



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

CORAM: D.S. MAJANJA J.

JUDICIAL REVIEW NO. 678 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ENERGY REGULATORY COMMISSION.....RESPONDENT

EX PARTE

MIDLAND ENERGY LIMITED

AND

LPG CYLINDER EXCHANGE POOL.....INTERESTED PARTY

RULING

1. Pursuant to leave granted on 6th December 2017, the ex-parte applicant (“the applicant”) lodged a Notice of Motion dated 27th December 2017 seeking the following reliefs:

1. THAT this Honourable Court be pleased to issue an order of certiorari to bring forth before this Court and quash the Respondents decision dated 23rd November 2017 purporting to revoke the Applicants Licence Number ERC/LPG/1206.

2. THAT this Honourable Court be pleased to issue an order of prohibition prohibiting the Respondent from revoking and or in (any) manner interfering with the Applicants Licence No. ERC/LPG/1206 without following the laid down procedures under the Energy Act No. 12 of 2016 and all other relevant laws.

2. The facts upon which the application is grounded are set out on the face of the motion. They are that the applicant is a duly authorised liquefied petroleum gas (LPG) dealer pursuant to a Licence Number ERC/LPG/1206. On 23rd November 2017, the respondent, the Energy Regulatory Commission (“ERC”) notified the applicant that it had made a decision to revoke the applicant’s licence. The applicant complains that the decision to revoke the licence was not justified, was illegal, unreasonable and irrational, as it was made in contravention of **section 85(2)** of the **Energy Act** which expressly requires a 14-day notice to show cause before revoking any licence. The applicant further complains that the decision was made without giving it an opportunity to be heard contrary to **Article 50** of the Constitution and was in breach of the rules of natural justice. The applicant also contends that the decision to revoke the licence violated the applicant’s legitimate expectation to fair administrative action contrary to **Article 47** of the Constitution and **sections 3, 4** and **5** of the **Fair Administrative Act, Act No. 4 of 2015** (“the **FAA**”).

3. The facts surrounding this motion are largely common ground. They are set out in the supporting affidavit of Geoffrey W. Oguna, the applicant’s general manager, sworn on 6th December 2017 and the replying affidavit of Edward Kinyua, the Acting Director of Petroleum of the ERC, sworn on 9th January 2018. The parties filed extensive written submissions and cited various authorities to support their respective positions. The parties raised two main issues. The first is whether this court has jurisdiction to determine this matter in view of the alternative remedy provided under the **Energy Act**. The second issue, which depends on the finding on the first one, is whether the applicant right to a fair hearing was violated when its licence was revoked. Before I deal with the issue I now set out the facts giving rise to these proceedings.

4. At all material times, the applicant was the holder of a Petroleum Business Licence (LPG) issued by the ERC on 27th June 2017. By virtue of the licence, the applicant was entitled to import, export and wholesale of LPG in bulk and cylinders using midgas branded cylinders only. The licence was to expire on 26th June 2018.

5. As part of its mandate, the ERC promulgated the **Energy (Liquified Petroleum Gas) Regulations, 2009** vide **Legal Notice No. 121 of 2009**. The regulations sought, *inter alia*, to standardise the capacity of domestic cylinders and enact the use of unified valves. The regulations also established the LPG Cylinder Exchange Pool (“the Pool”) to facilitate and regulate the exchange of LPG cylinders between licenced operators in order to increase consumer uptake of LPG by ensuring ease of migration of consumers from one LPG brand to another and also ensure that the LPG operators fairly compensate each other for collection and storage of each other cylinders. As part of the licence condition, the applicant and other licencees were required to and did sign to the LPG Cylinder Exchange Pool Agreement (“the Pool Agreement”).

6. In early 2017, the ERC received reports that some of the pool members, including the applicant, had accumulated huge debts after failing to settle deposits for LPG cylinders. As this was interfering with smooth operations of the pool and had the capacity to negatively affect distribution of and access to LPG by the public, the Ministry of Energy held a meeting of stakeholders including the applicant on 21st September 2017. The meeting resolved that LPG dealers with debt obligations exceeding Kshs. 20 million should clear the outstanding amount within 60 days failing which the ERC would take steps to revoke their licences. Following the meeting, ERC issued a notice dated 2nd October 2017 to the applicant notifying it to clear the outstanding debt otherwise it would take action against it including revoking of its licence.

7. On 16th November 2017, the ERC issued a Notification of Licence Revocation where it notified the applicant that the grace period given to the applicant to settle the debt would expire on 21st November 2017 and that if the debt is not settled, its licence would be revoked. By a letter dated 23rd November 2017, the ERC wrote to the appellant informing it that its licence had been revoked for non-compliance with the with the Pool Agreement which constituted breach of the licencing conditions.

8. The respondent objects to these proceedings on the ground that **section 80** of the **Energy Act** provides that any person aggrieved by the decision of the ERC shall refer the dispute to the Energy Tribunal (“the Tribunal”) established under **section 108** of the **Energy Act**. The applicant finds support for its position in **section 159(2)(b)** of the Constitution which provides that the Judiciary shall promote alternative forms of the dispute resolution. The applicant also points to the fact that **section 9(2)** and **(3)** of the **FAA** provides that the High Court shall not review administrative action unless alternative remedies have been exhausted. The applicant called in aid several cases; **Safe Rider Vehicle Technologies (PTY) and 2 Others v National Police Service Commission NRB JR No. 10 of 2017 [2017]eKLR**, **Republic v National Environment Management Authority NRB CA Civil Appeal No. 84 of 2010 [2011]eKLR** and the **Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Limited [198]KLR 1** and urged the court to strike out the claim.

9. The position taken by the applicant on the issue of jurisdiction is that the application raised matters of violation of the Constitution and the Bill of Rights and therefore under **Article 165(3)(a)** and **(b)** of the Constitution, the High Court has jurisdiction to determine the matter. The applicant pointed out that since the application raised constitutional issues, the Tribunal did not have jurisdiction to hear and determine constitutional issues. Counsel referred to **Royal Media Services v Attorney General NRB Petition No. 466 of 2014 [2015]eKLR** and the case of **Bernard Murage v Fineserve Africa Limited and 3 Others**. Conversely, the respondent submitted that the **section 9(2)** and **(3)** of the **FAA** cannot confer on the Tribunal the jurisdiction to deal with and enforce fundamental rights and freedoms.

10. The Energy Tribunal is established under **Part VI** of the **Energy Act** as follows:

108. For the purpose of hearing and determining appeals in accordance with section 107 and of exercising the other powers conferred on it by this Act, there is established a tribunal to be known as the Energy Tribunal, hereinafter referred to as the “Tribunal”.

11. **Section 107** provides for appeals from the decisions of the Commission to the Tribunal on the following terms:

107. Where under this Act the provision is made for appeals from the decisions of the Commission, all such appeals shall be made to the Energy Tribunal, in accordance with the provisions of this Part.

12. The applicant does not dispute that the ERC had power to **section 85** of the **Energy Act** to revoke its licence. **Section 89** of the **Act** provides for an appeal against the action of the Commission or a licensing agent. It states as follows:

89. A person aggrieved by the action of the Commission or a licensing agent in—

(a) refusing to renew or grant a licence or revoking a licence; or

(b) imposing conditions on a licence; or

(c) refusing to replace or amend a licence, may, within thirty days of receipt by him of written notification of such action, in writing appeal, to the—

(a) Tribunal in case of an appeal against the Commission; or

(b) Commission in case of an appeal against a licensing agent, whose decision shall be communicated within forty-five days of receipt of the appeal by the Tribunal (or the Commission as the case may be) from any such aggrieved person. [Emphasis mine]

13. From the provisions I have cited, it is clear that a party whose licence is revoked by the ERC has a statutory right of appeal to the Tribunal established under the **Act**. Does the fact that this procedure exists exclude the jurisdiction of this court to entertain the application for judicial review? The existence of a statutory remedy vis-à-vis the right to apply for judicial review has been the subject of judicial pronouncement. It has been held that where a statute provides for a mode of resolving a dispute that procedure must be followed. For example in **Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017]eKLR**, the Court of Appeal reiterated this principle that, “[It] is abundantly clear to us that where there is a specific procedure as to redress of grievances, the same ought to be strictly followed.” (See also **Speaker of the National Assembly v Njenga Karume [2008]1 KLR 425**).

14. After reviewing various decisions, the Court of Appeal in **Republic v National Environmental Management Authority (Supra)**, held as follows;

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute.

15. This principle is not inconsistent with the provisions of the Constitution and the Bill of Rights. First, **section 159(2)(b)** of the Constitution imposes on the Judiciary to the obligation to promote alternative dispute resolution hence the utilization of Tribunals such as the Energy Tribunal falls within this objective. This provision exists side by side with the original and unlimited jurisdiction of the High Court under **Article 165** of the Constitution. On this issue, the Court of Appeal in **Mutanga Tea and Coffee Company Limited v Shikara Limited and Another MSA CA Civil Appeal No. 54 of 2014 [2015]eKLR**, observed that:

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail constraining the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.

16. **Second, the judicial review and the common law principles of natural justice are now anchored in Article 47 of the Constitution. Article 47(3)(a) of the Constitution stipulates that:**

Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal;...[Emphasis added]

In line with the Constitution and in order to give effect to the right of fair administrative action, Parliament enacted the **FAA**, which as I have shown provides for review of administrative action by a court. In this case therefore, the Energy Tribunal is one such Tribunal that is empowered to review administrative action.

17. I appreciate that the availability of an alternative remedy is not a bar to judicial review proceedings or any other proceedings for enforcement of a fundamental right in the High Court but in order to avoid the alternative dispute resolution mechanism clearly anchored in the Constitution, an applicant must show that there are exceptional circumstances that would allow the court sidestep its constitutional imperative to promote alternative dispute resolution. That is why **section 9(4)** of the **FAA** provides that:

9(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. [Emphasis added]

18. Has the applicant discharged its burden of demonstrating that this court should not entertain this cause? In order to remove itself from the ambit of the Tribunal, the applicant contends that the application before the court raises a matter for enforcement of fundamental rights and freedoms namely the right to a fair hearing under **Articles 47** and **50** of the Constitution and as such, it is only the High Court that has jurisdiction to entertain the matter under **Article 169** of the Constitution.

19. To support this argument, counsel for the applicant called in aid the decision in **Royal Media Services Limited v Attorney General (Supra)** where the Court held that the HIV and AIDS Tribunal created under **section 20** of the **HIV and AIDS Control Act**, did not have jurisdiction to determine matters arising out of the Bill of Rights as the enforcement of rights and fundamental freedom could only be enforced by the High Court and subordinate court where Parliament has enacted legislation under **Article 23(2)** of the Constitution.

20. I think that position in this case can easily be distinguished. The applicant chose to move the court by an application for judicial review where considerations of an alternative remedies are a factor in granting leave as I have shown elsewhere in the Constitution. Further, **Article 47** of the Constitution and the implementing legislation, the **FAA**, provide Tribunal as body reviewing administrative action.

21. At the end of the day, the dispute between the ERC and the applicant relates to revocation of its licence which is within the purview of

the Tribunal jurisdiction under **section 89(a)** of the *Energy Act*. That the matter is one that may implicate several fundamental rights and freedoms does not, for that reason alone, remove the matter within the competence of that Tribunal. I also accept that the Energy Tribunal is a specialist Tribunal dealing specifically with matters concerning the *Energy Act*. The membership of the Tribunal comprises not only of legal experts but also persons versed in matters likely to come before the Tribunal. For the reasons I have stated, I find and hold and there are no exceptional circumstances or facts that would call upon this court to by-pass the statutory strictures provided in resolving the dispute. Accordingly, I decline to exercise this court's jurisdiction.

22. I strike out the Notice of Motion dated 27th December 2017 with costs to the respondent.

DATED and **DELIVERED** at **NAIROBI** this 23rd day **NOVEMBER** 2018.

D. S. MAJANJA

JUDGE

Mr Njiru instructed by Adera and Kenyatta Advocates for the ex-parte applicant.

Mr Gituma instructed by Igeria and Ngugi Advocates for the respondent.