental Management and Coordination Act, 1999 as read with Article 47 and 50 of *the Constitution*.

    b. That on Order of Certiorari be issues to bring into this Honourable Court and quash the decision of the 1st Respondent to issue a sugar manufacturing licence to the 4th Respondent as communicated by the 1st Respondent vide its letter dated 9th November 2018 to the Petitioner.

    c. That a declaration be issued to declare that the first Respondent has no power under section 20 of the *Crops Act* 2013 as read with section 58 of the EMCA

Act 1999 to consider and or issue a manufacturing licence to an applicant which has not been issue an Environmental impact Assessment Licence (EIA) by NEMA.

d. That a declaration be issued to declare that the 4th Respondent's application for a sugar manufacturing licence was illegal, null and void ab initio for want of EIA licence.

e. That a declaration be issued that the First Respondent's report on the Petitioner's Objection to the proposed grant of sugar milling licence to the 4th Respondent forwarded to the Petitioners vide the 1st Respondent's letter dated 9th November 2018 is illegal and nullity ab initio.

f. That an order of Certiorari be issued to bring into this Honourable Court and quash the sugar milling licence issued by the 1st Respondent to the 4th Respondent pursuant to Kenya Gazette Notice No. 2196 dated 9th March 2018.

g. That a declaration be issued to declare the 4th Respondent cannot lawfully commence the business of milling sugar cane at its factory located on L.R No. Bukhayo/Ebusibwabo/921. L.R No. Bukhayo/Ebusibwabo/3179 and L.R No. Bukhayo/Ebusibwabo/1274 in Busia County until it obtains an Environmental Impact assessment Licence in accordance with section 58 of the Environmental Management and Coordination Act 1999.

h. An order of permanent injunction be issued to restrain the 4th Respondent from commencing the business of milling sugar cane at its factory located in on L.R No. Bukhayo/Ebusibwabo/921 L.R No. Bukhayo/Ebusibwabo/3179 and L.R No. Bukhayo/Ebusibwabo/1274 in Busia County until it obtains an Environmental Impact assessment Licence in accordance with section 58 of the Environmental Management and Coordination Act 1999

i. That a declaration be issued to declare that the 4th respondent has constructed its sugar factory on on L.R No. Bukhayo/Ebusibwabo/921. L.R No. Bukhayo/Ebusibwabo/3179 and L.R No. Bukhayo/Ebusibwabo/1274 in Busia County illegally

j. That an order of permanent injunction be issued to compel the 3rd and 4th Respondent to dismantle ad relocate the sugar factory built on on L.R No. Bukhayo/Ebusibwabo/921. L.R No. Bukhayo/Ebusibwabo/3179 and L.R No. Bukhayo/Ebusibwabo/1274 in Busia County.

k. That a declaration be issued to declare that the decisions, actions and omissions of the 1st Respondent culminating in the issuance of a sugar manufacturing licence to the 4th Respondent violates the Petitioner's right under Article 27, 35,40, 47 and 50 of *the Constitution*.

l. That an order of permanent injunction be issued to restrain the 4th Respondent to commission and or operate its sugar factory unless and until it obtains an EIA licence.

m. General damages for violation of the Petitioner's right and freedoms enshrined in Articles 27, 35, 40, 47 and 50 of *the Constitution*.

n. That costs of the Petition be provided for.

The Submissions

27. The Petitioner filed written submissions and supplementary written submissions dated 21st January 2022 and 27th June 2022 respectively.

28. It was its case that the only remedy for the illegality in issuing out the sugar milling licence to the 4th Respondent is found in the Court of Appeal decision in Kenya Pipeline Company Ltd. -vs- Glencore Energy (U.K) Limited (2015) eKLR where it was observed;

> In Standard Chartered Back -vs- Intercom Services Ltd. & 4 Others (supra) this Court, differently constituted accepted the submission made that once an issue of a breach of a statute is brought to the attention of the Court in the course of proceedings, then in the interest of justice the Court must investigate it because the Court's fundamental role is to uphold the law.

29. Regarding damages, the Petitioner relied on the decision in Petition No. 248 of 2013 Arnacherry Limited -vs- the Attorney General opined that an award of Kshs 50,000,000/= will suffice in view of aggravating circumstances of the case.

The 1st Respondent's case:

30. The Authority challenged the Petition through the Response to the Petition dated 10th December 2018 and the Replying Affidavit of Solomon Odera, the Interim Director of the Sugar Directorate of the AFA, deposed to on 31st December 2018.

31. The 1st Respondent stated that since Africa Polysack (APC) Sugar Company Ltd was no longer a player in the sugar industry and that the legal framework governing the issuance of sugar milling licences that applied under the Sugar Act has since changed, the 3rd Respondent was within its power and competence to issue EIA licence to the 4th Respondent.

32. The 1st Respondent pointed out that the power to issue the said licence was not dependent on the historical relationship between the 4th Respondent and Africa Polysack (APC) Sugar Company Limited.

33. The 1st Respondent stated that the question whether the factory on L.R No. Bukhayo/Ebusibwabo/921. L.R No. Bukhayo/Ebusibwabo/3179 and L.R No. Bukhayo/Ebusibwabo/1274 was subjected to an EIA was an issue within the mandate of the 3rd Respondent.

34. It, however, was its case that it was under an obligation to receive accept and consider EIA licenses issued by the 3rd Respondent as a matter of procedural prudence and law.

35. The 1st Respondent further pointed out that it could not licence a Sugar Factory which was built in absence of a NEMA approval or against its recommendations, unless a sound legal basis is established.

36. The 1st Respondent stated that it received and considered an EIA licence submitted by the 4th Respondent's in support of its application for a sugar milling licence and it was satisfied that it was a bona fide EIA licence issued by the 3rd Respondent under its statutory mandate.

37. As regards failure to avail to the Petitioner 4th Respondent's application and other documents in support of its application for a sugar milling licence, the 1st Respondent asserted that the Petitioner was

not entitled to the said documents as they were confidentially submitted to it for that singular purpose and no for dissemination.

38. On the foregoing, the 1st Respondent argued that it was vexatious for the Petitioner to demand to see the documents and lodge an objection to that end in the hope that it will sustain its case.

39. The 1st Respondent further stated that on 10th April 2018, it invited the Petitioner to argue its objection but adjourned the hearing due to the Petitioner's interference and determination to scuttle the process.

40. The 1st Respondent further stated that in order to pre-empt resumption of the Objection hearing, The Petitioner instituted Petition No. 153 of 2018 but was later dismissed.

41. The 1st Respondent stated that it is then that the Committee constituted to hear the Objection convened and considered the Objection on its merits.

42. The 1st Petitioner claimed that the allegation by the Petitioner that the Committee met at the time the Judgment was being delivered is mischievous and meant to portray the 1st Respondent as contemptuous of Court proceedings.

43. The 1st Respondent denied violation of the Petitioners right to fair hearing. It also denied violation of the right under Article 27, 35, 40 of *the Constitution*. It was its case that it accorded it a fair opportunity to present its case and exercised the powers within its mandate in issuing the milling licence.

44. The 1st Respondent further claimed that the Petitioner does not have monopoly and ability to process sugar cane and it is not in law entitled to become dominant in the sugar sector.

45. As to the question of sufficiency of sugar cane in Busia County, the 1st Respondent stated that it is not for the Petitioner to decide but the 1st Respondent in consultation with stakeholders in the sugar sub sector.

46. In the end, the 1st Respondent stated that the Sugar Milling Licence issued to the 4th Respondent is valid ang legal under the law.

47. In the Replying Affidavit, Mr. Odera largely reiterated the contents of the Response to the Petition.

48. It was his case that contrary to the Petitioner's claim that it acted in contempt of the Orders in the ELC Case, the said judgment acknowledged that the 1st Respondent ought to be allowed to exercise its mandate in regulating the sugar sub-sector.

49. He deposed further that, unlike the Sugar Act, the *Crops Act* does not specifically make provision for registration of sugar millers and neither does it make such registration a mandatory pre-condition for an entity to apply for a sugar milling licence. It was its case, therefore, that it was improper to invoke a law that had been repealed.

50. He deposed further that under section 16 of the *Crops Act*, which provides for registration of dealers and dealing in crops, the fact that the Petitioner had not been registered was not an impediment to its application for sugar milling, and as such could not peg the 4th respondent's non-registration to deny it sugar milling licence.

51. Mr. Odera deposed that that the decision of the 1st Respondent was not ultra-vires Section 20(9) of the *Crops Act* or in contravention of the Petitioner's rights or fundamental freedoms claimed to have been violated.

The Submissions

52. In its written submissions dated 29th November 2021, the 1st Respondent identified the issues for determination as; whether it contravened Section 20 of the *crops Act* and whether it violated the Petitioner's constitutional rights.

53. In buttressing the fact that it was within its power under Section 20 of the *Crops Act* to issue the milling licence, the 1st Respondent referred to the Court of Appeal decision in West Kenya Sugar Company Limited -vs- Kenya Sugar Board and Another (2014) eKLR where it was observed;

> 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. Conditions stipulated in section 15(109b) 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.

54. The 1st Respondent submitted that its power under section 20(8) of the *Crops Act* is discretionary and it includes the manner in which to consider objections.

55. It was its case that the right of an applicant for a milling licence are not synonymous with the rights of an objector. It stated that whereas the applicant for a licence is entitled to a hearing the same must not be an oral hearing. The decision in Civil Appeal No.108 of 2009, Kenya Revenue Authority -vs- Mengina Salim Murgani was relied upon where it was observed: -

> However, in or view, the fairness of a hearing is not determined solely by its oral nature. In the matter of R -vs- Immigratio Appeal tribunal ex-parte Jones (1988)1WLR,477.481 it was held;
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> The hearing does not necessarily have to be an oral hearing in all cases. there are ample authotity that decision-making bodies other than courts and bodies whose procedure are laid down by statute are masters of their own procedure.

56. In refuting the claim on violation of the right to information, the 1st Respondent submitted that the Petitioner is precluded from claiming it since it only is available to Kenyans and not foreigners. Further, it was its case that it can only be enforced by natural persons and not legal persons as the Petitioner.

57. Further to the foregoing, the 1st Respondent submitted that it was at liberty to ignore the 4th Respondent's as doing so would be in direct contravention of the 4th Respondent's right to privacy under Article 31 of *the Constitution*.

58. It asserted that the limitation was within the ambit of Article 24(1) of *the Constitution* since it was reasonable and justifiable in an open and democratic society.

59. On the issue whether there was violation of Article 27, 40, 47 and 50 of *the Constitution*, the 1st Respondent submitted that the Petitioner failed to prove with the requisite degree of precision the manner of violation.

60. It was its case that there was no proof of discrimination or unequal application of the law when the 1st Respondent granted the milling licence to the 4th Respondent.

61. The 1st Respondent further denied violation of the right to property by stating that the Petitioner had no monopoly proprietary rights over production of sugar in Busia County.

62. Further to the foregoing, it was its case that the Petitioner had not brought any evidence, a requirement under section 107 of the *Evidence Act*, on how sugar milling licence to the 4th Respondent constituted breach of its property rights.

63. The 1st Respondent submitted that failing to grant the 4th Respondent a sugar milling licence would be contrary to section 21(3)(b)(e)(f) and (i) of the *Competition Act* that encourages competition in the market place.

64. In submitting on violation of the right to fair administrative action, the 1st Respondent stated that it is an administrative body as opposed to a judicial authority. Therefore, objections to an application for a licence are not stricto sensu the same as objection proceedings before a judicial authority.

65. In the end, the 1st Respondent submitted that the Petitioner was not entitled to the prayers sought as it would result in abuse of Court process. It was urged that the Petitioner ought to meet the costs of the suit since the suit does not fall within the precincts of public interest.

The 4th Respondent's case

67. Busia Sugar Industries Limited challenged the Petition through the Replying Affidavit of Ali Ahmed Taib, its Managing Director, deposed to on 18th December 2018.

68. From the outset, Mr. Taib described the Petition was as vexatious having been declared as such and to that end referred to the decision in Nairobi Judicial Review Application No. 426 of 2014 and in Kakamega Petition No. 26 of 2016.

69. He further deposed that in Petition No. 153 of 2018, this Court had found the Petitioner to be abusing Court process by filing multiple suits in Court and for not following laid down statutory procedures as encapsulated in the *Crops Act*.

70. He deposed that the Petitioner had failed to disclose to the Court that it is a party to the proceedings in Bungoma Petition No. 6 of 2016 and Kisumu Court of Appeal Case No. 35 of 2017 where the issue of EIA was being ventilated.

71. To further highlight impropriety of the instant Petition, the 4th Respondent deposed that the when the Petitioner objected to the issuance of the milling licence, the 1st Respondent convened a meeting wherein Counsel for the Petitioner was present for the hearing on 25th March 2018.

72. He deposed that upon being heard, the said Counsel for the Petitioner requested for the 4th Respondent's application documents together with proprietary documents which the 4th Respondent's Counsel objected to on private proprietary information basis.

73. He deposed that prior to considering the objection, the Petitioner dashed to Kisumu Law Courts through Judicial Review Application No. 6 of 2018 where it sought among other orders stay of the Gazette Notice.

73. Having failed to obtain the orders, he deposed that the Petitioner subsequently rushed to Nairobi through Petition No. 153 of 2018 where he obtained conservatory orders for more than 6 months until 9th November 2018 when judgment was delivered thus paving way for licensing of the 4th Respondent.

74. He deposed that the Petitioner then filed a Notice of Appeal seeking to challenge the decision of the Court in the Appellate Court and in addition, filed another application in Bungoma Petition No. 6 of 2016 seeking the same orders as in the instant Petition.

75. On the issue of EIA licence, the 4th Respondent deposed that the 4th Respondent's licence as initially issued to Africa Polysack Limited was extensively litigated upon and it was upheld in National Environment Petition No. 150 of 2015 and Busia Petition No. 1 of 2014 that the EIA was transferrable to the 4th Respondent.

76. From the foregoing, the 4th Respondent submitted that the Petitioner was barred for filing any suits since it is settled and, in any event, any challenge on EIA licence is statutorily barred as provided for in section 129(2) of the EMCA which requires that a challenge on a licence cannot be raised more than 60 days from the issuance of the licence.

77. The 4th Respondent reiterated the position that the information sought by the Petitioner was privileged proprietary content including trade secrets.

78. In conclusion, he deposed that the Petitions strewn with malevolence and the intention of denying the 4th Respondent an opportunity to enjoy its property and to disenfranchise the famers of Busia County.

The Submissions

79. The 4th Respondent filed written submissions dated 4th May 2022. In reference to section 20(1) of the *Crops Act* that provides that the Licences issued are in force until the thirtieth of June next year, it was its case that the Licence, subject of the dispute, is now academic since it ceased to exist on 30th June 2019.

80. The 4th Respondent submitted that since 2019, the 1st Respondent has issued 3 separate milling licences to both the 4th Respondent and the Petitioner.

81. Separately, the 4th Respondent submitted that under section 25 of the *Crops Act*, the Petitioner ought to have appealed the decision of the 1st Respondent to the Cabinet Secretary in order to exhaust the mechanisms for dispute resolution.

82. It submitted that failure to do so within 30 days, the Petition against issuance of the licence was time barred.

83. It was submitted further that according to Article 162 of *the Constitution* as read with Environmental Management and Coordination Act, this Court was divested of jurisdiction to preside over issues relating to EIA.

83. As regards validity of the licence issued to it vide the Gazette Notice, the 4th Respondent submitted that the 1st Respondent received and considered the Objection and gave the 4th Respondent written reasons for its decision to grant the licence in its decision of 9th November 2018.

85. In conclusion, the 4th Respondent submitted that whereas the Petitioner claimed that the 1st Respondent issued it with a milling licence without an EIA licence, the Petitioner did not provide any proof to aid its case. It was urged that the Petitioner be dismissed with costs

86. The 2nd and 3rd Respondents did not file any pleadings in this dispute.

Analysis

87. This Court has carefully considered the Petition, the responses, the rival written submissions and the decisions referred therein and finds that two issues for determination arise. They are: -

    i. Whether the jurisdiction of this Court is impugned on the basis of the doctrines of exhaustion and sub-judice.

ii. In the event the answer to (i) above is in negative, whether the Petitioner's rights under Articles 27, 35, 40, 47 and 50 of *the Constitution* were infringed.

88. The Court will deal with the issues in seriatim.

a. Whether the jurisdiction of this Court is impugned on the basis of the doctrines of exhaustion and sub-judice:

89. As the jurisdiction of this Court has been contested on the basis of the two doctrines, thereby forming two sub-issues, this Court will, in the first instance, deal with the sub-issue on whether its jurisdiction is impugned on the basis of the doctrine of exhaustion.

90. This Court will now briefly look at the doctrine of exhaustion and then juxtapose it with the instant Petition herein.

91. The doctrine in doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows:

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
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> > 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
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> > Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
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> > 43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision

which provides the Constitutional rationale and basis for the doctrine.

This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

92. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
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> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

93. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from Article 165 (3) and (6) of *the Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of *the Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of *the Constitution* became automatic. And in our view, it could not be ousted or substituted.

94. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision

in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

95. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

96. In ascertaining whether the doctrine of exhaustion applies in this matter, the provisions of the *Crops Act*, 2013 come to the fore.

97. The Preamble to the *Crops Act* describes the purpose of the Act as to consolidate and repeal various statutes relating to crops; to provide for the growth and development of scheduled agricultural crops and for connected purposes. The *Crops Act* became operational on 4th January, 2013.

98. As the *Crops Act* mainly deals with the growth and development of various agricultural crops, it also provides for regulation thereof. In the Petition, the crop at hand is sugar which is one of the scheduled crops and, as such, its growth and development is regulated by the State. The regulation of sugar in Kenya is the mandate of the AFA, which is an entity established under the *Agriculture and Food Authority Act*, 2013.

99. Section 18 of the *Crops Act* provides for manufacturing licences. It requires any person intending to manufacture or process a scheduled crop product for sale to obtain a licence issued under the Act. Section 20 deals with the procedure towards the issuance of the licences. Sub-sections (6), (7), (8), (9) and (10) provides as follows: -

> (6) The licensing authority shall, at least thirty days before granting a licence under this Act, give notice of the proposed grant in the Gazette and in such other manner as the authority may determine.
>
> (7) The notice referred to in subsection (6) shall—
>
> (a) specify the name or other particulars of the person or class of persons to whom the licence is to be granted;
>
> (b) state the purpose for the proposed licence and indicate the date such licence is proposed to be issued to the successful applicant; and

(c) invite objections to the proposed grant of licence and direct that such objections be lodged with the Authority within fourteen days next following the date of the notice.

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

(9) The issuance of a licence to an applicant under this Act shall not be withheld without reasonable cause.

(10) A licence issued under this Act shall not be transferable.

100. Section 25 is on appeals. It states as under: -

(1) An applicant for or holder of a licence who is aggrieved by a decision of the licensing authority on or in respect of—

(a) the grant, refusal, renewal, variation or revocation; or

(b) the conditions imposed on the grant, renewal or variation, of a licence, may appeal to the Cabinet Secretary.

(2) An appeal under this section shall be lodged within thirty days from the date on which the appellant first received notice of the decision.

101. Returning to the matter at hand, it is the 4th Respondent's contention that the Petitioner ought to have instead appealed to the Cabinet Secretary under Section 25 of the *Crops Act* instead of filing the instant Petition.

102. There is no doubt the Petitioner was aggrieved by the 1st Respondent's grant of a manufacturing licence to the 4th Respondent. In that case, the Petitioner was to lodge an appeal as provided for in law. The only exception would be instances where the Petitioner demonstrated any of the exceptions to the doctrine of exhaustion.

103. The 4th Respondent raised the above sub-issue in its Reply to the Petition, the Replying Affidavit and its submissions. Despite an opportunity having been granted to the Petitioner to respond to the issue herein, it did not and the matter was eventually fixed for judgment. Nevertheless, the Court will deal with the contention.

104. The Petitioner sought various declarations that some of its rights under *the Constitution* were infringed by the grant of the licence. It also sought injunctions and damages.

105. The intended appeal was to be lodged to the Cabinet Secretary who is part of the Cabinet (under Article 152 of *the Constitution*) and a State officer under Article 260 of *the Constitution*.

106. The Hon. Attorney General is also part of the Cabinet. Under Article 156(4)(a) of *the Constitution*, the Hon. Attorney General is the Government's principal legal advisor. Further, this Court takes judicial notice of the structure of the Ministries in Kenya to include legal departments.

107. This Court ascribes to the position that in a case where Parliament donates powers to a person or entity like the Cabinet Secretary, then such has the mandate to determine if one's rights are infringed in discharging its duties. As said, in this case, the Cabinet Secretary is in a position to consider the appeal on the issuance of the licence to the 4th Respondent in light of the averments of infringement of the Bill

of Rights and is in a position to find whether there was any denial, violation, infringement or threats. However, the Cabinet Secretary lacks the jurisdiction to interpret *the Constitution*.

108. The reason for the foregoing holding is simple. The Cabinet Secretary as a State officer is called upon by Article 10 of *the Constitution* to infuse the national values and principles of governance while undertaking his/her duties. Article 3 obligates every person to respect, uphold and defend *the Constitution*. Therefore, the Cabinet Secretary must be in a position to uphold *the Constitution*, and in doing so, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to the rights in the Bill of Rights.

109. The above duty is to be distinguished from the duty to interpret *the Constitution*. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is just that simple. Conversely, interpretation of *the Constitution* is a serious judicial function. While interpreting *the Constitution*, the High Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court with superior jurisdiction.

110. Unlike the High Court, Cabinet Secretaries, Tribunals and other quasi-judicial bodies do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. Allowing a Cabinet Secretary to apply *the Constitution* is the only way of ensuring that the officer acts within *the Constitution*. How else would a Cabinet Secretary be held constitutionally-accountable if not accorded the opportunity to apply and defend *the Constitution*?

111. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to rights in the Bill of Rights and interpreting *the Constitution*. Whereas the former is not exclusively a judicial function, the latter is. The jurisdiction, therefore, to interpret *the Constitution* is the exclusive duty reserved to the High Court vide Article 165(3)(d) of *the Constitution*.

112. In the instant matter, the Cabinet Secretary has the jurisdiction to determine whether the Petitioner's rights in the Bill of Rights were denied, violated, infringed or threatened in the process of the 1st Respondent granting the licence to the 4th Respondent.

113. The Court will now consider whether any of the exceptions to the doctrine of exhaustion are applicable in this matter. One of the exceptions is if the Cabinet Secretary would not serve the values enshrined in *the Constitution* or law. The other exception is if the appeal to the Cabinet Secretary is not suitable to determine all the issues raised. In other words, if the Petitioner will not be accorded adequate audience before the Cabinet Secretary, or the Petitioner may not have the quality of audience before the Cabinet Secretary which is proportionate to the interests the Petitioner wishes to advance in this Petition, then the jurisdiction of the Cabinet Secretary will be ousted.

114. Among the prayers sought by the Petitioner are general damages for infringement of its rights and fundamental freedoms. Section 25 of the *Crops Act* does not, however, accord the Cabinet Secretary the power to assess damages where a complainant succeeds in demonstrating the infringement of rights and fundamental freedoms in such contemplated appeals. In that case, therefore, lodging an appeal to the Cabinet Secretary, and in view of the remedies sought in the Petition, would not accord the Petitioner the appropriate avenue to deal with all the issues raised in the Petition given that the Cabinet

Secretary lacks any powers to consider the limbs of damages. To that end, the second exception to the doctrine of exhaustion applies in this case in respect to Section 25 of the *Crops Act*.

115. As such, the contention that this Court lacks jurisdiction to deal with the instant Petition on account of the mechanism provided for in Section 25 of the *Crops Act* is unstainable and is hereby dismissed.

116. Next is a look at the doctrine of sub-judice.

117. In answer to this sub-issue, I will run through how the Supreme Court in Advisory Opinion Reference No. 1 of 2017, Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR handled the issue of sub-judice.

118. The Supreme Court was approached by the Applicant, Kenya National Commission of Human Rights. It sought the Court's Advisory Opinion on the purposive interpretation of Chapter 6 of *the Constitution* of Kenya specifically in the context of the affairs of political parties.

119. The Applicant contended that there was lack of clarity and/or guidance in High Court and the Court of Appeal decisions on the place of chapter 6 of *the Constitution*, especially in respect of leadership and integrity qualifications of persons offering themselves to be elected or appointed to public service.

120. Before the matter could proceed, one of the Interested Parties filed a Preliminary Objection claiming that the application before the Court was sub-judice two other cases before the High Court namely; Constitutional Petition No. 142 of 2017 and Constitutional Petition No. 68 of 2017. It asserted that the application was an abuse of the Supreme Court's advisory opinion jurisdiction.

121. Upon considering the parties' arguments and counter-arguments, the Apex Court comprehensively addressed the often raised jurisdictional challenge of sub-judice. It first defined the term, outlined its purpose and then set the threshold for its operation. The Court observed as follows: -

> (67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

122. Upon setting the above foundation for the operation of the doctrine, the Learned Judges then pitched the issues emanating from the two High Court cases against the ones raised by application before them. They went ahead and observed as follows: -

> (68) In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of *the Constitution*.

> The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of *the Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of *the Constitution* on leadership and integrity.
>
> (71) In so doing, (determining the two Constitutional Petitions) the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of *the Constitution*, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.

123. From the foregone, the Court was of the finding that the application before it was caught up by sub-judice doctrine. It refused to usurp the jurisdiction of the High Court in the following terms: -

> (72) We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of *the Constitution*, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of *the Constitution* and that Court has already been moved.
>
> (73) Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of *the Constitution*. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).

124. The Supreme Court, hence, declined jurisdiction because it was demonstrated that the issues before the Court were the same as those before the High Court.

125. From the foregoing, for the doctrine sub-judice to be in operation all its ingredients must be proved to exist.

126. This Court has carefully considered this issue. The 4th Respondent contended that the instant Petition is pegged on the issue of the EIA Licence issued by NEMA. That, the licence was initially issued to Africa Polysack Limited and extensively litigation ensued. They were National Environment Petition No. 150 of 2015 and Busia Petition No. 1 of 2014 where the transfer of the licence to the 4th Respondent was upheld. That, the Petitioner brought up similar proceedings in Bungoma Petition No. 6 of 2016 and also lodged an appeal in Kisumu Court of Appeal Case No. 35 of 2017 where the issue of EIA licence is pending determination.

127. The pendency and nature of the litigation in Bungoma Petition No. 6 of 2016 and the Civil Appeal in Kisumu Court of Appeal Case No. 35 of 2017 were not denied by the Petitioner.

128. A careful perusal of the Petition and the prayers sought reveal that the dispute herein arose when the Petitioner was allegedly denied access to the 4th Respondent's EIA Licence during the hearing of its objection. The Petitioner, however, admittedly accessed the licence which the 4th Respondent used in its application on a read-only format. The EIA Licence was the one issued to Africa Polysack Limited which had been transferred to the 4th Respondent and was subject of the pending litigations.

129. The Petitioner was, therefore, made well aware of the 4th Respondent's licence at the hearing of its objection. Further, there is no doubt that the Petitioner had previously seen the impugned licence before and had even extensively litigated on it. From this Court, it is apparent that subjecting the same licence to the instant proceedings is an attempt by the Petitioner to either defeat or by-pass the pending litigations especially the appeal before the Court of Appeal in Kisumu.

130. The Petition is also anchored on Section 58 of the *Environmental Management and Co-ordination Act*, 1999. The provision deals with the need to apply for an Environmental Impact Assessment Licence before commencement of any project. In this case, Africa Polysack Limited successfully obtained the licence before commencing the operations. In fact, that EIA licence was one of the items transferred to the 4th Respondent which action prompted several litigations including those pending.

131. On a carefully consideration of this matter, this Court holds the position that it is prudent that this Court exercises restraint in dealing with the instant Petition on the basis of the pending litigations. The Court holds that position since once the Court of Appeal determines the issue of the EIA Licence, then that will determine the concerns raised in this Petition. In saying so, the Court remains alive to the contention that the Petition seems to deal with the procedure adopted during the hearing of the objection and not the issues of the licence. However, the substratum of the Petition is the Petitioner's access to the 4th Respondent's EIA Licence, which it is on record that the Petitioner had long accessed the same before and at the hearing.

132. This Court would have determined the Petition on the basis of the foregoing preliminary issue. However, for completeness of the record, suffice to say that the Court has also considered the allegations of contravention of Articles 27, 35, 40, 47 and 50 of *the Constitution*.

133. From the record, this Court finds difficulty in ascertaining any form of discrimination upon the Petitioner by any of the Respondents. The Court also fails to see how Article 35 of *the Constitution* was infringed where the Petitioner was in possession of the impugned EIA Licence long before the objection hearing. The Court remains at a loss on how Articles 40, 47 and 50 of *the Constitution* were allegedly infringed.

134. The Petitioner, therefore, failed the test set by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR on the threshold of constitutional Petitions. The Apex Court had the following to say:

> Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

135. Therefore, the Petition is not proved even if the objection that it is sub-judice, which is valid, is not considered or is overruled.

136. On the basis of the foregoing, the Petition cannot stand and falls by the way side.

137. In the end, this Court makes the following final orders: -

a. The Petition is hereby dismissed.

b. The Petitioner shall bear the costs of the Petition.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment; virtually delivered in the presence of:

Miss Wairimu holding brief for Mr. Kibe Mungai, Counsel for the Petitioner.