



**Omtatah v Cabinet Secretary for Petroleum and Mining & 2 others; Abel Mwenja
Gichimu t/a Mzima Gas Supplies (Interested Party) (Constitutional Petition 313 of 2019)
[2023] KEHC 26486 (KLR) (Constitutional and Human Rights) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 313 OF 2019**

**AC MRIMA, J
DECEMBER 15, 2023**

BETWEEN

OKIYA OKOITI OMTATAH PETITIONER

AND

**CABINET SECRETARY FOR PETROLEUM AND MINING .. 1ST RESPONDENT
ENERGY AND PETROLEUM REGULATORY AUTHORITY 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

ABEL MWENJA GICHIMU T/A MZIMA GAS SUPPLIES . INTERESTED PARTY

JUDGMENT

Background:

1. At the heart of the dispute herein is the legality of the decision by the Cabinet Secretary for Petroleum and Mining and Energy and Petroleum Regulatory Authority, 1st and 2nd Respondents herein respectively, to ban Liquefied Petroleum Gas (LPG) dealers from handling and cross-refilling gas cylinders that belong to other brands.
2. In a synopsis, on 7th August 2019, The *Petroleum (Liquefied Petroleum Gas) Regulations, 2019* (Legal Notice No. 100 of 12th June 2019) (hereinafter simply referred to as ‘the impugned Regulations’) were published.



3. The *impugned regulations* abolished LPG Cylinder Exchange Pool, effectively banning LPG dealers from refilling and dealing in gas cylinders that belong to other brands.
4. Under the *impugned regulations*, consumers could no longer swap their empty gas cylinders with refilled ones of any brand at any retail gas dealer. They could only do so through branded retail points of the respective gas cylinder they are in possession of.
5. The Petitioner, Okiya Okioti Omtatah, was aggrieved on various fronts as regards the impact of the *impugned regulations* on consumers of LPG as well as business community dealing in LPG.
6. The Respondents and the Interested Party vehemently challenged the Petition.

The Petition:

7. Through the Petition dated 8th August 2019, supported by the Affidavit and Supplementary Affidavit of Okiya Omtatah Okioti deposed to 8th August 2019 and 16th September 2019 respectively, the Petitioner sought to challenge the *impugned regulations*.
8. The Petitioner pleaded that the abolition of LPG Cylinder exchange pool constitutes advancement of unfair trade practices by the 1st and 2nd Respondents and denied Kenyans the convenience of trading their cylinders at any outlet without regard to the brand of their gas cylinder.
9. It was the Petitioner's case that under the Cylinder Exchange Pool there was unhindered access to cooking gas.
10. The Petitioner averred that despite the leeway in Regulation 2 of *impugned Regulations* that allows Mutual Cylinder Exchange System among brand owners who have consented to exchange gas cylinders of different brands, consumers will no longer have access and convenience of buying cooking gas at their neighbourhood kiosk or nearest petrol station.
11. The Petitioner further posited that even though the unified valve will continue, allowing households a degree of flexibility in choosing gas cylinder brands, the new regulations required consumers to pay a refundable deposit, a scenario that is not favourable to consumers since the price brand owners charges are way above the market value.
12. Th Petitioner pleaded that the Regulations are silent on the relationship between the deposit amount charged by brand owners for empty cylinders and the market price of the gas cylinders.
13. He posited that, according to his survey, on average, the lowest amount charged by LPG brand owners as cylinder deposits is Kshs. 2,600 for a 6kg cylinder and Kshs.4,200 for a 13kgs cylinder, an amount that is way above market price of imported brand new empty cylinders.
14. The Petitioner was aggrieved that the new regulations did not put in place a ceiling on what percentage in relation to the market price of empty cylinders should be charged by brand owners as deposit, a lacuna that allows for exploitation of consumers.
15. With respect to the ban on cross re-filling of empty gas cylinders, as provided for in regulation 14(a), (b)(i) & (k) and 19(4) of the *Regulations*, the Petitioner pleaded that since gas cylinders themselves are a distinct product from the gas inside, the brand owners right associated with the gas inside is exhausted on first sale. As such, the brand owner should not, in principle, contest the cross-refilling of empty gas cylinders since the gas inside is not branded.
16. It was his case that the foregoing violates the consumers right to property and stifles the liberty of the consumer to have their gas cylinder refilled by any qualified and licensed dealer irrespective of the brand.



17. It further was its case that the regulations had the objective of ring-fencing markets so that brand owners could obtain undue competitive advantage by locking out small scale dealers.
18. The Petitioner pleaded that Regulation 26(1) and (2) of the new Regulations which provides that a cylinder shall remain the property of the brand owner violates the property rights protected under Article 40(2)(a) and 46 of the Constitution to the extent that it arbitrarily deprives buyers their right to property after purchase of the cylinders.
19. The Petitioner further claimed that the new regulations discriminated against both the consumer and independent re-fillers whose activities helped Kenyan LPG market competitive.
20. To that extent, the Petitioner pleaded that there are alternative ways of addressing rogue LPG actors without punishing innocent consumer and independent re-fillers.
21. The Petitioner asserted that the regulations could not pass the reasonableness test, a requirement under Article 47(1) of the Constitution and would deny local traders a chance to earn a living in violation of their economic and social rights under guaranteed in Article 43 of the Constitution .
22. The Petitioner asserted that the new regulations were contrary to Article 73 of the Constitution for having the effect of clearing local small-scale traders from the LPG market in favour of multinational companies.
23. In a distinct line of argument, the Petitioner averred that the process of enactment of the Legal Notice No. 100 of 2019, which brought forth the Regulations, was not in conformity with sections 2, 3, 4, 5, 6, 7, 8, 9, 11 and 22 of the Statutory Instruments Act.
24. It was the Petitioner's contention that by not publishing the impugned Regulations in the Kenya Gazette before implementing them, the 1st and 2nd Respondent violated Article 35(3) and 232(1)(f) of the Constitution and section 22 of the Statutory Instruments Act.
25. The Petitioner pleaded that whereas there was some form of stakeholder participation limited to large players in the sector, the general population and Parliament were never accorded an opportunity to participate in the process of making the new regulations contrary to Article 10(2) and 232(1)(d) of the Constitution .
26. On the foregoing factual and legal foundation, the Petitioner prayed for the following reliefs;
 - i. A declaration that regulations 14(a), (b)(i) & (k), 26, 19)4) and 32 of the Petroleum (Liquified Petroleum Gas) Regulations, 2019 (Legal Notice No. 100 of 12th June 2019 and the definition of deposit in regulation 2 are unconstitutional and therefore invalid, null and void.
 - ii. A declaration that the Petroleum (Liquified Petroleum Gas) Regulations, 2019 (Legal Notice No. 100 of 12th June 2019 are unconstitutional and, therefore, invalid null and void *ab initio* in their entirety.
 - iii. A declaration that the Petroleum (Liquified Petroleum Gas) Regulations, 2019 (Legal Notice No. 100 of 12th June 2019 could not come into effect before they were published (i.e., printed and offered for sale to the public) in Kenya Gazette.
 - iv. A declaration that the date of publication of statutory instrument in Kenya Gazette is the date when they are printed and offered for sale to the public by the Government printer, and electronic versions of legal instruments that are circulated without being printed and published by the Government printer are NOT valid.



- v. A declaration that it is unreasonable and unjustified to abolish the LPG Exchange Cylinder Pool that was established under regulation 14 of the repealed [Energy Petroleum \(Liquified Petroleum Gas\) Regulations](#), 2009 (Legal Notice No. 121 of 2009).
- vi. A declaration that brand owners which, at the point of sale, collect cylinders deposits that are not a token but are equivalent to or higher than market value of LPG cylinders cede ownership of the cylinders to buyers who pay the amount.
- vii. A declaration that other than abolishing the LPG Cylinder Exchange Pool there were and still are less restrictive means to achieve the purpose of reigning in illegal and unsafe refilling of LPG cylinders.
- viii. A declaration that the abolition of the LPG Cylinder Exchange Pool constitutes the advancement of unfair trading practices by the 1st and 2nd Respondents.
- ix. An order quashing regulation 14(a), (b)(i) & (k), 26, 19)4) and 32 of the [Petroleum \(Liquified Petroleum Gas\) Regulations](#), 2019 (Legal Notice No. 100 of 12th June 2019 and the definition of ‘deposit’ in regulation 2.
- x. An order quashing in their entirety the [Petroleum \(Liquified Petroleum Gas\) Regulations](#), 2019 (Legal Notice No. 100 of 12th June 2019).
- xi. An order that the costs of this suit be provided.
- xii. Any other relief the Court may deem just to grant.

The Submissions

- 27. The Petitioner urged his case further through written submissions dated 24th April 2021.
- 28. In demonstrating applicability of the concept of first sale doctrine and principle of exhaustion on LPG cylinders, the Petitioner relied on the Court of Justice of the European Union in [Viking Gas -vs-Ko-san Gas](#), where the Court held that;

It follows from the foregoing that the sale of the composite bottle exhausts the rights that the licensee of the right to the trade mark constituted by the shape of the composite bottle and proprietor of the marks affixed to that bottle derives from those marks and transfers to the purchaser the right to use that bottle freely, including the right to exchange it or have it refilled, once the original gas has been consumed, by an undertaking of his choice, that is to say, not only by that licensee and proprietor, but also by one of its competitors. The corollary of that right on the part of the purchaser is the right of those competitors, within the limits set out in Article 7(2) of Directive 89/104, to refill and exchange the empty bottles.

- 29. Deriving from the foregoing, the Petitioner submitted that the brand in an item is separate from the personal property right in the item. When a person purchases a branded gas cylinder, they obtain a personal property right in that good notwithstanding that the brand (copyright) subsists in another person or entity.
- 30. It was his case, therefore, that a trademark owner cannot oppose the refilling of branded gas cylinder and that according to section 14 of the [Sale of Goods Act](#), having purchased the gas cylinders, ownership of the containers is transferred to consumers.



31. The Petitioner submitted that tying consumers to brand owners who initially sold the cylinders to them militates against free market principles, and violates the express provisions of Article 36(2) of the Constitution , which forbids compelling a person to join an association of any kind.
32. As regards the constitutional requirement of subjecting the new regulations to public participation, the Petitioner asserted that he general public as well as major stakeholders in the sector were not consulted by the 1st and 2nd Respondents.
33. To demonstrate the importance of public participation, the Petitioner referred to the South African decision in Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others, where it was observed;

...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.
34. Closely related to the foregoing is the submission that the new regulations were enacted in violation of the statutory Instruments Act.
35. The Petitioner submitted that by failing to subject the statutory instrument to requisite public participation and to prepare a regulatory impact statement, and to submit the statutory instrument to Parliament for scrutiny and approval rendered it illegal, invalid, unconstitutional and void.
36. Is further was its case that the decision to enforce Legal Notice No. 100 of 12th June 2019, before the Government Printer published the statutory instrument on 6th August 2019, was a violation of Section 22(1) of the Statutory Instrument Act which required every statutory instrument to be published in the Kenya Gazette.
37. The Petitioner submitted that the Government Printer does not publish electronic copies of the Kenya Gazette and section 83T of the Kenya Information and Communications Act, No. 2 of 1998, on electronic gazette could not be applied to the Government Printer.
38. In conclusion, the Petitioner submitted that it was entitled to the reliefs.
39. On costs, the Petitioner submitted that this being a constitutional litigation between a private party and the State, in the event it is successful it should be awarded costs and if not, each party should bear their own costs.

The 1st & 3rd Respondents case:

40. The Cabinet Secretary for Petroleum and Mining and the Hon. Attorney General opposed the Petition through the Replying Affidavit of Andrew M. Kamau, the Principal Secretary State Department for Petroleum in the Ministry of Petroleum and Mining deposed to on 9th September 2019.
41. He deposed that the 2nd Respondent is responsible for policy formulation and regulation of the Petroleum and mining sectors in Kenya.
42. To that end, it was his case that the new Regulations were formulated pursuant to section 101 of the Petroleum Act No. 2 of 2019 and after a comprehensive review of Energy (Liquefied Petroleum Gas) Regulations 2009.



43. He deposed that, as identified by relevant stakeholders, the new regulations were necessitated by cylinder interchange arrangement, cylinder ownership, licensing of LPG cylinder businesses and consumption and whether it was necessary to use unified valves for all LPG cylinders.
44. He deposed that in the year 2016, after several consultations with the stakeholders, the 1st Respondent constituted a Technical Committee to review LPG regulatory framework.
45. He deposed that the review of the repealed Regulations was undertaken in full compliance with the Constitution and the law which included draft regulations by the Office of the Attorney General in compliance with the Statutory Instruments Act.
46. It was his deposition that public participation was undertaken including comprehensive stakeholder engagement whose feedback was given due consideration and incorporated where practicable.
47. It was his case, therefore, that the Petitioner was using Court process to express what he ought to have expressed during public participation while the regulations were being developed.
48. He deposed that the Petition fails to substantiate any impropriety on the part of the Respondents in the development of the Regulations.
49. In the end it was his position that the Petitioner had failed to plead any particulars of infringement of fundamental rights and freedoms and as such, it should be dismissed.

The Submissions:

50. In its written submissions dated 13th September 2021, the 1st and 3rd Respondents submitted that there was public participation since the draft regulations were published in the Kenya Gazette on 4th May 2018 for a period of 40 days to enable stakeholders and members of the public to give comments.
51. It was its submission that on 8th June 2018, a stakeholders' workshop was held by the 2nd Respondent and since there were no objections to the proposed regulations by the stakeholders it marked the conclusion of the mandate of the Technical Committee.
52. In reference to the decision in Were Samuel & 14 Others v Attorney - General & 2 Others (2017) eKLR, the 1st and 3rd Respondents submitted that the process of public participation cannot and ought not to be dictated to the relevant bodies and that the mode used cannot be used to invalidate amendments to the law. In the case, it was observed;

Complying with the requirement of public participation does not mean that every affected person, group of persons or segment of the society be contacted and heard individually. It would simply be impossible to hear everybody who claims to be affected by a given legislation. However, it suffices if the public including those to be affected were made aware of the impending legislative process and accorded an opportunity to participate

53. In opposition to the Petitioner's claim that abolition of the Mandatory LPG Cylinder Exchange Pool would advance unfair trade practices, the 1st and 3rd Respondents submitted that according to regulation 2 as read with Regulation 25 of the impugned Regulations, the claim was unfounded since the said provisions allow for brand owners to enter into mutual agreements with those they would allow to exchange cylinders on their behalf.
54. It was their case further that the 2nd Respondent has powers to set how LPG cylinder exchanges may be handled by the players in the sector *vide*, Section 10 (a) (ii) of the Energy Act and to set the rates the cylinder deposits *vide* section 11(b) of the said Act



55. On the aspect of deposit rates, it was the 1st and 3rd Respondents case that the deposit rates published in the impugned notice were for customers returning their cylinders to the respective brand owners and not as urged by the Petitioner.
56. In the end, it was their case that the Petition was not deserving of the orders it sought.

The 2nd Respondent's case:

57. Energy & Petroleum Regulatory Authority challenged the Petition through the Replying Affidavit of Edward Kinyua, the Director Petroleum and Gas Directorate, deposed to on 9th September 2019.
58. It was his case that in a bid to bring uniformity in the LPG sector, the Kenya Bureau of Standards and the 2nd Respondent herein commenced a standardization of LPG cylinders and valves.
59. He deposed that as a result of free interaction with other marketers in the Cylinder Exchange Pool, there was a rise in unauthorized re-filling of various brands of LPG cylinders among other malpractices such as hoarding, defacing and under filling of competitors' cylinders.
60. He deposed further that due to lack of proper check during cylinder refilling, there had been an increase of cases of fatal accidents.
61. It was his case that the Management Committee that comprised of one representative from the Ministry of Energy, one representative from Kenya Bureau of Standards and 6 representatives from LPG marketing companies identified challenges during implementation of the repealed Regulations of 2009.
62. It was his case that among them were; the lack of distinct exchange pool deposits accounts which consumers could be paid in case of insolvency of brand owners; lack of LPG cylinder insurance against third party injuries in case of accidents and lack of provision from tracking cylinders throughout the supply chain in order to enhance traceability in case of an accident.
63. He deposed that on 16th November 2016, the 1st Respondent constituted a Technical Committee in order to aid compliance, improve safety and spur growth of the LPG sector.
64. He deposed that the membership of the Committee was drawn from the ministry of Energy and Petroleum, Energy Regulatory Commission, National Oil Corporation, Completion Authority of Kenya, Anti-Counterfeit Agency, Kenya Bureau of Standards, Directorate of Occupational safety and Health Standards, Petroleum Institute of East Africa and Energy Dealers Association.
65. He deposed that the Energy Dealers Association represent 29 Independent Brand Owners and 31 Brands and that before issues on LPG were discussed questionnaires were sent in advance to all Technical Committee Members.
66. He deposed that the Technical Committee meetings ended on 13th February and draft regulations were developed thereafter. It was his case that the highlight of the deliberation included the unified valve would be retained since it favours consumers in various ways.
67. He deposed further that at the meeting of on 16th March 2017 the Committee identified that ownership of the LPG cylinder by the brand owner outweighed any other competing considerations.
68. It was his case that on 12th January 2018 the Technical Committee resolved that mandatory LPG cylinder Exchange pool ought to be abolished and in its place allow for interested parties to enter mutual exchange agreements.



69. In asserting compliance with public participation, he deposed that the regulations were published in the Kenya Gazette on 4th May 2018 for a period of 40 calendar days to allow for stakeholders and members of the public to give comments.
70. He deposed that on 8th June 2018, national stakeholder's workshop was held in Hotel Intercontinental, Nairobi to discuss the comments generated from the public.
71. He deposed that subsequent to the conclusion of the Technical Committee and stakeholder meeting, no party came forth with objections on the proposed regulations.
72. He deposed that in compliance with section 11 of the *Statutory Instruments Act*, the Cabinet Secretary Ministry of Petroleum and Mining forwarded to Parliament the regulations together with the Regulatory Impact Assessment to the Clerk of the National Assembly.
73. Mr. Kinyua deposed further that the right to a cylinder brand was affirmed by the judgment in Petition No. 529 of 2014 *William Odhiambo Abok -vs- Attorney General & 2 Others* (2019) eKLR.
74. In clarifying the import of cylinder deposit, Mr. Kinyua deposed that the cylinder deposits are meant to help settle cylinder deficits between brand owners since the already exchanged cylinders prior to gazettelement of Legal Notice No. 100 of 2019 were held in different competitor's yards.
75. He deposed that Regulation 26 of the *impugned regulations* entitles consumers to the full amounts paid on account of a cylinder on return of the cylinder to the brand owner.
76. In opposition to the quest to declare unconstitutional Regulation 14 that lists acts that constitute unauthorized refilling of cylinders, he deposed it was agreed upon by the industry stakeholders that the safety measures were in public interests for the ordinary consumer of LPG.
77. Mr. Kinyua urged that it was in the public interest that the Regulations be sustained by this Court.
78. He implored the court to dismiss the Petition with costs.

The submissions:

79. The 2nd Respondent filed written submissions dated 1st September 2021. They were a reproduction of the depositions of the Replying Affidavit of Edward Kinyua.

The Interested Party's case:

80. Abel Mwenja Gichimu T/A Mzima Gas Supplies challenged the Petition through the Replying Affidavit of Abel Mwenja Gichimu the sole proprietor of the business of Mzima Gas Supplies deposed to on 16th September 2019.
81. He deposed that the Petition was imprecise regarding constitutional rights violated and that it made assertions of discrimination and corruption without evidence.
82. He deposed that the Petition was based on false information and comprehension between the 2009 Regulations and 2019 Regulations. He asserted that the only material difference is the alteration of the position between what was compulsory LPG pool system to a mutual LPG system which is now voluntary between brands.
83. He deposed that the *impugned Regulations* brought about a sobriety in the business and empowered owners of cylinders to exercise ownership rights by associating with those they wish to, consistent with the *Constitution*.



84. It was his case that contrary to what the Petitioner asserted, the *impugned Regulations* did not promote unfair trade practices rather, it promoted freedom of trade since LPG dealers will be at liberty to exchange their cylinders with whomsoever they wish.
85. He further deposed that the *impugned regulations* promote consumer protection since they impose safety responsibilities on LPG dealers.
86. In response to the Petitioner's claim of exhaustion of a brand's proprietary rights upon first purchase, Mr. Gichimu deposed that the consumer leases the cylinder and property rights remains with the dealer/brand.

The Submissions:

87. The Interested Party filed written submissions dated 4th June 2021.
88. While submitting on ownership of the Gas cylinder, it was his case that the *impugned Regulations* clarify the position in Regulation 26 and 26(2).
89. It was submitted that the cylinder owner has rights that cannot be infringed upon. To that end, reference was made to the decision in *William Adhiambo Abok -vs- Attorney General & 2 Others* (2019) eKLR where it was observed that regulation 7(1) and (2) do not violate the right to property, but only bars anyone from filling the cylinder without the permission of the cylinder or brand owner.
90. The Interested Party submitted that the 2009 and 2019 Regulations are similar on the fact that ownership of the cylinder remains in the hands of the licensed brand owner. It was its case that the only departure between the two Regulations was the creation of a voluntary mutual cylinder exchange pool.
91. In the end, the Interested Party submitted that invalidating the Regulations would create a lacuna in the LPG sector. He urged that the Petition be dismissed with costs.

Analysis:

92. 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 Regulations 14(a), (b)(i) & (k), 19(4), 26 and 32 of the *Petroleum (Liquified Petroleum Gas) Regulations, 2019* and the definition of deposit in Regulation 2 contravene Articles 43, 47(1) and 73 of the *Constitution* .
 - ii. Whether the electronic version of the Kenya Gazette is unconstitutional.
93. The Court will deal with the issues in seriatim.
 - a. Whether Regulations 14(a), (b)(i) & (k), 19(4), 26 and 32 of the Petroleum (Liquified Petroleum Gas) Regulations, 2019 and the definition of deposit in Regulation 2 contravene Articles 43, 47(1) and 73 of the *Constitution* :**
94. To enable this Court deal with the instant issue with ease, there is need to reproduce Regulations 14(a), (b)(i) & (k), 19(4), 26 and 32 of the *Petroleum (Liquified Petroleum Gas) Regulations, 2019* and the definition of deposit in Regulation 2. The said provisions are tailored as under: -
 14. The following acts constitute the unauthorized refilling of cylinders and any person who commits these acts shall be liable to the fine set out in the Fifth Schedule –



- a. refilling of a cylinder by a person or entity other than the brand owner or refilling of a cylinder without the prior written consent from the brand owner provided that such consent shall have been submitted to the Authority;
 - (b) refilling of a cylinder that —
 - (i) does not bear the embossed markings of the brand or trade name; or
 - (k) wholesale or retail of filled cylinders belonging to another brand owner without written consent from the brand owner and such consent submitted to the Authority.
19. (4) A person shall not undertake the business of retail of liquefied petroleum gas cylinders of another brand owner without prior written consent from the brand owner and such consent submitted to the respective County Government and the Authority.
26. (1) A cylinder shall remain the property of the brand owner and a consumer shall pay a cylinder deposit where the liquefied petroleum gas consumer does not provide an empty cylinder in exchange during the purchase of liquefied petroleum gas in cylinders.
- (2) A liquefied petroleum gas consumer who returns a cylinder to a brand owner shall be entitled to a full refund of the cylinder deposit.
32. The *Energy (Liquefied Petroleum Gas) Regulations, 2009* are repealed.
95. The rationale behind the above provisions seems to have been the guiding principles in the enactment of *Petroleum (Liquefied Petroleum Gas) Regulations, 2009* (hereinafter referred to as ‘the 2009 Regulations’) which Regulations were repealed by the enactment of the *impugned Regulations*.
96. In discussing the constitutionality of similar provisions of the 2009 Regulations, the High Court in *William Odhiambo Abok v Attorney General & 2 others* [2019] eKLR had the following to say: -
22. The Petitioner has impugned the *Energy (Liquefied Petroleum Gas) Regulations, 2009*, on grounds that some of its provisions, namely; regulations 7(1), (2), 14(1) and 14(8) are unconstitutional. The Petitioner has, therefore, sought to have them nullified as well as the entire regulations contained in Legal Notice No. 121 of 24th July 2009.
23. The *impugned regulation* 7 provides that (1) a person shall not fill LPG in Cylinder without the permission of the cylinder or brand owner and (2) that a person shall not alter the branching, deface, damage repair or submit for maintenance on LPG cylinder without the authority of the brand owner.
24. The petitioner has contended that the effect of the above provisions is akin to taking away the right to property. In their view, once a person purchases an LPG cylinder, he/she acquires property rights in the LPG cylinder and any restrictions introduced by regulations 7 is volatile of the person’s right to property contrary to Article 40 of the *Constitution* .
25. I do not agree with the Petitioner that regulation 7(1) (2) has the effect of violating the right to property. The regulations must be read in context. It bars anyone from filling the cylinder without the permission of the cylinder or brand owner. That in my view, controls where the cylinder is filled and by whom. The person who purchased the cylinder does not take it to a filling plant. He does not necessarily know where the cylinder is refilled. All he wants is a refilled cylinder and he cares less where it has been filled or by whom. In that case, therefore,



the regulation is intended to control the refilling of cylinders and, in my view, this is to the advantage of consumers who have to be sure of the safety and quality of the gas they use.

26. With regard to regulation 7(2), I do not also see any inconsistency with the Constitution as to render it constitutionally invalid. This is because the regulation prohibits alteration of branding, defacing, damaging, repairing or submitting the cylinder for repairs without authority of the brand owner.
 27. LPG cylinders are branded products of particular companies and, therefore, their brands must be protected. Invalidating this regulation would mean that one would be free to deface or damage the cylinder or repair it or submit it for maintenance anywhere without any consequences which is exposing consumers to risks.
 28. This would have the singular effect of jeopardizing not only quality of the LPG cylinders but also lives of consumers. LPG cylinders contain highly inflammable liquid gas hence the quality and standards of the cylinders should never be compromised. Those who are to repair and maintain them must be highly qualified for the job and only brand owners would guarantee this. If this requirement is to be considered as an infringement to the right to property, then as long as it would ensure the quality of the cylinders and the safety of consumers that would be justifiable in terms of Article 24 of the Constitution.
97. Returning to the issue at hand, Article 43 of the Constitution provides for economic and social rights. The provision states as follows: -
43. Economic and social rights
 - (1) Every person has the right-
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
 - (2) A person shall not be denied emergency medical treatment.
 - (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.
98. It was argued that the above Regulations 14(a), (b)(i) & (k), 19(4), 26 and 32 of the impugned Regulations would deny local traders a chance to earn a living in violation of their economic and social rights as guaranteed under Article 43 of the Constitution. First, this Court notes that the opportunity to earn a living is not one of the rights provided for under Article 43 of the Constitution. Second, it has not been demonstrated how any of the rights envisaged under Article 43 of the Constitution was infringed by any of the impugned Regulations.



99. Enriching the above position, in 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 extensively dealt with the issue as to whether a right to choose a mode of transport was among those envisaged under Article 46 of the Constitution. The Court stated thus: -
81. It is true that our Constitution’s Bill of Rights has a general underlying value of freedom which is a right to be afforded an opportunity to choose from a range of options voluntarily.....
82. However, while our Constitution puts a premium on the value of freedom, it has not inscribed “liberty of contract” as a fundamental right in our Bill of Rights. Our Constitution protects and ring-fences a number of enumerated rights and freedoms. These are rights and freedoms respecting which each individual is guaranteed including the right to be afforded an opportunity to choose from a range of options. However, the ring-fenced enumerated rights and freedoms do not include the right to make certain economic choices which may trammel the State’s “Police” powers to direct health, security and economic activities.
83. The question presented is one of the extent to which the Constitution inherently limits the “liberty of contracts”. Differently put, does the Constitution create a right for individuals to enter into any contracts on terms of their own choice? And if so, is such a right fundamental? When is it constitutionally permissible to limit or abrogate such freedom to contract?
91. In its various principles as well as in its structure and variety of civil, political, social, economic, cultural and group rights which the Constitution enumerates, the Constitution plainly envisages a directive role of the State in respecting, promoting, and fulfilling the various enumerated fundamental rights of individuals and groups. Such a directive role, of necessity, means that the State has leeway to regulate and limit the freedom to contract by individuals in order to achieve other public interest objectives including the objective of achieving the social and economic rights of citizens.....
93. Therefore, while the 4th Petitioner faults the Respondents for denying them the freedom to choose the mode of transport that they want, the 4th Petitioner wrongly assumes that the State, through the Respondents, has no right or constitutionally-protected and legitimate governmental interest in regulating the mode of transport for containers as part of the Government’s efforts to fulfil the collective social and economic rights of all citizens. The truth is that the State has legitimate governmental interests, permitted by the Constitution, to impose certain reasonable restraints on freedom of contract. However, while the State has much leeway to impose reasonable limitations to the freedom to choose economic activities in the common good, such limitations must be reasonable; non-discriminatory; non-oppressive; and procedurally imposed for them to pass constitutional muster.
100. The Court then went ahead and discussed a four-step-approach on how to prove an argument on infringement of a freedom or liberty under the Constitution. The Court stated as follows: -
94. A party who claims that his freedom or liberty under the Constitution has been impermissibly abrogated or limited, therefore has the onus to demonstrate the following four things.
95. First, to establish whether the allegedly violated right is an enumerated right or freedom under the Constitution. If the concerned freedom or right is a fundamental one enumerated under the Bill of Rights, the State is required to justify any abrogation or limitation under Article 24 of the Constitution. In such a case, the onus immediately shifts to the State to demonstrate that the limitation is “reasonable and justifiable in an open and democratic society based on



human dignity, equality and freedom.” In addition, the State must show that all the other requirements under Article 24 of the Constitution are satisfied.

96. Second, where the right or freedom allegedly violated or limited is not an enumerated right or freedom and is, instead, a non-fundamental right or a right generally covered under the general subtext of freedom or liberty under the Constitution or some other penumbral right or freedom as permitted under Article 19(3)(b) of the Constitution , a person claiming a violation is required to demonstrate that the abrogation or limitation is either unreasonable or oppressive. The Claimant can satisfy this requirement by showing two things:
- a. One, that the particular Policy or law in question does not serve any legitimate governmental interest; or
 - b. Two, that the particular Policy or law is not rationally related to the articulated governmental interest. Differently put, the means and goals of the Policy or law must be rationally related. A Claimant can succeed in showing that a law is unreasonable or oppressive if he can show that the means chosen to achieve the legitimate governmental interest is not rationally related to legitimate government goals.
97. Third, even where a policy or law passes muster under the rational basis test, it is incumbent for the State to demonstrate that the Policy or law limiting the non-fundamental right was crafted after a process of public participation or administrative fair hearing in which those most affected by the Policy or law have been given an opportunity to air their views and to have those views considered before the Policy or law is made final. This is a due process requirement.
98. Fourth, even where the impugned Policy or Law survives procedural scrutiny under the rational basis test and survives further scrutiny for public participation and administrative fairness, it must further survive a substantive scrutiny as to its impacts or effects on the rights of the Claimant. If the impugned Policy or Law otherwise violates an enumerated fundamental right or freedom in its effects (as opposed to its text and intent which must meet the requirements under Article 24 and is covered in the first requirement above), a Court would still find the impugned Policy or Law impermissible. For example, a Claimant can demonstrate that the specific Policy or Law being challenged has violated his or her social and economic rights under Article 43 of the Constitution as applied under Article 20 of the Constitution .
101. Applying the above criteria to this case, there is no doubt that the opportunity to earn a living is not one of the rights provided for under Article 43 of the Constitution . Second, it was not contended that the part of the impugned Regulations above do not serve any legitimate Governmental interest or that they are not rationally related to the articulated Governmental interest. Three, it was not proved how the impugned Regulations otherwise violates any other enumerated fundamental rights or freedoms in its effects.
102. This Court will deal with the aspect of public participation or administrative fair hearing shortly. Therefore, apart from the aspect of public engagement, which is yet to be dealt with, the Petitioner has not proved any of the three other steps in urging his position that part of the impugned Regulations abrogate the traders opportunity to earn a living.
103. On the issue of public engagement under Articles 10 and 47 of the Constitution , the Supreme Court decision in British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR comes in handy.



104. In the said case, the Apex Court developed guiding principles for public participation. The Court expressed itself thus: -

(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;



- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

105. With the above legal framework on public participation, this Court will now proceed to consider whether the *impugned Regulations* are unconstitutional for limited or lack of public participation in the process leading to their enactment.
106. Without much ado, the Petitioner's argument on this aspect fails. There is ample and cogent evidence on public engagement prior to enactment of the *impugned Regulations*. The contention, therefore, fails.
107. On Article 73 of the *Constitution* which provides for the principles of leadership and integrity, the Petitioner, once again, failed to demonstrate how any of such were infringed.
108. Having dealt with the first issue substantively, it is this Court's finding that the Petitioner has failed to prove how Regulations 14(a), (b)(i) & (k), 19(4), 26 and 32 of the *impugned Regulations* derogated Articles 43, 47(1) and 73 of the *Constitution*.

(b) Whether the electronic version of the Kenya Gazette is unconstitutional:

109. This is a rather straight-forward issue.
110. Section 2 of the *Kenya and Information Communications and Act*, 1998 defines an electronic gazette as follows: -
- the Kenya Gazette published in electronic form
111. There is, therefore, no difference between the electronic form and the manual form of the Kenya Gazette. Either of the two versions are legally valid.
112. Again, the Petitioner did not demonstrate how the electronic version of the Kenya Gazette infringes any of the provisions of the *Constitution*.
113. Further, this Court remains alive to the truism that the world is steadily moving towards what has been described as 'the electronic global village'. In Kenya, there is a deadline of 31st December 2023 for all Government services to have been uploaded and be available only online. Therefore, a finding that the electronic version of the Kenya Gazette is unconstitutional, will be counter-productive the said efforts.
114. There is also no justification that the electronic version should only be valid after the release of the manual copy of the Kenya Gazette.
115. All in all, the issue fails and is hereby dismissed.

Disposition:

116. On the basis of the foregoing, this Court makes the following final orders: -
- (a) The Petition is unsuccessful and is hereby dismissed.
- (b) Each party to bear its costs as it is a public interest litigation.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF DECEMBER, 2023.

A. C. MRIMA



JUDGE

Judgment virtually delivered in the presence of:

No appearance for Okiya Omtatah Okoiti, the Petitioner in person.

Mr. Mungai, Learned Counsel for the 2nd Respondent.

Chemosop/Duke – Court Assistants.

