



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 355 OF 2015

**IN THE MATTER OF AN APPLICATION BY PEKENYA GAS SUPPLIES LIMITED FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF THE ENERGY ACT

AND

IN THE MATTER OF THE ENERGY REGULATIONS,

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ENERGY REGULATORY COMMISSION.....RESPONDENT

EX PARTE: - PEKENYA GAS SUPPLIES LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 22nd October, 2015, the *ex parte* applicant herein, **Pekenya Gas Supplies**

Limited, seeks the following orders:

1. **An order of certiorari to bring into this Honourable Court the Respondent's letter dated 1st July 2015 for the purposes of being quashed.**
2. **An order of prohibition directed at the Respondent restraining it from subsequently revoking the *ex parte* Applicant's license on the premises contained in the letter dated 1st July 2015.**
3. **An order of mandamus directed at the Respondent compelling the Respondent to renew the license of the *ex parte* Applicant unconditionally upon the Applicant meeting the requirements set out in the law.**
4. **Costs be borne by the Respondent.**

Ex Parte Applicant's Case

3. According to the applicant, it applied to the Respondent for the issuance of a license to deal in bulk, wholesale, storage and filling of liquefied petroleum gas under the **Energy Act, 2006** (hereinafter referred to as "the Act"). Pursuant thereto, the Respondent on 10th November 2014, issued to the applicant a one-year license expiring on 9th November 2015 to deal in wholesale of liquefied petroleum gas in bulk, wholesale of liquefied petroleum gas in cylinders and storage and filling of liquefied petroleum gas.

4. According to the applicant, with the issuance of the aforesaid license the Respondent conferred on the Applicant a protected interest and a legal right to deal in liquefied petroleum gas as aforesaid and consequently the Applicant became imbued with a legitimate expectation that the Respondent would not derogate or do anything or act whose effect is to derogate from the rights and interests granted by the license.

5. It was contended that the Applicant, upon and even prior to the issuance of the license as part of pre-compliance requirements, invested a lot of monies and made huge financial commitments running into millions of shillings and therefore once again the Applicant had a legitimate expectation that its investment pursuant to the aforesaid license would not be in vain but would be protected and guaranteed.

6. On 7th January 2015 the Respondent wrote to the Applicant expressly informing the Applicant that it had been admitted into the LPG Cylinder Exchange Pool (hereinafter referred to as "the Pool") as a member. To the applicant, having been admitted as a member of the Pool as aforesaid has been in constant and very fruitful engagement with the Pool and has established that the Pool has further internal requirements that require heavy expenditure of monies running into millions of shillings hence further and deeper investment by the Applicant. The Applicant disclosed that it was in the process of sourcing for funds to enable it meet the internal requirements of the Pool and that there was no time limit for meeting the steep and stringent requirements to maintain membership into the Pool.

7. However on 2nd June 2015, the Respondent wrote a letter to the Applicant communicating the decision of petroleum licensing committee for the applicant to show cause why its license no. ERC/LPG/626 should not be revoked for alleged breach of the license conditions. To the applicant, the respondents in revoking the applicant's license did not follow due process as well as afford the applicant any hearing. It was contended that in the letter dated 2nd June 2015, the respondents involved the petroleum licensing committee which conducted its decision making process in isolation of the applicant in utter breach of the rules of natural justice.

8. To the applicant, this letter came as a complete surprise to it as it had not breached any of the license conditions since the license itself had no conditions attached to it. The applicant denied that it was engaged in the "business of filling and wholesaling of LPG cylinders" but was licensed to "wholesale LPG in bulk, wholesale LPG in cylinders" among others. In its view, the licence granted to it by the Respondent did not necessarily and per se oblige the Applicant to comply with the internal requirements of the Pool and that the Applicant by the very nature of the license could legally and properly engage in the business of liquefied petroleum gas without meeting the internal requirements of the Pool.

9. The applicant averred that it did respond to the letter dated 2nd June 2015 from the Respondent aforesaid and explained in absolute good faith and correctly the prevailing circumstances and the steps and efforts the Applicant was making to meet the internal requirements of the Pool. In spite of the response aforesaid and without affording the Applicant a hearing as envisaged under the Constitution, the Act and the **Fair Administrative Action Act** and without further observing the values and principles of public service as set out under the **Public Service (Values and Principles) Act**, the Respondent proceeded to revoke the license granted to the Applicant aforesaid on 1st July 2015.

10. It was the applicant's case that the revocation of its license not only violated the Applicant's inalienable right to natural justice or fair and impartial hearing but also violated the Applicant's legitimate expectations that the license will not be revoked except through due process. In its view, the action of the Respondent as communicated in the letter dated 1st July 2015 was therefore illegal for failure to accord with the requirements of section 85 of the Act, the Constitution and applicable statutes like the **Fair Administrative Action Act**.

11. It was the applicant's position that the Respondent had not complied with mandatory and material procedure and conditions for the action communicated in the letter dated 1st July 2015 as provided for under the Act was based on extraneous, irrelevant and malicious reasons or grounds and therefore suffered from the heavy burden of illegality and irrationality. The same, it was contended laboured under the heavy burden of procedural improprieties and was therefore procedurally unfair. In addition, the same was in excess of powers, jurisdiction and the scope of the authority of the Respondent was illegal and not in conformity with the Constitution and the Act.

12. The applicant averred that the said letter and the actions prior to the issuance of the said letter typified bias by the Respondent towards the Applicant and that the Respondent denied the Applicant a reasonable opportunity to state its case before the action was taken hence the action was influenced by a serious error or misapprehension of the applicable law and provisions.

13. That the action of the Respondent is unreasonable and offends the legitimate expectations of the Applicant, was a sorry product of abuse of discretion by the Respondent, based on bad faith and vendetta and was not proportionate to the interests or rights affected as the same was plainly unfair and grossly punitive given the totality of the circumstances.

14. It was submitted on behalf of the applicant that before the Respondents made the impugned decision the applicant was never afforded an opportunity of being heard. Relying on section 36(2) of the Act, it was submitted that the notice given to the applicant did not conform to the law as it was not the required 45 days' notice to show cause. It was submitted that whereas the notice was issued on 2nd June, 2015, the letter of revocation was subsequently issued on 1st July, 2015.

15. To the applicant had the notice run its course, the applicant would have complied with the law and had the applicant been granted an opportunity of being heard it would have substantiated and successfully satisfied the respondent allegations and issues.

Respondent's case

16. In opposition to the application, the Respondent averred that the Applicants Judicial Review application is incurable defective and ought to be dismissed in that the Applicant has merely cited the writs in general terms and has failed to show the manner in which they should be issued.

17. According to the Respondent, the Energy Regulatory Commission was established by the Government of Kenya in the year 2006 under the Act to be in charge of the Regulation of the energy sector in the country and this includes the petroleum sector and liquefied petroleum gas sector. That in this role the Respondent is mandated to, amongst other things, regulate importation, exportation, transportation, refining, storage and sale of petroleum and petroleum products; protect the interests of the consumer, investor and other stakeholder interests; monitor, ensure implementation of, and observance of the

principles of fair competition in the energy sector, in coordination with other statutory bodies.

18. It was contended that due to its very nature, its economic significance and inherent danger in the product, the petroleum industry in general and liquefied petroleum gas (LPG) industry in particular requires to be closely and keenly regulated and monitored hence there cannot be a free for all and anarchy in the petroleum and LPG sectors as considerable harm can be occasioned to the citizen and the economy by mishandling of the products.

19. The Respondent disclosed that in 2006 the Government of Kenya established the Energy Regulatory Commission to be in charge of regulation of the energy sector. As part of the Commission mandate is ,in coordination with other statutory authorities, to:

- i. formulate, enforce and review environmental, health, safety and quality standards for the energy sector; and
- ii. to enforce regulations, codes and standards in the energy sector.

20. Further the Government of Kenya also passed regulations to regulate the sector and ensure the safety of the Kenyan Citizenry which regulations include specific regulations relating to liquefied petroleum gas passed in 2009. In the Respondent's view, the licensing regime established under the Act is created to regulate the industry and the requirements that it establishes are reasonable and justifiable, required for the protection of the industry, the citizens of the country, the environment, public health and public safety. The said regime, it was averred is expeditious, efficient, lawful, reasonable and procedurally fair and meets the requirements of article 47 of the Constitution. To the Respondent, it is entitled to follow the licensing provisions of the Act if they meet the requirements of Article 47 of the Constitution.

21. The Respondent averred that section 14(5) of the ***Energy (Liquefied Petroleum Gas) Regulations, 2009*** (hereinafter referred to as "the Regulations") provides that it is a condition of the licensing for whole sale trade of LPG in cylinders that every licensee in this category shall join the LPG Cylinder Exchange Pool established under Regulation 14(1) of the said Regulations. It was explained that the pool facilitates the orderly exchange of gas cylinders amongst the market players.

22. The Respondent confirmed that on 26th September, 2014, the applicant applied for licence for Filling, Storage, wholesale of LPG Gas in bulk, wholesale of LPG Gas in cylinders and the Petroleum Licensing Committee of the Respondent at its meeting on 10th November, 2014 granted the applicant the said Licence and the Applicant was recommended to join the Pool on 7th January, 2015 in line with the Provisions of Regulation 14(5) of the said Regulations. On 15th January 2015 the Pool wrote to the Applicant advising them about the requirements. However, the Applicant never showed interest in joining the pool necessitating the Secretariat of the Pool to write to the Commission on 30th March, 2015 informing it of the reluctance of the Applicant to join the pool. After the Respondent engaged the Applicant by way of phone calls, the Applicant finally submitted the requisite documents to the Pool on 31st March, 2015.

23. The Respondent added that on 14th April, 2015, the Pool Secretariat wrote to the Applicant informing them that their documents were in order and that all that was required for them was to present themselves at the pool offices and sign the agreement. On 11th May, 2015 the Pool Secretariat wrote to the Respondent informing it of the continued reluctance of the Applicant to sign the Pool agreement. On 2nd June, 2015, the Respondent wrote a show cause letter to the Applicant for breaching Regulations 14(5) of the Regulations which notice the Applicant acknowledged receipt of and indicated that they would respond within 14 days. However, according to the records of the Respondent, no response was received by the Respondent following the show cause letter and the purported response referred to in the verifying affidavit was not by received the Commission. To the Respondent, the said letter is, in any event, an admission of the violations of the license conditions and refusal to join the LPG Gas Pool.

24. Consequently, on 1st July, 2015, the Commission revoked the licence for non-compliance with

Regulation 14(5) of the said Regulations, 2009. Subsequently, on 26th August, 2015, the Applicant wrote to the Respondent accepting that it had breached its license conditions and requesting for a second chance and pledged to join the Pool with immediate effect.

25. It was the Respondent's position that joining the Pool is a requirement of the law for licensees. The Applicant was granted a licence but failed, refused and/or neglected to join the pool for over nine months despite repeated requests, prodding and reminding by the Respondent and the Pool. The Applicant's responses show little respect for the requirements of the legal provisions that are intended for the protection of the Kenyan gas consumer.

26. It was therefore contended that the Applicant has not come to this Honourable Court with clean hands and ought not be granted the discretionary remedies by this Honourable Court.

27. It was disclosed that on the 4th June, 2015, The Anti-counterfeit Agency, visited the premises of the Applicant located in Nakuru to follow up on allegations that counterfeiting of branded gas cylinders and unauthorized refilling was taking place in the said premises. As a result of the visit the Applicants were charged with violation of the **Anti-Counterfeit Act** before the Subordinate Court in Nakuru being Criminal Case Number 1445 of 2015, which proceedings are still pending.

28. It was further disclosed that the Applicant on the 8th June 2015 filed a Constitutional Petition before the High Court in Nakuru being *High Court of Kenya at Nakuru Constitutional Petition No 28 of 2015 Pekenya Gas Supplies Limited vs. The Anti-Counterfeit Agency and 5 others*. Energy Dealers Association filed a similar Petition before the High Court in Nairobi on the 12th June 2015 being *High Court of Kenya at Nairobi Constitutional Petition No 248 of 2015 Energy Dealers Association vs. The Anti-Counterfeit Agency and 9 others* and in those matters the deponent of the supporting affidavit in the present proceedings, **James Kinyua Gachiiri**, is also the deponent of the supporting affidavit in the proceedings before the Constitutional Courts in Nakuru and Nairobi.

29. According to the Respondent, there was a failure by the deponent to disclose the existence of the said matters.

30. In the applicant's view, the orders sought ought not to be granted as the grant of the same would amount to granting the Applicant a licence without his fulfilling the licensing conditions.

31. It was the Respondent's position that the Applicant merely prepared a draft application and there were no attempts on his part to either file it since the purported documents were never commissioned and remain drafts. There was no evidence of any communication from the tribunal clerk supporting the averments that the appellant made any attempts to utilize the redress procedure provided for under the **Energy Act**. To the Respondent, the Applicants are being economical with the facts, suppressing material information, guilty of non disclosure in the ex parte application and misleading this Court in order to gain advantage and is undeserving of the prayers sought or even those already granted them.

32. The Respondent reiterated that the operation of LPG facilities in unauthorized ways can lead to loss of life, property and endanger the security of Kenya generally.

33. It was the Respondent's position that the entire application is an abuse of the court process, a total disregard of due process, smirks of impunity, trivializes Judicial Review Applications and fails to disclose any valid reason for grant of the writs of Mandamus, Certiorari and Prohibition prayed for.

34. It was submitted by the Respondent that whereas section 36(2) of the Act provides for a 45 days' period the said period only applies to revocation of licences in energy sector. Since liquefied petroleum gas is a product of petroleum energy, it was submitted that the relevant provision is section 85 of the Act under which subsection (2) provides for a 14 days' notice and that the Respondent would be at liberty to determine the matter within 30 days of the expiry of the notice. Instead of responding to the 28 days' notice to show cause the applicant sought an extension of time.

35. To the Respondent pursuant to section 4(6) of the *Fair Administrative Action Act*, it was necessary for an oral hearing to be conducted and there was no complaint that the provisions of the Act do not meet the requirements of Article 47 of the Constitution. It was submitted that the applicant having admitted non-compliance with the Regulations is not entitled to the orders sought.

36. It was further submitted that the Applicant had not exhausted the remedies available under the Act which provide for reference to the Energy Tribunal.

Determination

37. I have considered the foregoing. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

38. The purview of judicial review was clearly set by Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

39. This position was reaffirmed in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** in which it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

40. The Applicant contended that in revoking its licence the Respondent relied on extraneous matter. In

its view the issue of membership of the Pool was not one of the conditions for the grant of the licence to it and therefore ought not to have been the basis for the revocation of the licence. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...”

41. As was held by Warsame, J (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003**, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. It is therefore clear that a consideration of irrelevant matter is one of the grounds upon which judicial review relief may be granted.

42. However according to the Respondent, Regulation 14(5) of the ***Energy (Liquefied Petroleum Gas) Regulations, 2009*** (hereinafter referred to as “the Regulations”) provides that it is a condition of the licensing for whole sale trade of LPG in cylinders that every licensee in this category shall join the LPG Cylinder Exchange Pool established under Regulation 14(1) of the said Regulations. It was explained that the pool facilitates the orderly exchange of gas cylinders amongst the market players. The said Regulation provides that:

A person shall not conduct the business of filing and wholesaling of LPG cylinders unless such a person is a member of the LPG Cylinder Exchange Pool.

43. It was clear from the letter dated 2nd June, 2015 that it was the breach of this Regulation that the Respondent relied upon as a basis of the letter dated 2nd June, 2015 in which the applicant was given 14 days to show cause why its licence should not be revoked.

43. That the Applicant failed to comply with the conditions for the enjoyment of the licence was acknowledged by the applicant in the letter dated 26th August, 2015 in which the Applicant admitted that:

“we fully own up the failure to adhere to the conditions of the operational licence issued to us by your good office. While the breach of the said condition is not excusable, we hugely regret the irregularity and the resultant consequences...Granted a second chance to carry out the business we pledge to change and strictly do the following...Join the cylinder exchange pool immediately.”

45. Based on the foregoing I am unable to agree with the applicant that the membership of the pool was not a condition for the issuance and the enjoyment of the licence.

46. That the applicant was afforded an opportunity of hearing is not in doubt. It was however contended that no oral hearing was afforded to the applicant. The ingredients of a fair hearing are however provided in section 4(3) and (4) of the ***Fair Administrative Action Act, 2015*** which states that:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

47. However subsections (5) and (6) of the said section provides that:

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different procedure.

48. It is therefore clear that what is required of an administrator is compliance with Article 47 of the Constitution. This position resonates with the position adopted by **Michael Fordham** in *Judicial Review Handbook*; 4thEdn. at page 1007 that:

“procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case”.

49. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009**, the Court of appeal delivered itself as follows:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”

50. In **R vs. Aga Khan Education Services ex parte Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

“On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each scale must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.”

51. In Russel vs. Duke of Norfolk [1949] 1 All ER at 118, the Court expressed itself as hereunder:

“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.”

52. As was held in Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:

“The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc.”

53. This was the position in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

“In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings”

54. Clearly therefore what is required is that whatever procedure is adopted the same must meet the minimum principles of fairness.

55. A distinction must be made between a hearing and an opportunity of being heard. What the law requires is the latter rather than the former. This was the position adopted Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 in which the Court of Appeal held:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

56. In this case the applicant was given a chance to show cause but never made use of the said opportunity. The applicant has not shown in what manner the procedure adopted was unfair save for denial of oral hearing. In my finding it is not mandatory that for a process to be fair, there must be oral

hearing.

57. The applicant however contended that whereas the notice was given the period of the notice did not comply with the law. In its view the notice ought to have been a 45 days' notice. As was held in **Resley vs. The City Council of Nairobi [2006] 2 EA 311:**

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

58. In my view where a statute prescribes the length of the notice to be given in disciplinary matters, to give a lesser period of notice would amount to a violation of the rules of natural justice. Where a violation of the rules of natural justice is found to have been committed, the end result becomes immaterial. This was the position in **Onyango Oloo vs. Attorney General** (supra) where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio.” [Emphasis mine].

59. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

60. According to the applicant, pursuant to section 36(2) of the Act, the applicant ought to have been given a 45 days' notice to show cause. As already stated hereinabove the notice given was for 14 days. As correctly submitted by the Respondent section 36(2) falls under part III of the Act which is headed “Electrical Energy”. “Petroleum” is dealt with under part IV of the Act and section 85(2) which falls under that part provides that:

Unless otherwise specified in the licence, the Commission or licensing agent may give a

licensee fourteen days notice to show cause why the licence should not be revoked.

61. It is therefore clear that the 14 days' notice given to the applicant was lawful and the revocation which was effected within 30 days from the date of the expiry of the notice was similarly lawful pursuant to section 85(4) of the Act.

62. The Respondent contended that the applicant ought to have appealed to the Energy Tribunal instead of coming before this Court. Section 89(a) of the Act provides for an appeal to the Energy Tribunal in case a person is aggrieved by the decision of the Respondent.

63. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that 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.”

64. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

65. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425**, where it held that;

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

66. The same principle has been underlined in the cases of **Kipkalya Kones vs. Republic & Another ex parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291**, **Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012**.

67. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. That was also the position in **Ex parte Waldron [1986] 1 QB 824 at 825G-825H**, in which **Glidewell, LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. The issue

of 3rd party buyers for value without notice was considered in **Birmingham City Council vs. Qasim [2009] EWCA Civ 1080; [2010] BGLR 253.**

68. Before enactment of the *Fair Administrative Action Act, 2015*, the legal principle where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. This principle has however now acquired a statutory underpinning in section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 which provides that:

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

69. Subsection (3) thereof provides that:

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

70. Subsection (4) of the said section however provides that:

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.

71. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case no attempt was made by the applicant to justify its inability to resort to the available alternative appellate remedies before invoking this Court's jurisdiction.

72. Apart from the foregoing, the decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis added].

73. The applicant admitted that it never complied with the conditions necessary for the enjoyment of the licence. To grant the orders sought herein would amount to granting discretionary order to a party who has not approached the Court with clean hands.

74. Having considered the issues raised herein it is my view and I hereby hold that the Notice of Motion dated 22nd October, 2015 is unmerited.

Order

75. In the premises the Motion fails and is dismissed with costs.

Dated at Nairobi this 17th day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Aloo for the Respondent

Cc Mutisya