Republic v Energy and Petroleum Regulatory Authority & another; Smart Gas Energy Limited (Exparte) (Judicial Review 6 of 2021) [2021] KEHC 71 (KLR) (26 August 2021) (Judgment)

Smart Gas Energy Limited v Energy and Petroleum Regulatory Authority & another [2021] eKLR

Neutral citation: [2021] KEHC 71 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

JUDICIAL REVIEW 6 OF 2021

JM NGUGI, J

AUGUST 26, 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR THE JUDICIAL REVIEW ORDERS OF CERTORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE ENERGY ACT, NO. 1 OF 2019

AND

IN THE MATTER OF THE PETROLEUM ACT, NO. 2 OF 2019

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF ARTICLES 1,2,10,47,50,53,258,258,259, AND 260 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC ..... APPLICANT

AND

ENERGY AND PETROLEUM REGULATORY AUTHORITY 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

AND

SMART GAS ENERGY LIMITED ..... EXPARTE

An investigator is not always required to give notice and a scheduled hearing to a suspect.

Reported by Beryl Ikamari

Administrative Law *- investigations and fair administrative action - fairness, notice and affording an affected party a hearing before action was taken - whether an investigator was required to give notice and afford a scheduled hearing to a suspect before seizing contrabands or sealing off a crime scene in order to preserve evidence - Constitution of Kenya, 2010, articles 47, 49 and 50.*

Administrative Law *- fairness and reasonableness - sealing off a crime scene - where a facility had been sealed off for more than five months and there was no indication that the sealing off was necessary for purposes of preserving evidence - whether the sealing off of the facility was fair and reasonable - Constitution of Kenya, 2010, articles 47, 49 and 50; Petroleum Act, No 2 of 2019, sections 120(a) and 120(b).*

Judicial Review *- judicial review application - replying affidavit - timelines set for filing of a replying affidavit - delay in filing a replying affidavit - where the court set timelines for the filing of a replying affidavit and a respondent failed to file it within time - whether a delay in filing a replying affidavit was a technical issue - whether a replying affidavit filed out of time would be disregarded by the court.*

Judicial Review *- institution of a judicial review application - availability of a statutory dispute resolution forum (exhaustion doctrine) - where the Energy and Petroleum Tribunal was a statutory dispute resolution forum that could have resolved the parties' dispute but was yet to be operationalized - whether such a dispute resolution forum could affect the propriety of the institution of a judicial review application - Energy Act, No 1 of 219, section 36(4).*

Brief facts

The applicant was a registered company that dealt with Liquefied Petroleum Gas (LPG) and it had its LPG cylinder refilling plant at Industrial Area within Nakuru County. On March 2021, the Directorate of Criminal Investigations (DCI) officers conducted an inspection at the refilling plant. The result was that two individuals associated with the applicant were arrested and charged with two counts in Nakuru Criminal Case E1082 of 2021. The first count was illegally refilling LPG cylinders without the authority of the brand owners contrary to section 99(1) of the Petroleum Act, 2019 and sections 13(1) and 14(a) of the Petroleum Liquefied Gas Regulation. Count two was trading and dealing with LPG cylinders of another licensee for gain without the prior written consent of the licensee contrary to section 99(1) of the Petroleum Act 2019 and sections 13(1) and 14(a) of the Petroleum Liquefied Gas Regulation.

On March 25, 2021, officers from Energy and Petroleum Regulatory Authority (EPRA) and DCI visited the premises and ordered it to be closed. The *ex parte* applicant complained that the respondents' actions were irregularly undertaken without regard to due process. The *ex parte* applicant stated that the power exercised by the respondents did not exist in law and was arbitrary, illegal, and unreasonable. He sought judicial review remedies against the respondents.

The 1st respondent failed to file a replying affidavit in response to the applicant's application within the timeframe set by the court. The applicant submitted that the replying affidavit that was filed late should be disregarded by the court. Additionally, the 1st respondent argued that under section 36(4) of the Energy Act the court lacked jurisdiction to entertain the matter as an alternative mode of seeking redress was available to the applicant.

Issues

i. What was the effect of a delay in filing a replying affidavit in response to an application in a judicial review matter?

ii. Whether a statutory dispute resolute forum which was not operational would affect the propriety of the institution of a judicial review application.

iii. Whether it was reasonable to require an investigator to give notice and a scheduled hearing to a suspect in furtherance of requirements of fair administrative action.

iv. Whether the sealing off of a facility by investigators for more than five months was reasonable, where it was not shown that it was necessary for purposes of preserving evidence.

Held

1. The issue relating to the delay by the 1st respondent in filing a replying affidavit was a technical one and the court would not penalize the 1st respondent with the disproportionate action of striking out its replying affidavit. The delay would be mitigated by giving the applicant more time to respond to the issues raised in the replying affidavit.
2. Section 36(4) of the Energy Act had provided that the Energy and Petroleum Tribunal had appellate jurisdiction over decisions of the Authority and that any licensing authority could refer matters back to the Authority established under the Act or any other licensing authority for reconsideration. The 1st respondent (Energy and Petroleum Regulatory Authority) was the authority referred to. However, the Tribunal was not operational. An alternative forum was definitionally not accessible, timely, or effective when it was not operational. In the circumstances, it was proper for the applicant to approach the court for dispute resolution.
3. The applicant complained of procedural unfairness. The unfairness was related to three issues. One was that no notice was issued before the revocation of the applicant's license by sealing off and closing the applicant's plant. The second was that the procedure used was irregular as the specifics as to the reasons for the 1st respondent's actions were not provided. The third was that no hearing was afforded to the applicant.
4. The actions of the 1st respondent were administrative actions to which article 47 of the Constitution and the provisions of the Fair Administrative Action Act were applicable.
5. It would be absurd to require investigators to give notice and afford a scheduled hearing to a suspect before seizing contrabands or sealing off the crime scene in order to preserve evidence. Most situations required the investigators to act quickly. However, that did not give the investigators room to act as they pleased, they had to act as reasonably as possible and within the terms of the Fair Administrative Action Act. The investigators were obligated to seal off the crime scene for the shortest period possible where such sealing interfered with the property rights or business of the suspect or owner of the premises. Any sealing, in terms of the scale (area and extent) and period, had to be proportional to the crime under investigation. Additionally, all the protections and guarantees afforded under articles 49 and 50 of the Constitution were applicable.
6. The facility or plant in question had remained sealed off and unavailable to the applicant and its employees for more than five months. While the criminal charges that were the consequence of the investigations were serious, it was not a proportional response for the investigator to seal off the entire facility pending the conclusion of the criminal trial. Generally, the disproportionality arose from the following facts:

a) no evidence of the sealed physical facility was required in order to prosecute the charges.

b) A photograph of the facility could be taken for purposes of evidence.

c) The court, after the making of an appropriate request, could visit the facility and make observations if that was necessary.

d) The 1st respondent did not give indications as to the nature of evidence that was being preserved by sealing off the facility.

e) The facility had already been sealed off for five months and there was no indication as to when it would be unsealed.

f) The economic impact of the sealing-off compared to the weight of the offences in question, was too large and disproportionate.

7. The 1st respondent's decision to seal off the facility without exploring or utilizing other avenues for preserving and recording evidence was disproportionate. It was an administratively unfair decision.

8. Sections 120(a) and 120(b) of the Petroleum Act, which provided for orders of forfeiture where a person had been convicted under the Act, did not permit the indefinite sealing off of a facility where alleged unauthorized refilling of LPG gas cylinders was happening. The broadest interpretation of the provision would allow for the forfeiture of the LPG gas cylinders involved after conviction. There was no conviction and the Constitution required accused persons to be treated as innocent until proven guilty. Under the charge sheet, reference was made to 11 specific LPG cylinders of various brands and the 1st respondent could not confiscate more than what was identified.

9. If the 1st respondent intended to revoke the applicant's license for any transgression that warranted such revocation, it had to do so under the procedures allowed for such revocation. The 1st respondent had to follow due process and afford the applicant certain protections and guarantees provided by the law.

Application allowed.

Citations

Cases

1. *Baadi, Mohamed Ali & others v Attorney General & 11* others Petition 22 of 2012; [2018] eKLR— (Explained)
2. *Kilonzo, Diana Kethi v Independent Electoral & Boundaries Commission & 2 others* Petition 359 of 2013; [2013] eKLR — (Explained)
3. *Republic v Sara Wairimu Kamotho* Criminal Case 60 of 2019;[2020] eKLR — (Explained)

Gambia

*Jawara v Gambi*a (Communication No 147/95, 149/96) [2000] ACHPR 17;(11 May 2000)- (Explained)

Statutes

1. Constitution of Kenya, 2010 articles 47, 49, 50 — (Interpreted)
2. Companies Act, 2015 (Act No 17 of 2015) In general - (Cited)
3. Energy Act, 2006 (Act No 12 of 2006) sections 11, 21, 22(2)(4)(j)(m); 25; 36(4) — (Interpreted)
4. Fair Administrative Action, 2015 (Act No 4 of 2015) sections 4 (2)(3)(d)(6); 9(4) — (Interpreted)
5. Petroleum (Liquefied Gas Petroleum) Regulations, 2019 (Act No 2 of 2019 Sub Leg) — sections 13(1);14 (a); 18(1) — (Interpreted)
6. Petroleum Act, 2019 (Act No 2 of 2019) sections 81(2) (3); 99(1)(2)(b); 120(a)(b) — (Interpreted)

JUDGMENT

1. After duly obtaining leave of the court, the *ex parte* applicant filed a Notice of Motion Application dated 19/04/2021 seeking the following orders:

    a. A declaration that the decision by the respondents to seal and/or close the applicant's Liquefied Petroleum Gas (LPG) storage and filling plant, situate in Industrial Area, Nakuru, was procedurally unfair, unconstitutional and unlawful.

    b. An order of *Mandamus* compelling the respondents herein to reopen and/or unseal the applicant's Liquefied Petroleum Gas (LPG) cylinder refilling plant.

c. An order of *Certiorari* to remove into this honourable court and quash the decision of the respondents to close and/or seal the applicant's Liquefied Petroleum Gas (LPG) cylinder refilling plant.

d. An order of Prohibition to prohibit respondents from unilaterally closing, sealing and/or in any manner interfering by and raid with the applicant's operation in relation to applicant's Liquefied Petroleum Gas (LPG) cylinder refilling plant.

2. The basic facts of the case are uncontested and can be culled from the affidavit of Stephen Mwangi Kang'ethe deponed on April 19, 2021. Mr Kang'ethe is a director of the applicant.

3. The applicant is a registered company duly incorporated under the Company's Act, 2015. The applicant is a Liquefied Petroleum Gas (LPG) and filling facility licenced by the 1st respondent vide licence No. EPRA/LPG/1214 to store and fill Topgas branded cylinders only. It has its registered office and LPG cylinder refilling plant situate at Industrial Area within Nakuru County. The plant employs about one hundred employees.

4. On or about March 20, 2021, the respondent's officers accompanied by DCI officers visited the applicant's refilling plant for inspection. Mr Kang'ethe says that they found approximately 8 assorted brand cylinders outside the plant at a location reserved as a storage area for cylinders belonging to Energy Dealers Association (EDA). The officers arrested Mr Kang'ethe and one other individual at the site and charged them in Nakuru Criminal Case No E1082 of 2021 with two criminal counts as follows:

(a) Count 1: Illegally refilling liquefied Petroleum Gas (LPG) cylinders without the authority from brand owners to fill contrary to section 99(1) of the *Petroleum Act*, 2019 and section 13(1) and (14)(a) of the Petroleum Liquefied Gas Regulations. The particulars of the charge are that on the 20th day of March, 2021, at Smart Gas Energy Limited storage and filling facility in industrial area within Nakuru Town West Sub-county in Nakuru County together with others not before court, the two Accused Persons are alleged to have been found to have filled 1 piece (13kgs) of....

(b) Count 2:Trading and dealing with LPG Cylinders of another licensee for gain without the said licensee's prior written consent contrary to section 99(1) of the Petroleum Act, 2019 and section 18(1) and (14)(a) of the *Petroleum Liquefied Gas Regulations* as read with section 99(2)(b) of the Petroleum Act, 2019.

5. The EPRA and DCI Officers returned to the applicant's plant again on March 25, 2021. This time, they sealed the plant and ordered it closed. The ex parte applicant believes that the respondents' actions are "marred with irregularities having been carried out without regard of the due process and are aimed at harming the applicant's business enterprise." It further claims that the respondents have not provided any reason that would justify interference with the applicants business and/or trade, contrary to constitutional requirements and the Fair Administrative Act.

6. The ex parte applicant finds the respondents' actions to be illegal, arbitrary and unreasonable; and further argues that the power "as purportedly exercised by the 1st respondent does not exist in law and therefore the decision emanating therefrom is null."

7. The *ex parte* applicant says that it provides employment to hundreds of Nakuru residents who currently remain without employment and thereby leaving them without any means of livelihood in the middle of a raging Covid – 19 Pandemic; and that it is therefore in the in the interest of justice

and salient provisions of the constitution protecting the applicant's right to carry on business that the orders sought be granted.

8. The 1st respondent filed Grounds of Opposition and a replying affidavit. The court directed parties to file Written Submissions and both complied. At the interlocutory stage, the court had given directions for the filing of both the response and the submissions. By the time the court gave these directions, the applicant had already served the respondents with the Notice of Motion. The 1st respondent's counsel claims that they understood the directions to mean that the 1st respondent would only file its response after it had been served afresh with the Notice of Motion. Suffice it to say that, consequently, the 1strespondent did not file its replying affidavit until July 7, 2021 when it filed it simultaneously with its submissions.

9. When the matter came up for a scheduled mention on July 12, 2021 on noting the controversy, I permitted the applicant's counsel to file any response he wished to the 1st respondent's affidavit and to file Supplementary Submissions. The applicant's counsel subsequently filed Supplementary Submissions to go with the ones it had filed earlier.

10. One of the issues that the applicant has vigorously taken up is the fairly technical question whether the application should be treated as unopposed because the 1st respondent had failed to keep within the timelines given by the court on when to respond to the Application. The applicant insists that the court should disregard the replying affidavit.

11. I believe that my directions of July 12, 2021 in which I permitted the applicant's counsel time to file any responses it wished to both the 1st respondent's replying affidavit and Written Submissions renders the debate moot. I already treated the issue as a technical one and refused to penalize the 1st respondent with the disproportionate action of striking out its replying affidavit hence driving them from the seat of justice for tardiness in filing its response when such tardiness could be mitigated, as I did, by giving the applicant more time to respond to the issues raised.

12. With this out of the way, I can delve into the substantive issues raised in the present application.

13. The first substantive issue raised by the 1st respondent is the doctrine of exhaustion. The 1st respondent has hinted at the doctrine at the interlocutory stage and the Court leaned heavily on it in declining to give interlocutory relief.

14. The 1st respondent has impleaded that the court does not have jurisdiction to hear the case by dint of section 36(4) of the *Energy Act*. In essence, the 1st respondent has pleaded that the suit is debarred by the Exhaustion Doctrine.

15. This argument is based on section 25 of the *Energy Act* which establishes the Energy and Petroleum Tribunal, and section 36 which provides for the said Tribunal's jurisdiction as follows:

    1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.

    2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.

    3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.

4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.

5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

6) The Tribunal shall hear and determine matters referred to it expeditiously.

16. The Authority referred to in section 36 is the 1st respondent. However, as the applicant has submitted, the Tribunal mentioned in the statute is not operational. In her oral submissions, counsel for the 1st respondent conceded that the Tribunal has been constituted but that it is not operational. This, really, blitzes the exhaustion doctrine argument to smithereens: The doctrine of exhaustion only debars the presentation of controversies in Court where the alternative forum is accessible, affordable, timely and effective. Thus the four-judge bench in *Mohamed Ali Baadi and others v Attorney General & 11 others*[2018] eKLR cited with approval the case of case of *Dawda Jawara v Gambia* where it was held that:

A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.

17. An alternative forum is definitionally not accessible, timely or effective where the alternative forum is not yet operational but only awaits a date in the future for operations to begin. In the circumstances, it was, therefore, proper that the applicant approached the court for resolution of this dispute. Furthermore, where the purported alternative forum is not operational, accessible or effective, there is no requirement in our jurisprudence, as the 1st respondent claims, that a potential disputant first apply to the court to be exempted from the provisions of section 9(4) of the *Fair Administrative Action* (FAAA) before filing the suit. Instead, a party simply approaches the court and demonstrates the exceptional circumstances justifying it to file the suit in court in the first instance.

18. The applicant seeks Judicial Review of the actions of the 1st respondent on two main grounds:

(a) Procedural unfairness; and

(b) Unlawfulness.

19. The applicant argues that the impugned conduct by the respondents amounts to unfair administrative action. It is an administrative action, the applicant argues, because the applicant's constitutional and contractual rights were adversely affected by the sealing and/or closure of the LPG cylinder refilling plant. It is, procedurally unfair, the applicant argues because the applicant was not afforded the rights enumerated in section 4(2), (3) and (4) of the Fair Administrative Actions Act (FAAA).

20. The applicant insists that the FAAA applies to the action the Respondents took and that the respondents have not complied with it or otherwise demonstrated that the *Energy Act* or the Petroleum Act have permitted the 1st respondent to follow a different procedure which conforms to the principle set out in article 47 of the Constitution as permitted by section 4(6), FAAA.

21. Regarding procedural unfairness, as I understand it, the applicant raises three specific complaints:

(a) First, the applicant complains that no notice was given before the drastic action of functionally revoking its license by sealing and closing its plant was taken. Yet, the applicant argues, section 81(2) of the Petroleum Act requires EPRA to give a licensee 14-days' notice to show cause why the licence or permit should not be revoked. The applicant argues that the act of sealing its plant equates to suspension of licence given that the outcome is similar in both cases. This requirement of notice also comports with the requirements of the FAAA for due process before an adverse administrative decision is given.

(b) Second, the applicant argues that the procedure used by EPRA in the present case violates section 81(3) of the Petroleum Act because EPRA failed to give the specifics of the reasons it was taking the drastic action to seal its plant (and hence functionally revoke its licence). The law, argues the applicant, requires EPRA to specify the relevant condition of the licence or permit or the requirement of the statute to which the breach relates; the acts, omissions or other facts which, in the opinion of EPRA or the licensing authority constitute a contravention of the conditions of the licence or permit or requirements of the state, and the reasons the licensing authority is of the opinion that the conditions have occurred or arisen. The statute further requires the notice to be served upon the licensee at its principal place of business before it taking effect from the date of the service. The applicant argues that in its conduct EPRA is in violation of sections 4(3)(d) and 6 of FAAA.

(c) Third, the applicant complains that no hearing at all was afforded to it to date despite the requirements of FAAA.

22. Turning to the alleged substantive unlawfulness of the actions by EPRA, the applicant makes two arguments:

(a) First, the applicant argues that the actions by EPRA are illegal and unlawful and illegal because no evidence has been produces to illustrate that members of EPRA had delegated authority, as provided under section 21 of the *Energy Act*, 2019 to carry out functions under sections 11 and 22 of the Act since no resolution in writing has been produced to evidence this.

(b) Second applicant argues that there has been no demonstration that the appointments of the agents or members of the Authority who visited the applicant's refilling plant and took the adverse action against it were made setting out the duration of the appointments, the duties, reporting requirements, functions, authority and powers so conferred. Absent any evidence to the contrary, the "raid" by EPRA, the applicant insists, was whimsical and without legal foundation.

(c) Third, the applicant argues that the gap between the date when the arrests were made on March 20, 2021 and the when the sealing happened on March 25, 2021 has not been explained. I understand the applicant to imply that this gap points to possible extraneous factors being at play in the decision to seal and close the plant.

23. EPRA has responded to these arguments by the Applicant by arguing that its actions were lawful and within its mandate as provided for in sections 11(j); 11(m) and 22(4) of the *Energy Act*, 2019. These sections of the law, EPRA argues, grant it the power to enter into any facility where a crime is suspected to have been committed, lock up and seal the facility. It further argues that granting the orders sought by the Applicant would violate its mandate as a statutory regulator as such an order will hamstring it in carrying out its statutory mandate as an energy sector regulator. In this regard EPRA relies on *Diana Kethi Kilonzo v IEBC & 2 others* [2013] eKLR. In particular, EPRA relies on the holding in

that case that the courts should give leeway to other bodies created in the Constitution (and statutes) to discharge their mandates so long as they comply with the Constitution and national legislation.

24. EPRA argues that its duty is not only to enhance and regulate fair trade practices in the LPG market but also to protect the general public and consumers against the dangers posed by illegal operating, filling and or refilling of LPG and sale of offending cylinders which lack seals hence unfit for use by consumers. Its actions, EPRA insists, are lawful and intended not to harm the applicant's business but to protect the general public against hazardous LPG cylinders brought to the market by the Applicant.

25. Turning to the question of adequate notice in section 81(2) of the Petroleum Act, 2019, EPRA says that the decision to close the Applicant's facility was necessitated by the need to secure the site and evidence that would be relied on in the criminal case against the Applicant's agents. EPRA did not, it insists, revoke or suspend the Applicant's licence and that, therefore, there was no need to issue a notice as envisaged by section 81(2) of the Petroleum Act, 2019.

26. The main question presented by the dueling perspectives by the two parties, to my mind, is whether the actions taken by EPRA on March 20, 2021 and March 25, 2021 can be characterized as administrative actions and if so, whether they were procedurally and lawfully undertaken in accordance with the law – including the FAAA.

27. There can be no reasonable argument to support the view that the actions taken by EPRA were not administrative actions. If so, it also follows that article 47 of the Constitution and the provisions of the FAAA apply to the decisions of EPRA. The question, then, becomes whether EPRA fell afoul these statutory provisions and constitutional requirements.

28. EPRA says that the decision to close the applicant's facility was necessitated by the need to secure the site and evidence that would be relied on in the criminal case against the Applicant's agents. It insists that it did not revoke or suspend the Applicant's license and that therefore there was no need to issue a notice as envisaged by section 81(2) of the Petroleum Act. ERPA further argues that in view of the on-going criminal case, issuing the orders sought that the facility be re-opened, it will break the evidentiary chain of custody and negate the exhibits' probative value. EPRA submits that only the Criminal Court can render itself on the issue of sealing or reopening the facility since the plant is treated as a crime scene. It cited *Republic v Sara Wairimu Kamotho* [2019] eKLR where the court exhorted the importance of preserving the crime scene in the following words:

> The most important aspect of evidence collection and preservation is protecting the crime scene. This is to keep the pertinent evidence uncontaminated until it can be recorded and collected. The successful prosecution of a case can hinge on the state of the physical evidence at the time it is collected.

29. In addition, EPRA says that under section 120(a) and (b) of the Petroleum Act, 2019, the suit premis and the exhibits contained therein are the subject of a mandatory forfeiture order should the prosecution result into a conviction of the Accused Persons hence "the need to let the criminal proceedings take course in the fate of the status of the Applicant's facility."

30. As I understand it, EPRA expressly states that it has not revoked the Applicant's license. Instead, it has only sealed off the facility as a crime scene in order to preserve evidence. It has also sealed off the facility in anticipation of the exercise of its power to order a mandatory forfeiture. Given these circumstances, I understand EPRA to argue, it became impractical to afford the applicant the protections and guarantees in FAAA and section 81(2) of the Petroleum Act, 2019.

31. The question that arises from EPRA's argument is whether the protections and guarantees of FAAA are eviscerated at the intersection of the EPRA's inspection powers and criminal law. EPRA argues that the exceptional circumstances of criminal law – namely the need to preserve evidence – at the very least requires a modulation of the protections and guarantees of FAAA.

32. This is certainly an attractive argument; one that has the force of practical logic to it: when a crime is detected or when investigators have probably cause to think that a crime has been committed, it would be plainly absurd to require such investigators to follow the procedures of giving notice and affording a scheduled hearing to the suspect before seizing the contrabands or sealing off the crime scene in order to preserve the evidence. Instead, the exigencies of the situation call for the investigators to act quickly. However, even then, such investigators do not have a *carte blanche* to do as they please. They must act as reasonably as possible to approximate the protections afforded by the FAAA. In particular, the investigators should take the least disruptive method to preserve the crime scene. They are also obligated to seal off the crime scene for the shortage period of time possible where such sealing interferes with the property rights or business of the suspect or owner of the premises. The investigators cannot, for example, seal off the business facilities for years in the guise of preserving a crime scene. Any such sealing – both in terms of the scale (area and extent) and period -- must be proportional to the crime being investigated. Additionally, all the other protections and guarantees afforded by articles 49 and 50 of the Constitution apply.

33. In the present case, it is not disputed that the investigators visited the applicant's facility on March 20, 2021. They claim that they witnessed offences defined under the Petroleum Act, 2019 and Regulations made thereunder. The investigators returned to the facility on March 25, 2021 when they made the fateful decision to seal off the entire facility. The facility remain sealed off and unavailable for use by the applicant and its more than one hundred employees to date – more than five months after the sealing off of the facility.

34. The substantive administrative fairness question one must ask in the circumstances of this case is whether the situation is proportionate. I have come to the conclusion that it is not. While the charges are admittedly serious because of their implications for public safety, it is not a proportional response for investigator to seal off the entire facility which otherwise has a license to operate as it awaits the conclusion of the criminal trial. I find that the action is disproportionate for at least three reasons:

    (a) First, looking at the offences charged to wit conducting unauthorized refilling of LPG Cylinders without brand owners' consent and trading or otherwise dealing with LPG cylinders belonging to other brand owners without written consent from the brand owner, it seems plain that no evidence of the sealed physical facility would be required to successfully prosecute the charges. I say so because the LPG cylinders in question are finite and are known and marked. They are either in the custody of EPRA or they should be in their custody by now. If the physical site is somewhat needed for evidential purposes, then there is no evidence whose nature will be altered before the court takes the evidence.

    (b) Second, the evidence of the physical facility can easily be taken by photography or other admissible electronic format. It may even be so taken with the stipulation of the Accused Persons or by order of the court.

    (c) Third, if truly needed, EPRA can request the court for a site visit in limine in order for the court to make the observations it needs to make without inordinately inconveniencing the Applicant.

(d) Fourth, it is noteworthy that other than generally and vaguely alleging that the facility is sealed for purposes of preserving evidence, EPRA has not given any indication whatsoever about what nature of evidence is needed to be preserved by sealing off the facility given the offences charged.

(e) Fifth, it has already been about five months since the facility was sealed off and there is no indication when it might be unsealed.

(f) Sixth, the economic impact of the sealing off especially when compared with the weight of the offences charged, is too large and disproportionate.

35. The upshot is that the action by EPRA to seal off the facility without exploring or utilizing the other avenues available to preserve and record the evidence it says it needs from the facility is disproportionate and therefore constitutionally irrational. It is an administratively unfair decision.

36. This conclusion is not ameliorated by EPRA's reliance on section 120(a) and (b) of the Petroleum Act which provides for orders of forfeiture where a person has been convicted under that Act. The section provides as follows:

> Where a person is convicted of an offence under Orders of this Act, in addition to any other penalty imposed, an order forfeiture shall be made –
>
> (a) for the forfeiture of any vehicle, aircraft, vessel or equipment used in the commission of the offence;
>
> (b) for the forfeiture of petroleum recovered in the course of the commissionof the offence.

37. This section does not, by any stretch of its interpretation, permit the indefinite sealing off of a facility where allegedly unauthorized refilling of LPG cylinders is happening. At its broadest, the section would allow the forfeiture of the LPG cylinders and gas involved after conviction. At present, there has been no conviction and our Constitution requires that those charged with the offence be treated as innocent until proved guilty. Additionally, the charge sheet, which was attached to the affidavit of Annette Too, is specific as to the number of LPG cylinders involved: Both counts speak of 11 specific LPG cylinders of various brands. It would appear, logically, that these are the equipment involved in the alleged commission of the offences the applicants' agents are charged with. If EPRA is interested in confiscating more equipment than identified in the charge sheet, that need is neither self-evident nor sufficiently justified. Its legal pedigree is, therefore, suspect.

38. The bottom-line is that there is no justification in law for EPRA to seal off indefinitely the facility owned by the applicant for the reason that it has preferred two charges against the agents of the applicants. That action is disproportionate. It is the functional equivalent of revoking the license owned by the applicant because in its effect it indefinitely closes down the applicant's business with the attendant disruptive economic consequences and loss of livelihoods for the owners and employees. If EPRA is minded of revoking the applicant's license for any transgressions warranting such revocation and in exercise of its regulatory remit, it must do so frontally and under the procedures allowed for such revocation. EPRA cannot achieve by stealth and pretext, and without due process what it is only permitted to do after affording the applicant certain protections and guarantees in the law.

39. Consequently, the orders that the court makes are the following:

(a) This suit is properly before the court for the reasons advanced above.

(b) A declaration hereby issues that the decision by the Energy and Petroleum Regulatory Authority (EPRA) to indefinitely seal and/or close the applicant's Liquefied Petroleum Gas (LPG) storage and filling plant, situate in Industrial Area, Nakuru, is procedurally unfair, unconstitutional and unlawful.

(c) An order of Mandamus hereby issues compelling the Energy and Petroleum Regulatory Authority (EPRA) and the Inspector General of Police (and his agents) to re-open and/or unseal the Applicant's Liquefied Petroleum Gas (LPG) storage and filling plant, situate in Industrial Area, Nakuru within ten (10) days of today.

(d) In order to ensure the orderly execution of order (c) above, given EPRA's legitimate interests in preserving any evidence at the facility for purposes of the criminal trial and/or to take inventory of any equipment or assets for purposes of any potential order of forfeiture, within the ten (10) days permitted under that order, EPRA may:

i. Visit the facility and take electronic records of any such evidence as needed; and

ii. If deemed necessary, approach the Trial Court in Nakuru Criminal Case No. E1082 of 2021 under Certificate of Urgency for appropriate orders for scene visit or collection of scene of crime physical or photographic evidence including appropriate orders for the admission of such evidence in the criminal trial.

(e) For the avoidance of doubt, actions under Order (d) above must be taken and be completed within the ten (10) days allowed for EPRA to re-open and/or unseal the Applicant's Liquefied Petroleum Gas (LPG) storage and filling plant, situate in Industrial Area, Nakuru.

(f) Each party will bear its own costs.

40. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF AUGUST, 2021

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JOEL NGUGI

JUDGE

NOTE:*This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.*