



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

MISC. APPLICATION NO. 30 OF 2010.

(FORMERLY ELD TR. NO. 18 OF 2010.)

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION

AND

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**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI, MANDAMUS &
PROHIBITION.**

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AND

**IN THE MATTER OF THE LAW REFORM ACT CAP 26; CIVIL
PROCEDURE RULES CAP 21 LAWS OF KENYA PLUS THE
RULES OF PRACTICE AND PROCEDURE THEREIN.**

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AND

**IN THE MATTER OF THE PETROLEUM (EXPLORATION &
PRODUCTION) ACT CAP 208.**

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AND

**IN THE MATTER OF AN EXPLORATION PERMIT GRANTED
TO CENTRIC IMAGING INC. DISCLOSURES IN THE DAILY
NEWSPAPER ON TUESDAY 11TH DAY OF MAY, 2010**

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BETWEEN

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REPUBLIC.....APPLICANT.

VERSUS

PERMANENT SECRETARY MINISTRY FOR ENERGY.....RESPONDENT.

AND

TURKANA DRILING COMPANY OF KENYA..... 1sT INT. PARTY.
LUNDIN KENYA LIMITED2ND INT. PARTY.
AFRICA OIL COROPORATION3RD INTERESTED PARTY.,
PLATFORM RESOURCES INC.....4TH INT. PARTY.
CENTRIC IMAGING INC..... 5TH INT. PARTY.

INTERSTATE PETROLEOUM LIMITED.....EX PARTE.

RULING.

1. Pursuant to an order of leave granted to the exparte applicant on 27th July, 2010, the applicant filed a notice of motion on 9th August, 2010 in which it seeks for an order of certiorari to remove to this court the exploration permit issued by the respondent in respect of Block 10 BA, BIO`ck 10 BB, Block 11 B, Block 12A and Block 13 T granted to the 1st to 5th interested parties, for purposes of quashing the permit and its consequential regulations. The applicant is also seeking for an order of Mandamus to compel the respondent to make full disclosures regarding information given to it by the applicant in respect of samples submitted vide letters dated 14th July, 2006, 27th December, 2005 and 30th December, 2005 and also 13th December, 2005.

2. The applicant also sought for an order to compel the respondent to issue an exploration permit in respect of Block 10 BA, B lock 10 BB, Block 11 A, Block 11 B, Block 12A and Block 13T to the applicant. And an order of prohibition to restrain the interested parties from executing whatsoever, the exploration permit issued by the respondent in respect of the' above cited blocks. Finally, the applicant sought for an order of restitution of the crude oil samples and/or the chemical analysis report thereon to the applicant. This application is supported by the grounds stated on the body thereto. The statement of facts dated 17th June, 2010 and the verifying affidavit sworn by Maosa Kengara Monene sworn on 17th June, 2010 as well as a further affidavit sworn on 5th November 2010.

3. Briefly stated, the applicant's case is that on 13th December, 2005 while drilling for water in Turkana and West Pokot areas of Rift Valley Province, they discovered a black substance smelling like kerosene which they suspected to be crude oil. They submitted the samples for chemical analysis to the Ministry of Energy. This was submitted in three samples labeled P. TI and T2 in bottles. On 27th December, 2005 the Permanent Secretary Ministry of Energy acknowledged receipt of the letter and confirmed that the samples would be sent for chemical analysis and the results would be communicated to the applicant. The letter went on to explainto the applicant the requirements one is required to meet in order to venture into petroleum exploration and production in Kenya.

4.This is provided for under the Petroleum (Exploration and Production) Act Cap 308 Laws of Kenya. There is a letter on record from the Kenya Petroleum Refinery Limited dated 30th' December, 2005 which gives the results of the analysis that the sample is more likely to be fuel oil. They requested for a larger sample for conclusive analysis and they promised to provide the correct size sample bottles if required. On 14th July 2006, the PS Ministry of Energy wrote to the applicant and indicated that the samples were sent to Kenya Petroleum Refineries Ltd. and was found to be black and very heavy.

5. There are several correspondence from the exparte applicants to the Minister for Energy, and also a petition to the President of the Republic of Kenya seeking for an exploration permit under section 5 (2) of the Petroleum Act. According to the letters, the applicant needed the permit so as to obtain sufficient

substance as sample, to be submitted for chemical analysis as requested by the letter of 14th July, 2006 by the Permanent Secretary Ministry of Energy. The exparte applicant also wrote on 16th August, 2006 seeking for the copy of the chemical analysis certificate and report of the samples analyzed. They applied to be granted with a non-exclusive exploration permit covering Blocks 10A and 11.

6. The exparte applicant persistently sent letters to the respondent including to the President of the Republic of Kenya insisting that they should be issued with a non exclusive exploration permit. Finally, on 18th January, 2010 the exparte applicant issued a notice under the Government Proceeding Act, giving its intention to sue the Attorney' General on behalf of the Minister for Energy who is accused of abuse of secrets contained in the chemical analysis report ,, which is alleged to have been expropriated to Turkana Drilling Company Ltd. The Permanent Secretary is also faulted for denying the exparte applicant a non exclusive exploration permit contrary to section 5 (2) of the Act. He is also alleged to have colluded with Turkana Drilling Company Ltd. and abused its powers under the Act.

7. This is the genesis of the dispute that has now snow balled into the present application that is seeking for orders of judicial review to set aside the permits issued to the interested parties. According to counsel for the exparte applicant, it was denied information and was not aware that it ought to have sought to enter into a Production Sharing Contract. The respondent failed to provide the applicant with the necessary information and in the absence of information, the exparte applicant kept on seeking for exploration permit. Counsel urged the court to find that, the respondent failed to perform an administrative duty which it should be compelled to perform. The applicant was also not informed of the fate of the application. When the exparte applicant submitted the samples for analysis they were kept in great expectations but the respondent failed to communicate on their application for exploration.

8. Regarding the time frame within which the application was filed, counsel submitted that one of the contracts entered into between the respondent and the 1st interested party was in January, 2010 thus an order of certiorari can issue. It was further argued that the analysis carried out on the samples was not complete, yet the respondent failed to cooperate with the exparte applicant and frustrated their efforts to carry out an exploration so as to provide sufficient sample. Counsel made reference to the case of; Republic vs. Attorney General St Another Exparte Waswa St 2 others 120051 1KLR where Nyamu - J (as he then was) and Ibrahim-- J. held that:

"(1) There an implied duty of jairness attached to all administrative acts. Where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair. Taking into account an irrelevant consideration is one of the recognized grounds for intervention in Judicial Review. The Registrar had taken into account an irrelevant consideration in the decision making process.

(2) A legitimate expectation arised where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases the expectation ought not to he summarily disappointed.

(3) The failure by a public officer or public body to give reasons for a decision may be proper ground for challenging the decision. A duty to give reasons would be implied in the following situations.

(a) Where the decision involves an interest, which is highly regarded iii law;

(b) Where the nature of the process requires reasons to be give; or

(c) From the circumstances of the individual.

9. This application was opposed by the resyondent and also by the interested parties. Mr. Ombwayo , learned counSel for the respondent relied on the replying affidavit sworn by Mr. Patrick Nyoike, the Permanent Secretary Ministry of Energy on 18th October, 2010. It was submitted that the order of certiorari can not issue because the Minister for Energy has not granted any exploration permit to any of the interested parties (or any other person). In respect of Block 10 BA, 1OBB, 11, 12A and 13 as alleged by the applicant or at all.

Moreover Geological information on the disputed blocks was available and well documented in the library and Website of National Oil Corporation of Kenya. The possible existence of crude oil deposits in the disputed Blocks is a matter of general notoriety which has been in public domain from as early as 1992. This information is publicly available at the library's' website and archives of the National Oil Corporation of Kenya. Moreover, Shell, an International oil and Marketing company . conducted

exploration and discovered crude oil in Block 1 NB in 1992.

10. The application' by the exparte applicant applied for "Exclusive" rights while the Act clearly states that an exploration permit only confers non-exclusive" rights to a holder. There is therefore nothing to quash as there is no decision, even if the same permit existed an order of certiorari cannot issue because a permit is not a decision unless if there is an error on the face of the record. The respondent has the discretion and powers to issue a permit. The court can only compel the Minister to consider an application for issuance of a permit but cannot compel the issuance of a permit which is tantamount to ousting the powers, mandate and discretion vested upon the Minister.

11. Regarding the issue of disclosure of information, it was argued that it was up to the exparte applicant to seek information as provided for under the Act. The respondent does not owe the applicant any duty to provide information which the applicant would have obtained in the ordinary course of business. Mr. Ombwayo also faulted this application which he submitted was brought outside to statutory period. The locai standing of the applicant was also challenged as the party who submitted the three bottles of samples is different from the exparte applicant. It was further argued that the orders for restitution cannot also be granted in . an application for judicial review in view of the provisions of section 8 (1) of the Law Reform Act which binds the court to follow the provisions of the Administrative Act of England of 1938.

12. This application was also opposed by Prof. Githu Muigai and Mr. Zul Alibhai, both appearing for the Pt 2nd and 31,;i interested parties. Mr. Monari teaming up with M/s. Omondi also opposed the application on behalf of the 4th and 5th interested parties. It was submitted that the exparte applicants lacks *loci standi* to bring this application for judicial review based on claim that they submitted samples for analysis with the respondent. The samples were submitted by an entity known as Interstate Mining Company Ltd. which is different from exparte applicant. The exparte applicant was incorporated in 2006 therefore there was no legal entity inexistence to submit the samples that are complained about. It is also explained in the replying

affidavit by the interested parties that they were not aware of the samples submitted to the respondent by the exparte applicant.

13. The interested parties have explained in the replying affidavits how International exploration of crude oil is done through excavation and review of ecological data which information is available at the National oil Company of Kenya. The exploration of crude oil started way back in 1980's • when Shell petroleum discovered some crude oil in two blocks and the issue then, was whether the volume was commercially viable. It is therefore not true for the exparte applicant to state that they were the first to discover oil while drilling for water. Secondly, the applicant's case is predicated on the grounds that they were denied an exploration pemiit. While the interested parties have production sharing contracts and there is no permit to quash.

14. The exparte applicant did not applyTor a Production Sharing Contract, but applied for a permit which is different as defined under section 5 (2) of the Petroleum Act. As far as the interested parties were concerned, they have nothing to do with the information that the exparte applicant claimed was not given to them. Moreover an exploration permit cannot confer any right of priority to the applicant. It is a contract with the Government where the company is required to do so much by way of exploration, spend a lot of money and if the oil is found, it has to be shared with the Government. It is a huge risk for the exploration company and the reward has to be shared with the Government.

15. In this case, there was no need for further exploration permit and that is why the respondent entered into a Production Sharing Contracts. The Government needed parties with financial resources, know how, technical competence as set out under section 8 of the Act. The exparte applicant did not demonstrate any of the above conditions.

Prof. Githu Muigai and Mr. Monad also submitted extensively on points of law which I will analyze later on in this ruling. I must register my appreciation to all the parties for the research done in this matter as demonstrated by the volume of authorities cited and espoused in the written submissions.

16. This application seeks for orders of judicial review. In considering whether or not to grant the orders sought, the principles to bring to bear are well settled in some long line of authorities settled by the Court of Appeal and also the High Court. Key among them is the case of; Kenya National Examination Council

vs. Republic Civil Appeal No. 266 of 1996. The Court is supposed to consider firstly, how the decision sought to be quashed was arrived at, otherwise establish whether there was procedural improprieties. Secondly, whether the tribunal that passed the decision had jurisdiction to do so, or to determine whether there are illegalities. Lastly, the Court is also supposed to establish whether the rules of natural justice were observed and whether the decision took into account relevant matters such as fairness were taken into account to rule out irrationalities.

17. The applicant seeks to set aside the decision of the Minister that issued the interested parties with an "exploration permit" by way of an order of Mandamus. An order of Mandamus is defined by the learned authors of the text book Halsbury's Laws of England:-

"As a command issueing from the High Court of Justice directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing specified in it which appertains to his or their office and is in the nature of public duty"

In this case the order of Mandamus is sought to compel the Minister to issue an exploration permit to the applicant. Under the petroleum Act, the Minister is given the discretion to issue non exclusive exploration permits.

18. It was contended by the respondent that it was not necessary for the Minister to issue exploration permit to any party because that had been done earlier. The respondent was interested in entering into Production Sharing Contract with companies for production sharing and that is what was entered into with the interested parties. It is also common ground that there is no exploration permit that was issued to the interested party. The interested parties were issued with a Production Sharing Contract which is different from a non exclusive exploration permit that the applicant is seeking to quash.

19. The second matter for consideration is whether the respondent who derives powers to issue permits by statute; can be directed by a Court to exercise those powers in a specific way, unless of course it can be proved there was abuse of the process. As stated above, the interested parties were not issued with an exploration permit, but entered into a contract known as production sharing contract. Therefore the order sought to be quashed by the exparte applicant does not exist. It is trite that a party is bound by its own pleadings; the claim by the exparte applicant is in respect of the exploration permit.

20. The applicant contended that they submitted samples comprising of some black substance "Which they believed was crude oil that they discovered while drilling water. They claimed that the respondent short changed them and expropriated their secrets to the interested parties. The evidence presented by the exparte applicant in support of this contention is not plausible because the samples were presented in 13th December, 2005 by an entity known as Intestate Mining Company Ltd. while the exparte applicant was registered sometimes in 2006. Moreover, the exparte applicant applied for an exploration permit under section 5(2) of the Petroleum Act. Which provides that:?

"For the purposes of obtaining geological information, the Minister may grant non-exclusive exploration permits, in respect of areas specified therein, under which a person may enter upon an area and prospect and carry out geological and geophysical surveys."

21. Under section 8 of the same Act it makes provisions of the conditions a contractor has to comply with before the Government can enter into a Petroleum agreement as follows:?

"The Government shall enter into petroleum agreement only with contractors who have the financial ability, technical competence and professional skills necessary to fulfill the obligations under the petroleum agreement."

The reason why I have cited the above provisions of the law is to find out whether the respondent acted contrary to the law. Firstly, the Minister is given the discretion to grant a permit. This court cannot interfere with the respondent's discretion unless it can be shown that it was not exercised in accordance with the law and the set down regulations. The exparte applicant has not demonstrated that it presented an application for permit. What is shown on record is a host of correspondence which did not reveal the necessary information such as;

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- (a) the name, nationality, nature of business and the principal place of business of the applicant;
 - (b) the name and nationality of every director where the applicant is a company, corporation or other body corporate;
 - (c) the delineation of the area proposed to be covered* by the exploration permit; and
 - (d) the purpose of the proposed exploration to be undertaken and the description and estimated duration of the exploration; and
 - (e) such additional information as the Minister may require to enable him assess the suitability of a grant of an Exploration Permit.

22. What the exparte applicant's correspondence reveal is a series of correspondence that show that they were in the business of borehole drilling and stumbled on what they thought was crude oil? There is no evidence that they demonstrated the required qualifications as set out above. Moreover the applicant did not exhibit any copy of a formal application that they submitted for exploration permit that was allegedly refused by the respondent. I am therefore not satisfied that the application meets the threshold of granting orders of judicial review.

For the sake of clarity I need to emphasize that the interested parties were not issued with an exploration permit but with a Production Sharing Contract which as demonstrated by the interested parties, was granted in accordance with the provisions of section 8 of the Act. There is no evidence by the applicant that they applied for the Production Sharing Contract, they applied for a non exclusive permit which is not the same as PSC.

23. The nature and scope of rights conferred on the holder of an exploration permit are different from those conferred by a Production Sharing Contract. An exploration permit only confers non exclusive rights on an applicable block, while a production sharing contract on the other hand confers exclusive rights on the applicable block. Thus an applicant for an exploration permit cannot be granted such a permit in an area where another entity has concluded a Production Sharing Contract. In this case it can only be said that the applicant came late to seek an exploration permit when the interested parties had gone ahead and entered into a Production Sharing Contracts. I need not belabor this point any further save to say that an order of prohibition cannot also issue.

24. The last issue to consider is whether the applicant is entitled to an order of restitution that is the return of the samples that it submitted. Mr. Orribwayo, counsel for the respondent submitted, and rightly so, that under section 3 of the Petroleum Act, it is provided that:-

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"All petroleum existing in its natural conditions in strata lying within Kenya and the continental shelf is vested in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other persons."

25. The record also show that the samples were submitted for chemical analysis and the results were made available to the applicant. I agree with the submission by counsel for the respondent that the samples cannot be returned to the applicant. Moreover the order of restitution cannot issue under the provisions of section 8 of the Law Reform Act or order 53 of the Civil Procedure Rules.

26. Finally I find this application by the exparte applicant lacking in merit. It is i)ased on the applicant's fanciful desire to enter into petroleum exploration without following the laid down procedure but through a chain of correspondence that are contrived to circumvent the lengthy procedures and regulations set out under the Act.

27. I have no hesitation to order it dismissed with costs to the respondent and the interested parties.

Ruling read and signed on this 16th December, 2010 at Kitale

M KOOME.

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JUDGE.

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