



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ithagi v Energy & Petroleum Regulatory Authority & another (Constitutional
Petition E005 of 2023) [2023] KEHC 3194 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E005 OF 2023**

OA SEWE, J

MARCH 29, 2023

**IN THE MATTER OF THE DECISION MADE BY THE ENERGY &
PETROLEUM REGULATORY AUTHORITY COMMUNICATED VIDE
THE PRESS RELEASE DATED 14TH JANUARY 2023 TO CROSS-
SUBSIDIZE THE PRICE OF DIESEL WITH THAT OF SUPER PETROL**

AND

**IN THE MATTER OF THE FAILURE BY THE ENERGY & PETROLEUM REGULATORY
AUTHORITY TO ADHERE TO THE PRINCIPLE OF PROCEDURAL FAIRNESS,
TRANSPARENCY, ACCOUNTABILITY AND CREDIBILITY AS REQUIRED BY
ARTICLES 10, 24, 27, 40, 201 AND 210 OF THE CONSTITUTION OF KENYA,
2010 AND SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT,
2015 & REGULATION 7 OF THE PETROLEUM (PRICING) REGULATIONS, 2022**

AND

**IN THE MATTER OF ARTICLES 10, 22, 27, 40, 201
AND 210 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE PETROLEUM ACT,
2019, FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

**IN THE MATTER OF CONTRAVENTION OF REGULATION
7 OF THE PETROLEUM (PRICING) REGULATIONS**

BETWEEN

KEVIN TURUNGA ITHAGI PETITIONER

AND



**THE ENERGY & PETROLEUM REGULATORY AUTHORITY 1ST
RESPONDENT**

**THE CABINET SECRETARY IN-CHARGE OF ENERGY &
PETROLEUM 2ND RESPONDENT**

RULING

Before the Court for determination is the Notice of Motion dated January 26, 2023. It was filed under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Sections 4 and 5 of the *Fair Administrative Act*, 2015 and Rule 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The petitioner thereby prayed for orders that,

- [a] Spent
- [b] Spent
- [c] Spent
- [d] Pending the hearing and determination of the Petition, this Court be pleased to issue temporary conservatory orders suspending the decision by the Director General of the Energy & Petroleum Regulatory Authority (EPRA) to cross-subsidize the price of Diesel with that of Super Petrol.
- [f] Costs of the application be in the cause.
- [2] The application was premised on the grounds that the petitioner is a frequent consumer of petroleum products whose price is highly regulated by EPRA (the 1st respondent); that in his inaugural speech on September 13, 2022 the President of the Republic of Kenya promised to end the fuel subsidization program initiated by his predecessor; and that in line with that policy shift, the 1st respondent terminated the fuel subsidy on Super Petrol but retained subsidies on Diesel and Kerosene. The petitioner further averred that, in blatant contravention of its mandate, the 1st respondent started a trend of cross-subsidization of the cost of Diesel with that of Petrol whereby, instead of calculating the price of Petrol as per the formula provided in the Pricing Regulations, it added an arbitrary mark-up, referred to as Price Stabilization Surplus/Deficit with effect from October 14, 2022.
- [3] Thus, the petitioner complained that, in effect, the 1st respondent has been levying the arbitrary amount in contravention of Article 210 of the *Constitution* of Kenya and in abuse of the Petroleum Pricing Regulations. He added that:
 - [a] The whole cross-subsidization scheme as structured, applied and promoted by the 1st respondent is arbitrary, unilateral and opaque;
 - [b] The whole amount referred to as Stabilization Surplus on Super Petrol is unconstitutional as it has no legal basis whatsoever;
 - [c] Besides the Stabilisation Surplus, the petitioner as a petrol consumer is still being levied the Petroleum Development Levy which is also being used to subsidize Diesel and Kerosene thus putting him at a disadvantage;
 - [d] That the whole cross-subsidization scheme, however well intentioned, is discriminatory against Super Petrol users while lining the pockets of Diesel consumers;



- [e] The Stabilization Surplus ends up disadvantaging the low-income earners who depend on motorcycles and matatus for transport whose main fuel is petrol, thus further making their cost of living higher. On the other hand, Diesel consumers are big factories and large commercial vehicles who are in a position to carry the burden of high cost of fuel.
- [4] The aforementioned grounds were expounded on in the petitioner's Supporting Affidavit, sworn on January 25, 2023. To buttress his averments, the petitioner annexed to his affidavit copies of the Press Releases issued by the 1st respondent on October 14, 2022, November 14, 2022, December 14, 2022 and January 14, 2023. He further deposed that no justification exists for the reliance on a part of the general population, whose fuel of choice (Super Petrol) only reduced a little, to subsidize that of users for whom the price of Diesel reduced significantly. It is for the foregoing reasons that the petitioner prayed that the 1st respondent be restrained from unlawfully applying the cross-subsidization policy as communicated in the subject Press Releases.
- [5] The application was resisted by the two respondents. The 1st respondent relied on a Replying Affidavit sworn on February 17, 2023 by its Director, Petroleum and Gas, Eng. Edward Kinyua. He adverted to the mandate of the 1st respondent at paragraphs 4 to 7, 11 to 13 and 18 of his Supporting Affidavit; and at paragraphs 8, 9 and 10 of the Replying Affidavit, Eng Kinyua explained that the importation of Super Petrol, Diesel and Kerosene into Kenya is undertaken through Open Tender System in accordance with the Petroleum (Amendment) Rules, 2012 (Legal Notice No 24 of 2012) which reflects the prices of petroleum products in the international markets.
- [6] Eng Kinyua further averred that the Government has been subsidizing petroleum pump prices since April, 2021 when the petroleum prices in the international markets spiked. He explained that the subsidy program implementation was aimed at cushioning consumers from high inflationary pressure that could have resulted had price increases been effected. He averred that, in line with the Presidential Directive issued on September 13, 2022, and in consultation with the policy maker, the Ministry of Energy & Petroleum, subsidies on Super Petrol were removed in full while those on Diesel and Kerosene were partly removed effective September-October 2022 pricing cycle. He explained that the reason Diesel pump price was partly maintained was because the landed cost for the product was yet to reduce. A second consideration was the adverse economic impact that continued pump price increases of Diesel and Kerosene would have created.
- [7] At paragraphs 19 to 24 of the 1st respondent's Replying Affidavit, Eng Kinyua deposed that, in the October-November pricing cycle, the landed costs of Super Petrol had registered a significant decline, while that of Diesel continued to increase, as driven by global market dynamics; and therefore, a cross-subsidy was necessary to cushion the economy from high inflation that would have set in if the trend continued. He explained that it was on that account that, guided by policy, the 1st respondent implemented the cross-subsidization of Diesel with Super Petrol in the October-November 2022 pricing cycle. He averred that the 1st respondent acted in good faith to balance the interests of consumers and other stakeholders, including the petitioner, and in furtherance of the function given to it under Section 10(hh) of the *Energy Act*. Thus, Eng Kinyua posited that orders sought herein are not in public interest and therefore should not issue.



- [8] On behalf of the Cabinet Secretary, Ministry of Energy (the 2nd respondent), a Replying Affidavit was filed herein on February 20, 2023, sworn by the Principal Secretary, Mr Mohamed Liban. He explained that the 2nd respondent is responsible for the policy formulation for the energy and petroleum sections in Kenya; and that the Ministry and its Cabinet Secretary draw their mandate, functions and powers from the Constitution of Kenya, the constituting Executive Orders, the Energy Act, No 1 of 2019, and the Petroleum Act, No 2 of 2019, among other legal instruments.
- [9] Mr Liban further averred that following a high level review of the Petroleum Development Levy in September 2022, it was observed that the levy was having a negative impact on consumers of petroleum products and the economy. Accordingly, the President directed the 2nd respondent to take necessary steps to ensure that the levy and its application to stabilize petroleum pump prices was reviewed so as to cushion the public from the high pump prices. In consequence thereof, administrative measures were taken to remove in full the subsidies on Super Petrol and to partially remove the subsidies on Diesel and Kerosene pump prices in the September-October 2022 pricing cycle.
- [10] Mr Liban further deposed that, guided by policy, the 1st respondent applied a cross-subsidy scheme in the October-November 2022 pricing cycle; and added that, had this not been done, the pump price of Diesel would have increased by 18.15 per litre, resulting in adverse economic effects. He asserted that the cross-subsidization is a necessary measure made in view of public interest and with the full backing of the law as provided for in Sections 10(a)(ii), 10(hh) and 11 of the Energy Act, Section 4 of the Petroleum Development Act, 1991 and Paragraph 4 of Legal Notice No. 124 of 2020. He consequently denied any violation of the law, including the Constitution and the Fair Administrative Action Act, and added that, in any case, the application has been overtaken by events as the December 2022-January 2023 cycle had come to an end.
- [11] With the leave of the Court, the petitioner filed a Further Affidavit on March 6, 2023 to demonstrate that, on February 14, 2023, the 1st respondent is still imposing the cross-subsidization scheme and therefore that the application has not been overtaken by events as averred by the respondents. He annexed a copy of the relevant Press Release in proof of his averment and reiterated his prayer for conservatory orders pending the hearing and determination of his Petition.
- [12] The application was canvassed by way of written submissions, pursuant to the Court's directions dated February 2, 2023. Accordingly, learned counsel for the petitioner, Mr Wairagu, filed his written submissions on March 6, 2023. On the authority of Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others [2016] eKLR, he proposed the following issues for determination:
- [a] Whether the petitioner has demonstrated a prima facie case with a likelihood of success; and whether there is a real danger that the petitioner will suffer prejudice as a result of the violation complained of;
 - [b] Whether, if a conservatory order is not granted, the Petition will be rendered nugatory;
 - [d] Whether the public interest is in favour of granting a conservatory order; and,
 - [e] Whether the conservatory order sought will delay the early determination of the dispute.



- [13] Thus, Mr Wairagu submitted that a prima facie case has been made out by the petitioner; it having been established that the 1st respondent has, since the period 15th October-November 14, 2022, introduced a cross-subsidy scheme where consumers pay a higher price for Super Petrol to subsidize the pump price for Diesel. Counsel reiterated the assertion of the petitioner that the scheme not only fails to adhere to the prescribed formula in Regulation 7 of the Petroleum (Pricing) Rules, 2022, but also contravenes Articles 40 and 210 of the Constitution.
- [14] On whether the Petition will be rendered nugatory if conservatory orders are not issued, Mr Wairagu submitted that, as the 1st respondent continues to implement the cross-subsidy scheme, the petitioner and others affected by the scheme have no recourse since the Government will not be willing to refund the funds so far collected under the scheme. He therefore urged that, unless the conservatory order is issued, the Petition will be rendered nugatory.
- [15] In terms of public interest, Mr Wairagu submitted that it is in the public interest that the Constitution and the law are respected and followed; and therefore an allegation that the Constitution has been violated or is threatened with violation ought not to be taken lightly. He further submitted that, the imposition of an unconstitutional levy on millions of Kenyans is no small matter and ought to be curtailed pending the disposal of the Petition.
- [16] On behalf of the respondents, Ms Lang'at relied on her written submissions filed on March 8, 2023. She proposed the following issues for determination:
- [a] Whether the 2nd respondent took reasonable administrative measures in the cross-subsidy of petroleum products;
 - [b] Whether the 1st respondent has the mandate of technical and economic regulation of the petroleum and renewable energy sectors;
 - [c] Whether the application is merited.
- [17] Ms Lang'at reiterated the averments set out in the two Replying Affidavits as to the mandates of the two respondents and submitted that the administrative measures undertaken by them were necessary in the public interest and were grounded not only in the law but also in the policy directions given pursuant thereto. She cited the provisions of the applicable law in her submissions as well as the case of Consumer Federation of Kenya (COFEK) v Attorney General & 4 Others [2012] eKLR and urged the Court to consider whether the measures taken were reasonable in the circumstances.
- [18] On the mandate of the 1st respondent, Ms Lang'at urged the Court to note the averment by the respondents that Diesel is the major driver of the economy, with an average monthly consumption of 230 million litres. According to her, it was imperative that measures be taken to balance the interests of consumers and other stakeholders in the wake of rising global prices. She submitted that all the steps taken in this regard were taken in accordance with the applicable law and regulations.
- [19] On the merit of the application, Ms Lang'at relied on Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR and Centre for Rights and Awareness & 7 Others v Attorney General [2011] eKLR as to the elements that the petitioner needed to prove to be eligible for the grant of a conservatory order. She also made reference to the case of Mrao Ltd v First American Bank of Kenya Limited & Others [2003] eKLR for the definition of a prima facie case. She concluded her submissions by asserting that the 1st respondent acted in good faith to



balance the interests of consumers and other stakeholders and in furtherance of the function given to it under the *Energy Act*.

[20] I have given careful consideration to the application, and in particular, the grounds relied on by the petitioner as explicated on the face of the application and in the Supporting Affidavit. I have likewise considered the responses filed by the respondents as set out in their respective Replying Affidavits and the written submissions filed herein by learned counsel. The underlying facts are not in dispute. For instance, there is no dispute as to the respective mandates of the respondents. There is further no dispute that the 1st respondent has the mandate of fixing the applicable prices for petroleum products on the 14th day of each month pursuant to Rule 3(1) of the *Petroleum (Pricing) Regulations, 2022*. It states:

' The Authority shall determine and publish the maximum wholesale and retail prices of petroleum products on the 14th day of every calendar month.'

[21] It is also common ground that at the international level, the prices of petroleum products went up in April 2021; and that as a result, the Government of Kenya took a decision to subsidize the pump prices of petroleum products to cushion consumers from high inflationary pressure that would have ensued. The subsidies were therefore in effect from April 2021 until September 13, 2022 when a Presidential Directive was issued that resulted in the lifting in full of subsidies on Super Petrol. There is consensus that subsidies on Diesel and Kerosene pump prices were removed only partially in the September-October 2022 pricing cycle. The justification given at paragraph 17 of the 1st respondent's Replying Affidavit was that, while the landed cost of Super Petrol had reduced significantly, the landed cost for Diesel was yet to come down.

[22] Thus, the two respondents averred that it was the mandate of the 1st respondent to intervene and put in place measures that would ensure pump price stabilization. To that end, the 1st respondent implemented the contentious cross-subsidization scheme. The petitioner's Supplementary Affidavit confirms that the scheme is yet to be lifted, hence the application for conservatory order.

[23] This being an interlocutory application, there is need for caution on the part of the Court so as to not delve into the merits of the Petition prematurely. The need for caution was aptly expressed thus by Hon Ibrahim, J (as he then was) in the *Muslim for Human Rights & 2 Others vs Attorney General & 2 Others [2011] eKLR*:

' The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters.'

[24] Hence, in Nairobi High Court Petition No 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others vs Attorney General, the view was expressed that:

' At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.'



[25] In the same vein, the Supreme Court had the following to say in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* (supra):

' Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case or 'high probability of success' in the Applicant's case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.'

[26] Hence, it is now settled that an applicant for conservatory orders for purposes of Article 22 and 23(3)(c) of the [Constitution](#) must satisfy the Court as to the following three considerations:

- [a] That he/she has a prima facie case with a high likelihood of success;
- [b] That the Petition will be rendered nugatory;
- [c] That public interest weighs in his/her favour.

[27] What amounts to a prima facie case was aptly stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 thus:

' A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'

[28] Similarly, in [Kevin K Mwiti & others v Kenya School of Law & others](#) (supra), it was held that:

' A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.'

[29] The petitioner cited Article 210 of the [Constitution](#) as the key provision that has been violated by the respondents. The provisions states:

' No tax or licensing fee may be imposed, waived or varied except as provided by legislation.'



- [30] The respondents' response was that there is in place a comprehensive legal framework that underpinned the cross-subsidy scheme. In particular, the respondents relied on Section 10 of the *Energy Act* which sets out its mandate and functions. Section 10(a)(ii) for instance gives the 1st respondent the authority to regulate the importation, refining, exportation, transportation, storage and sale of petroleum and petroleum products with the exception of crude oil; and under Section 10(hh) the 1st respondent had the duty to protect consumer, investor and other stakeholder interests. In addition, Paragraph 4 of the Petroleum Development Levy Order, 2020 (Legal Notice No 124 of 2020) provides for stabilization of local petroleum pump prices in instances of spikes occasioned by high landed costs of petroleum products. It provides:
- ' The levy shall also be used for matters relating to the development of the oil industry including to stabilize local petroleum pump prices in instances of spikes occasioned by high landed costs above a threshold determined by the Authority. The Cabinet Secretary may by writing to the administrator, request for a draw down from the Petroleum Development Fund to stabilize local petroleum pump prices where he deems it necessary.'
- [31] It appears therefore that there was legal basis for the decision to impose the cross-subsidy scheme. As to whether it was reasonable, the 1st respondent explained, at paragraph 17 of its Replying Affidavit that the subsidies on the Diesel pump price were partly maintained because the landed cost was yet to reduce. The 1st respondent supplied the trends of landed cost for the period October 2022 to January 2023 at paragraph 19 of its Replying Affidavit and added that the subsidy was necessary to cushion the economy from high inflation that would have otherwise set in. At paragraph 21 of its Replying Affidavit, the 1st respondent explained that Diesel is the major driver of the economy with an average monthly consumption of 230 million litres; and that it is mostly used in the transportation, agricultural and industrial sectors. It added that had the 1st respondent not taken the action of cross-subsidy, high Diesel pump prices would have further exacerbated the cost of living in the country as industries, farmers and transporters passed the burden of the extra cost to the consumers, thereby adversely affecting the citizenry, including the petitioner.
- [32] At a policy level, the 2nd respondent explained that, following a Presidential Directive dated September 13, 2022, a high level review of the Petroleum Development Levy was done with a view of stabilizing the petroleum products' pump prices so as to cushion the public from their adverse effects. It was then that the decision was taken to implement the cross-subsidy Scheme upon removing subsidy on Super Petrol. And therefore the 1st respondent was merely guided by policy in applying the cross-subsidy scheme.
- [33] In the premises, I am not convinced that the petitioner has made out a prima facie case to warrant the issuance of conservatory orders as prayed for herein.
- [34] Granted my finding as aforesaid, it is highly unlikely that the Petition will be rendered nugatory, taking into account the range of reliefs provided for in Article 23 of the *Constitution*. Similarly, I have addressed the public interest angle of the application in my analysis above and found that it weighs in favour of the bigger picture, as presented by the respondents.
- [35] In the result, I find no merit in the petitioner's application dated January 26, 2023. The same is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH MARCH
2023**

OLGA SEWE

JUDGE

