



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 359 OF 2018

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 10, 22, 23, 35, 46, 156, 165, 232 AND 258 OF THE
CONSTITUTION OF KENYA (2010)**

-AND-

IN THE MATTER OF: FAULTY PRO-POOR GAS CYLINDERS PAID BY PUBLIC FUNDS

-AND-

IN THE MATTER OF: IRREGULAR PROCUREMENT AND BAD QUALITY OF PRODUCTS

-AND-

IN THE MATTER OF: CONSUMER PROTECTION ACT, 2012

-BETWEEN-

CONSUMERS FEDERATION OF KENYA.....PETITIONER

-AND-

NATIONAL OIL CORPORATION OF KENYA.....1ST RESPONDENT

MINISTRY OF PETROLEUM AND MINING.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

ALLIED EAST AFRICA LTD.....4TH RESPONDENT

SURGE ENERGY LIMITED.....5TH RESPONDENT

KENYA BUREAU OF STANDARDS.....6TH RESPONDENT

-AND-

LAW SOCIETY OF KENYA.....PROPOSED 1ST INTERESTED PARTY

PETROLEUM INSTITUTE OF }

EAST AFRICA..... } PROPOSED 2ND INTERESTED PARTY

RULING

1. Through a petition dated 2nd October 2018, the Petitioner herein who describes itself as an independent, self-funded, multi-sectorial, non-

profit Federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and business rating on consumerism and customer-care issues which derives its mandate from Article 46 of the Constitution of Kenya 2010, the Consumer Protection Act, 2012 and the Competition Act, Cap 504 among other statutes, sued the respondents herein seeking the following orders:

- i) A DECLARATORY ORDER that the actions of the Respondents contravene the provisions of the Constitution under Articles 10, 35, 46 and 258 AND THUS contravened the rights and Freedoms of the Petitioner under.**
- ii) AN ORDER OF MANDAMUS, to compel the 2nd Respondent to create a task force composed of multi-sectoral agencies, including the Petitioner, to review and establish the cause of such large numbers of defective gas cylinders and propose the way forward.**
- iii) AN ORDER OF MANDAMUS, compelling the 1st and 2nd Respondents, their agents, and officers to provide to the Petitioner, on behalf of the public, with a proper report/information on the quality of the cylinders supplied to the public and the steps they have taken to rectify the supply and consumption of the faulty cylinders in the market.**
- iv) AN ORDER OF MANDAMUS against the 1st and 2nd Respondents, their agents and officers directing them to provide a comprehensive transcript on the findings made on the tested gas cylinders.**
- v) AN ORDER OF MANDAMUS, compelling the 1st and 2nd Respondents to reinstitute the procurement process afresh, in compliance with the Constitution and Procurement laws of Kenya.**
- vi) AN ORDER OF PROHIBITION, proscribing the Respondents and their agents from releasing to the public any cylinders that have not been cleared by the Kenya Bureau of Standards as fit for consumption.**
- vii) AN ORDER OF PROHIBITION, proscribing the 1st and 2nd Respondents from using public funds to repair the faulty and/or defective gas cylinders.**
- viii) AN ORDER OF STRUCTURAL INTERDICT, for this honourable Court to supervise compliance with procurement protocols and compliance with its orders.**
- ix) Any other relief the court deems fit to grant.**
- x) Costs of this Application be borne by the Respondent.**

2. A summary of the petitioner's case was that in what was dubbed as **Project Mwananchi**, the government of Kenya, through the then Ministry of Energy and Petroleum was to buy 5 million gas cylinders by the end of 2019, fill them with gas and distribute them to the low and middle-income households at a reduced cost of **Ksh. 2,000/=** which fee was to cover the cost of the cylinder, burner, grill and gas. According to the petitioner, the project was intended to subsidize the cost of cooking fuel for the poor especially in the rural areas so as to contain the destruction of forests through reduction and subsequent elimination of the use of charcoal, firewood and kerosene.

3. The petitioner states that the then Ministry of Energy and Petroleum (succeeded by the 2nd Respondent) confirmed that a consortium led by Allied East Africa Ltd, a Kenyan firm contracted to supply the government with the initial 300,000 *Gas Yetu* cylinders, provided faulty cylinders that were risky to the consumers but that even after raising the red flag, government did not cancel the contract for the consortium led by Allied East Africa Ltd.

4. It is the petitioner's claim that out of the 300,000-cylinder supply contract, the first batch of the delivery in June 2017 totalling about 2,000 had defective valves and were rejected by 1st and 2nd Respondents and that out of the subsequent deliveries, about 60 per cent were rejected for failing to meet the safety and quality standards relating to leakages and slow filling rates.

5. It is the petitioner's case that based on the unfolding developments, the credibility of the contract, contractors, procurement process, ability to deliver and the all-important suitability and appropriate quality have been left to speculation as to the likely danger to consumers. It maintains that the viability and integrity of the procurement, process, contractors and eventual product do not meet legal, moral and socio-economic integrity test thereby necessitating the filing of this petition.

6. Contemporaneously with the petition, the petitioner also filed an interlocutory application, under certificate of urgency, seeking, *inter alia*, the following orders:

- a) An order of DECLARATION that this is a public Interest Litigation matter.**
- b) A DECLARATION that the Petitioner's rights under Articles 10, 35 and 46 of the Constitution of Kenya have been infringed by the Respondents.**
- c) That pending the hearing and determination of the Petition the court do grant an ORDER FOR STAY against the 1st and 2nd Respondents from using any public funds in the repair of the defective gas cylinders.**
- d) An order for INJUNCTION be issued against the 1st, 2nd, 4th and 5th Respondents from releasing any gas cylinders to the public pending the hearing and determination of the Petition**

e) Any other relief the court deems fit to grant.

f) Costs of this Application be borne by the Respondent.

7. The matter was then placed before me on 23rd October 2018 for directions on the certificate of urgency when this court certified the case as urgent and directed that the suit papers be immediately served on all the respondents and that the matter be mentioned on 29th October 2018 for further directions.

8. On 29th October 2018, Mr. Akusala, learned counsel for the petitioner intimated to the court that even though all the respondents had been served with all the suit papers, none of them had filed any response to the petition and application. He then prayed that the conservatory orders sought in the petition be allowed pending the inter partes hearing of the application owing to the nature of the case and the fact that the public was at the risk of losing billions of shillings in respect to the faulty gas cylinders.

9. Mr. Sekwe, learned counsel for the 2nd and 3rd respondents, opposed the application for the conservatory orders while stating that he had not been served with the pleadings and added that he was aware that the petitioner had not furnished the court with any concrete evidence so as to warrant the granting of the prayers sought in the application.

10. Upon considering the pleadings filed by the petitioner and the gravity of the issues raised therein together with the rival arguments of the parties' respective counsel, this court found that the applicant had established a prima facie case and granted interim conservatory orders pending the hearing and determination of the application as follows:

a. An order of DECLARATION that this is a public Interest Litigation matter.

b. That pending the hearing and determination of the Petition the court do grant an ORDER FOR STAY against the 1st and 2nd Respondents from using any public funds in the repair of the defective gas cylinders.

c. An order for INJUNCTION be issued against the 1st, 2nd 4th and 5th Respondents from releasing any gas cylinders to the public pending the hearing and determination of the Petition.

11. The application was then listed for inter partes hearing on 20th November 2018 when counsel for the respondents objected to the issuance of the interim conservatory orders and urged the court to set aside, discharge or vary the said orders on the basis that not only were they not served with the pleadings but that the orders ought not to have been granted as they had the effect of prohibiting the release of any gas cylinder, a scenario which would be inimical to public interest as the orders have the effect of affecting all the gas cylinders in the country including those that were not the subject of the petition.

12. After hearing lengthy submissions from counsel for the respondents and the petitioner, the 1st respondent and the petitioner entered into a consent in which they agreed to vary the impugned interim orders issued on 29th October 2018 to read as follows:

a) That pending the hearing and determination of the application, the court grants an order of stay against the 1st and 2nd respondents from using any public funds for the repair of the defective gas cylinders for the mwanainchi gas project.

b) That an order of injunction be and is hereby issued against the 1st 2nd and 3rd respondents from releasing any gas cylinder in the mwanainchi gas cylinder project pending the inter partes hearing of the application.

c) Ruling on 19th March 2019.

13. I have considered the matter before me and I note that the bone of contention between the parties was whether or not the interim orders issued on 29th October 2018 should be discharged, varied and/or set aside. I find that having agreed, through the consent recorded on 20th November 2018, that the impugned orders be varied in the manner that I have already outlined in this ruling, the issue of whether the impugned orders should be varied, discharged or set aside is now spent and what the parties should be concerned with is the hearing of the initial application inter partes or better still, the hearing of the main petition so as to expeditiously and conclusively resolve the dispute between all the parties.

14. In that regard, direct that the matter be mentioned before Makau J. on 29th April 2019 when parties may take directions on the hearing of the main suit. Or such further directions that the court may deem just and fit to grant.

I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 12th day of April 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Akusalla & Miss Amisi for the petitioner

Court Assistant - Fred