



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC EO21 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR

JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

JOSEPH KARANJA NGÁNGÁ T/A SIMKEL TRADERS.....APPLICANT

VERSUS

THE ENERGY AND PETROLEUM REGULATORY AUTHORITY.....RESPONDENT

RULING NO. 2

1. The Applicant herein has filed an application by way of a Chamber Summons dated 17th February 2021, seeking to be granted leave to apply for an order of mandamus compelling the Respondent, whether by itself, its agents, workers or servants to forthwith release, handover, deliver back, restore possession use and control of the Petroleum Tanker Registration Number KAS 231B. Further, that the costs of this application be in the cause.

2. The said application is supported by a statutory statement dated 17th February 2021, and a verifying affidavit sworn on the same date by the Applicant. The *ex parte* Applicant states that it is the registered owner of a Petroleum Tanker Registration Number KAS 231B which transports fuel and dry cargo, and that on or about 7th May 2019, the said tanker was intercepted and detained by the Respondent through its officers, on allegations that it had traces of 'Export Product'. According to the Applicant, subsequent tests done by the Respondent revealed the presence of "Export Product", and the matter was escalated to the Commissioner of Investigations and Enforcement at the Kenya Revenue Authority for imposition of penalties against the Applicant.

3. The Applicant further states that it gave an explanation of the circumstances surrounding the said traces of Export Product found on the tanker, and that to date no communication has been made to the Applicant of any outcome of the investigations and the Respondent has not released the tanker back to the Applicant, or taken any further action.

4. In light of the foregoing facts and the provisions of section 25 and 36 of the Energy Act on the establishment and jurisdiction of the Energy and Petroleum Tribunal, the Court directed the parties to canvas the issue of leave *inter partes*. The parties' respective cases are set out in the following sections of this ruling.

The Applicant's Case

5. The Applicant contended that he had a legitimate expectation that he would be given a fair hearing in an administrative forum and a resolution would be made on the way forward to have the matter closed. However, that over a year later no communication has been made of any outcome by the investigations and the Respondent has not made any efforts or taken any actions to have the tanker released back to the Applicant, and that to date, the tanker is still parked at the Respondent's premises occasioning losses to the Applicant whose tanker was obtained on loan.

6. The Applicant argued that at best, he was entitled to be issued with a notice of seizure of the products, sanctions for breach of regulations if any, or at least a verdict but instead, he was condemned against the rules of natural justice which conduct is unacceptable and unjustifiable. Therefore, that unless the Respondent and its officers are compelled to release back the tanker, the same will continue being wasted and wearing off, rendering it uneconomical and unroadworthy causing him grave loss and irreparable damage. It was further his contention that the purported decisions by the Respondent were patently unconstitutional, illegal, *ultra vires* and offend public policy thus null and void and should be declared as such.

7. Gachie Mwanza & Company Advocates, the Applicant's advocates on record, filed written submissions dated 9th March, 2021. Counsel submitted that the circumstances under which judicial review order of mandamus is issued were set out by the Court of Appeal in **Republic v Kenya National Examination Council, Ex-parte Gathenji & 8 Others, Civil Appeal No. 234 of 1996** which was cited with approval in the case of **Musa Mohammed Dagane & 25 Others v Attorney General & Another (2018) eKLR**. Counsel further submitted that the test for mandamus was set out in **Apotex Inc. v Canada (Attorney General) 1993 CAN LII 3004 (F.C.A)** and was also discussed in **Republic v Principal Secretary, Ministry of Internal Security & Another, Ex-parte Schon Noorani & Another (2018) eKLR** .

8. It was argued that in the instant case, the Respondent did not forward any decision to the Applicant after they conducted investigations, but instead chose to detain the petroleum tankers without any lawful and or plausible explanation contrary to Section 23(1), (2) and (3) of the Energy Act. In counsel's view, the wrongful detainment of the Applicant's tanker not only violated his inalienable right to natural justice or fair and impartial hearing but also violated the Applicant's legitimate expectations that he would be granted a fair hearing and due process of the law would be followed.

9. It was therefore submitted that the Respondent's actions was illegal for failure to accord with the provisions of the Constitution and the Fair Administrative Actions Act. Accordingly, counsel argued that the Applicant was highly prejudiced by the Respondent's action to seize, hold and detain his tanker with no sufficient reasons and he continues to suffer financial loss and loss of business as a result.

The Response

10. In response to the application, the Respondent filed a Replying Affidavit sworn on 23rd April, 2021 by Silas Sanga, its Senior Surveillance and Enforcement Officer. He confirmed that the Applicant is the registered owner of petroleum tanker registration number KAS 231B, which he uses for transportation of petroleum and petroleum products within the Republic of Kenya. That on 7th May, 2019, the Respondent received intelligence from a team comprising of officers from Kenya Revenue Authority and the Directorate of Criminal Investigations that the said motor vehicle was suspected to be transporting fuel that did not meet the relevant legal Kenyan standards. He further averred that the team then intercepted the motor vehicle at the Kenya Builders & Concrete Company in Kayole within Nairobi County and identified that the motor vehicle has six (6) compartments with a combined storage capacity of eight thousand (8000) litres.

11. The Respondent's averment is that tests were conducted on samples of fuel taken from each compartment by the Respondent's appointed contractor, M/s Intertek Testing Services Limited, which revealed that the said motor vehicle was ferrying fuel meant for export. As a result, the vehicle was seized and taken to Kenya Pipeline Company Limited for storage, pending investigations by Kenya Revenue Authority, and its officers issued custom notices and sealed the affected compartments with customs seals. Subsequently, the Respondent notified the Kenya Revenue Authority via a letter dated 31st May, 2019 to ensure penalties and fines were preferred against the offender.

12. It was further averred that the Applicant, being aggrieved by the decision of the multiagency team, instituted court proceedings in **Joseph Karanja Ng'ang'a vs The Energy and Petroleum Regulatory Authority, Milimani Civil Suit No. 2329 of 2020** seeking *inter alia*, a mandatory injunction compelling the Defendant to release the said motor vehicle but the matter was struck out at the preliminary stage on jurisdiction. Further, that on 25th March, 2021, the Respondent wrote to Kenya Revenue Authority urging them to resolve the matter so as to avoid unnecessary litigation. However, despite the efforts done by the Respondent, Kenya Revenue Authority has failed, neglected and or otherwise refused to resolve the matter.

13. He contended that the Applicant's actions were a violation of the Excise Duty Act 2015, the East Africa Customs Management Act 2004 and section 92 of the Petroleum Act 2019. However, Kenya Revenue Authority is mandated with the responsibility of handling and or investigating matters where export products or materials are being dealt with or handled illegally within the Kenyan market and by virtue of this mandate, Kenya Revenue Authority issued customs notices to the Applicant and sealed the truck using Kenya Revenue Authority customs seals.

14. Consequently, that the suit motor vehicle is being held at the behest of Kenya Revenue Authority and therefore, the Respondent is unable to make a determination on the release of the said motor vehicle. Moreover, that the Respondent was only involved in the investigation process of purposes of testing the fuel product in the suit motor vehicle, and once it was established that the product contained in the vehicle was meant for export, the responsibility of hearing and determining the matter fell upon Kenya Revenue Authority, which fact is well within the Applicant's knowledge.

15. The Respondent therefore argued that the Applicant has failed to demonstrate an arguable case against the Respondent on grounds that the Respondent herein is not the decision maker nor the custodian of the suit motor vehicle. Further, that should the court be inclined to grant the leave, it would be an exercise in futility as the orders would be unenforceable against the Respondent.

16. Winny Rop, the advocate for the Respondent, also filed written submissions dated 23rd April, 2021. Counsel submitted that in order to grant leave, a court must be satisfied that an arguable case exists with a reasonable chance of success as was held in the case of **Republic v County Assembly of Nakuru & 2 Others Ex-parte Samuel Waithuku Njane & 21 Others (2017) eKLR**, and urged that the Applicant has failed to make out an arguable case against the Respondent as it is not the decision maker in the circumstances.

The Determination

17. I have considered the pleadings and arguments by the parties herein, and note that the requirement for leave to commence judicial review proceedings, is provided in *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the said leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

18. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a

Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

- (1) whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;**
- (2) whether the claimant has capacity to bring a claim for judicial review;**
- (3) whether the claimant has a sufficient interest to bring a claim for judicial review;**
- (4) whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;**
- (5) whether the claim is otherwise an abuse of process;**
- (6) whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;**
- (7) whether the claim has been brought promptly;**
- (8) whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.**

19. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Other grounds that may influence the exercise of the Court's discretion in this regard are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

20. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

21. In the present application, this Court needs to consider whether there is an alternative dispute resolution mechanism that is available, in light of the existing statutory provisions on the Energy and Petroleum Tribunal. Article 159 (2)(c) of the Constitution obliges the courts while exercising judicial authority to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and reconciliation and traditional dispute resolution mechanisms Section 9(2) of the Fair Administrative Action Act in addition provides as follows:

“The High Court or a subordinate court under subsection (1) shall not review and administrative action or decision under the Act unless the mechanisms including internal mechanism for appeal or review and all remedies available under any other law are first exhausted.

22. Section 25 of the Energy Act establishes the Energy and Petroleum Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law, and under section 36 of the Act, the jurisdiction of the said Tribunal is provided 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.**

23. The Authority referred to in the section is the Respondent herein, and there is thus a dispute resolution mechanisms provided by the Energy Act as regards the dispute between the Applicant and the Respondent, and specifically in relation to any decisions alleged to have been made by the Respondent. The availability of an alternative statutory remedy is a material consideration in the exercise of the Court's

discretion to grant leave, and the main reason is that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised.

24. This position is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (1992) KLR 21** in the following words:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

25. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others, (2015) eKLR**, as follows:

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

26. The Court is however granted discretion to exempt an applicant from such mechanisms in exceptional circumstance under section 9(4) of the Fair Administrative Action Act. The exceptional circumstances arise where the alternative mechanisms would not serve the values enshrined in the Constitution or law, particularly, where the dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. The Applicant has neither pleaded nor demonstrated any exceptional circumstances.

27. In addition, it is also instructive that the Applicant has not disclosed and disputed that he had sought similar remedy in **Joseph Karanja Ng'ang'a vs The Energy and Petroleum Regulatory Authority, Milimani Civil Suit No. 2329 of 2020**. Therefore, the instant application is essentially a collateral attack on, and intended to subvert the ruling delivered by a Court of concurrent jurisdiction, and is clearly in abuse of the process of Court.

28. Lastly, the Applicant has not joined a key affected party in the dispute herein, namely Kenya Revenue Authority. It is also instructive in this respect that internal dispute resolution mechanisms are also provided for any disputes arising from decisions made, or customs levied by the Kenya Revenue Authority. Section 229 of the East African Community Customs Management Act, 2004 (EACCMA) in this respect provides as follows:-

“(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

(2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

(3) Where the Commissioner is satisfied other than, owing to absence from the Partner State, sickness cause, or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).

(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.”

“(5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.

29. Further, section 230 of EACCMA provides that:

“(1) A person dissatisfied with the decision of the Commissioner under Section 229 may appeal to a tax appeals tribunal established in accordance with Section 231.

(2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner.”

30. Likewise, with respect to tax disputes, section 51(1) & (2) of the Tax Procedures Act provide as follows as regards the dispute resolution process:

“(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.”

31. Section 52 of the Tax Procedures Act in addition provides as follows as regards appealable decisions to the Tax Appeals Tribunal:

“(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”

32. It is thus the finding of this Court that the Applicant is required to first exhaust the alternative dispute resolution mechanisms available in relation to decisions made by the Respondent or by the Kenya Revenue Authority, and his application is not properly before this Court.

The Disposition

33. In the premises, the Applicant has not demonstrated an arguable case for the foregoing reasons, and the application by the Chamber Summons dated 17th February 2021 is not merited.

34. I accordingly order as follows:

I. The prayers sought in the Applicant’s Chamber Summons dated 17th February 2021 are hereby declined, and the said application is hereby dismissed.

II. Each party shall bear their own costs of their own costs of the Chamber Summons dated 17th February 2021.

35. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

J. NGAAH

JUDGE