



Commission for Human Rights and Justice v Energy and Petroleum Regulatory Authority (EPRA) & another; Viji Filings Limited & 20 others (Interested Parties) (Petition E102 of 2024) [2024] KEHC 8624 (KLR) (Constitutional and Human Rights) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E102 OF 2024
LN MUGAMBI, J
JULY 18, 2024**

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE PETITIONER

AND

**ENERGY AND PETROLEUM REGULATORY AUTHORITY
(EPRA) 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

VIJI FILINGS LIMITED INTERESTED PARTY

JUJA ENERGY LIMITED INTERESTED PARTY

VIKI ENERGY LIMITED INTERESTED PARTY

TYDES GENERAL MERCHANTS LIMITED INTERESTED PARTY

GREAT LAKES COMMODITIS LIMITED INTERESTED PARTY

TANGA LOGISTICS LIMITED INTERESTED PARTY

TANGA ENERGY SOULTIONS LIMITED INTERESTED PARTY

POWER GAS LIMITED INTERESTED PARTY

CRESCENT ENERGY LIMITED INTERESTED PARTY

PURE GAS LIMITED INTERESTED PARTY

GAS AND RUBRICANTS TRADING KENYA LIMITED . INTERESTED PARTY

MILELE GAS LIMITED INTERESTED PARTY



SURE GAS ENERGY LIMITED	INTERESTED PARTY
MAX GAS LIMITED	INTERESTED PARTY
KENDAL ENERGY SOLUTIONS LIMITED	INTERESTED PARTY
MO GAS SUPPLIERS LIMITED	INTERESTED PARTY
MURIMI INVESTMENT LIMITED	INTERESTED PARTY
GICOMU GAS LIMITED	INTERESTED PARTY
TOPLINE TRADERS LIMITED	INTERESTED PARTY
HAZINA ENERGY SOLUTIONS LIMITED	INTERESTED PARTY
INSTAGAS LIMITED	INTERESTED PARTY

RULING

Introduction

1. By a Chamber Summons application dated 28th February 2024, the Petitioner seeks orders that:
 - a. Spent.
 - b. Pending the hearing and determination of this Petition and/or further orders, this Court be pleased to issue a conservatory order prohibiting and/or restraining the 1st Respondent, Energy and Petroleum Regulatory Authority (EPRA), either by itself, its authorized agents, servants, employees or otherwise whomsoever from unilaterally closing, sealing off and/or in any manner whatsoever from interfering with the operations of the Interested parties and/or raiding the Interested Parties Liquefied Petroleum Gas (LPG) storage and filling plants unless there is an illegality and/ or breach of the conditions of the license or permit and/ or the statute and/or there is an act, omission or other facts which, in the opinion of the 1st Respondent or the licensing authority constitute a contravention of the conditions of the license or permit or requirements of the statute.
 - c. Pending the hearing and determination of this Petition and/or further orders, this Court be pleased to issue a conservatory order compelling the 1st Respondent, Energy and Petroleum Regulatory Authority (EPRA), to forthwith and unconditionally re-open and/ or unseal the Interested Parties Liquefied Petroleum Gas (LPG) storage and filling plants unless there is an illegality and/or breach of the conditions of the license or permit and/or the statute and/or there is an act, omission or other facts which, in the opinion of the 1st Respondent or the licensing authority constitute a contravention of the conditions of the license or permit or requirements of the statute.
 - d. This Court be pleased to give such orders or other conservatory orders and or directions as would preserve the set of circumstances in such a way that the Petition is not rendered nugatory.
 - e. This Court be pleased to give such directions and other orders and or directions as to the hearing of the Petition filed as it may deem just in the light of all the circumstances.
 - f. The Petitioner be at liberty to apply for such other or further orders and or directions as this Court may deem fit and just to grant.



- g. Costs of this application be provided for.

Petitioner's Case

2. The application is sustained by the Petitioner's Executive Director, Julius Ogogoh's supporting affidavit of even date and the grounds on the face of the application.
3. The Petitioner stated that the Interested Parties operate gas plants in various parts of Kenya and are licensed to do so by the 1st Respondent. These licenses are renewed yearly. In essence the Interested Parties store, fill and distribute Liquefied Petroleum Gas (LPG) cylinders.
4. To illustrate; the 1st Interested Party which has license number No. EPRA/LPG/1191 and through the licence stores Viji gas, Tanga gas, Kerry gas, G-gas, Moto gas, Max gas cylinders at its Kenol branch. It also operates another plant along the Mai-Mahiu-Narok road pursuant to license No. EPRNLPG/6647 to store Viji gas, Kerry gas, G-gas, Mato gas, Max gas branded cylinders.
5. The 2nd Interested Party vide license No. EPRNLPG/ 10433 stores Max Gas branded cylinders at Juja Industrial Park, Kalimoni, Juja Subcounty within Kiambu County.
6. The 3rd Interested Party has been operating its plant situated off Meru Sikiago Road within Embu County. The license number was not stated.
7. The 4th Interested party vide license No. EPRNLPG/8621 stores Tanga gas, Gasky, Mwangi gas, Nuru gas, Max gas, Kerry gas, Gicov Gas, Viji gas, Kendy Mato gas branded cylinders at its plant in Ragati/Magutu in Kaatina within Nyeri County.
8. The 5th Interested Party vide license No. EPRNLPG/9775 stores Shine gas branded cylinders and vide license No. EPRA/LPG/ 11064 imports, exports and does wholesale of LPG in bulk at its plant along Thindigua, Kiambu road within Kiambu County.
9. The 6th Interested party pursuant to license No. EPRA/LPG/2080 stores Tanga gas, Viji Gas, Max gas, and Nuru gas branded cylinders at its plant along Kenol Muranga Road within Muranga County.
10. The 7th Interested party vide license No. EPRA/LPG/10443 stores Tanga gas and Viji gas branded cylinders at its plant at Mitamboni/Masokani within Machakos County. The 8th Interested party operates its plant at Webuye within Bungoma County. The license number was not issued.
11. The 9th Interested Party vide license No. EPRA/LPG/1101 stores Pure gas and Kendy gas branded cylinders along Kikuyu within Kiambu County. It also has a plant along Darotti road in Kamangu within Kiambu County which is operated pursuant to license No. EPRNLPG/10735 and stores Pure gas and Kendy gas branded cylinders.
12. The 10th Interested Party operates its plant at Ndeiya within Kiambu County. The license number was not stated.
13. The 11th Interested Party pursuant to license No. EPRNLPG/1227 stores Pure gas, Tayo gas, Kerry gas and Kendy gas branded cylinders at its plant at Kimani Ongata Rongai within Kajiado County.
14. The 12th Interested Party vide license No. EPRNLPG/ 1634 stores Stabex gas, Top gas, Pure gas and Kendy gas branded cylinders at its plant at Ndalat Kipkaren in Eldoret within Uasin Gishu County. It also operates another plant at Industrial area in Nakuru within Nakuru County pursuant to license No. EPRNLPG/ 11373 to store Pure gas, Kendy gas, Top gas and Stabex gas branded cylinders.



15. The 13th Interested Party has been operating its plant at Industrial area within Nakuru County pursuant to a license whose particulars were not stated. Equally the 14th Interested party operates its plant off Thika road, Ruiru within Kiambu County pursuant to a license whose details were not deponed. In addition, the 14th Interested party operates another plant at Maxgas Plaza, along Mombasa road within Kilifi County pursuant to license No. EPRNLPG/ 10814 to store Max gas branded cylinders.
16. The 15th Interested Party has been operating its plant along Limuru road in Limuru within Kiambu County pursuant to a license whose details are not stated.
17. The 16th Interested Party pursuant to license No. EPRA/LPG/9290 stores Kendy gas branded cylinders at its plant at Riandira in Sagana within Muranga County.
18. The 17th Interested Party vide license No. EPRA/LPG/8849 stores Tanga gas, Royal gas and Daima gas branded cylinders at its plant along Naivasha Mai-Mahiu road in Naivasha within Nakuru County.
19. The 18th Interested Party vide license No. EPRA/LPG/1643 stores Gicov gas branded cylinders at its plant in Embu within Embu County.
20. The 19th Interested Party vide license No. EPRA/LPG/10767; 11310; 10526 and 9901 stores Top gas branded cylinders at its plants at Kiogoro within Kisii County, KIE, Eldoret within Uasin Gishu County and along Nyeri Nanyuki Highway within Nyeri County.
21. The 20th Interested Party vide EPRA/LPG/10917 stores Mwanga gas branded cylinders at its plant at Kipkaren within Uasin Gishu County.
22. The 21st Interested Party vide license No. EPRA/LPG/10447 stores Viji and Tanga gas branded cylinders at its plant at Cianda within Kiambu County.
23. The Petitioner deposed that on various between 10th February 2024 to 27th February 2024, the 1st Respondent through its officers and without regard for due process, visited the Interested Parties gas plants and sealed them off. A further directive was issued that the Plants would be closed. The action amounts to suspension and/or revocation of their licenses which were due to expire on various dates in the near future.
24. The Petitioner avers that the 1st Respondent's action is in breach of Section 81 of the *Petroleum Act*, 2019 which provides that prior to sealing off and closing a premise, a notice ought to be issued together with the reasons for the measures taken. Equally, the 1st Respondent's act is deemed to be in breach of Articles 10, 27, 43, 47(c) and 50 of *the Constitution*. The 1st Respondent's action is thus contested to be unconstitutional, unlawful, arbitrary and unreasonable.
25. It is further deponed that the 1st Respondent's action has had disruptive economic consequences and loss of livelihoods for the Interested Parties and their employees. It is the Petitioner's plea therefore that this Court should intervene in this matter so as to protect the Interested Parties from the 1st Respondent's irrational and arbitrary actions.

Respondents' Case

26. The Respondents filed a Replying Affidavit through the 1st Respondent's Director General, Daniel Kiptoo Bargoria sworn on 19th March 2024. He confirms that the Interested Parties are licensees of the 1st Respondent and their operations revolve around storage and filling of LPG at various locations.



27. He nonetheless deponed that the 1st Respondent's under Section 76(2)(a) of the [Petroleum Act](#), 2019 is mandated to set out the requirements that should be complied with before a license is issued. In the same manner, Section 11(a) of the [Energy Act](#) empowers the 1st Respondent to issue, renew, suspend or revoke licenses.
28. Correspondingly he notes that Article 46 of [the Constitution](#) requires it to uphold consumer protection in view of the services and goods offered by its licensees. This is further echoed under Section 10(hh) of the [Energy Act](#). Moreover, Section 11 (g) of the [Energy Act](#) obliges the 1st Respondent to formulate, set, enforce and review environmental, health, safety and quality standards for the energy sector.
29. He posits that in view of its mandate and these provisions, the 1st Respondent undertook a short-term intervention to seal off and close facilities within 200 meters of residential homes. This was in a bid to protect the public pending the detailed technical audits and risk assessment of the facilities. It is stated that the 1st Respondent's authority to do so is well provided for under Section 11 (j), (k), (l) and 22(4) of the [Energy Act](#). He further adds that the Act under Section 85 provides a clear procedure for dispute resolution for any aggrieved party following such a decision.
30. It is asserted that the 1st Respondent contrary to the Petitioner's allegations, communicated its decision to the Interested Parties vide its letters to them. Additionally, he avers that the Petition and application are bad in law and an abuse of the Court process for two reasons. First the Petitioner failed to disclose material civil and criminal matters involving the Interested Parties. Second, failed to file the pertinent Company Resolutions before instituting this suit.
31. With regard to the civil and criminal matters, the 2nd Interested Party on 6th December 2023 was found to have committed offences under the Act. The offense was refilling LPG into cylinders belonging to other brand owners without consent and loading the same onto unlicensed LPG transport vehicle driven by an unlicensed driver by the 1st Respondent. Further that the party was in possession of LPG cylinders without seals. For this reason, the gas plant was sealed off pending investigation on 26th February 2024. The 2nd Interested Party was subsequently issued with a Notice to Show Cause on 15th December 2023 and invited for a hearing. The 1st Respondent's determination delivered on 23rd January 2024 suspended its license.
32. It is asserted that similar offences were committed by the 3rd Interested Party which led to the sealing of the facility on 26th February 2024. Soon after the 3rd Interested Party proceeded to tamper with the seals contrary to Section 22(5) of the [Energy Act](#). This party was issued with a Notice to Show Cause on 1st March 2024 which is yet to respond to.
33. In the same manner, the 12th Interested Party on 9th January 2024 was found to have committed comparable offences of refilling LPG into cylinders belonging to other brand owners and obstructing the 1st Respondent's officers in the course of performing their duties. As a result, the gas plant was sealed off pending investigations. This party was also arrested pending institution of criminal proceedings. This party was as well issued with a Notice to Show Cause on 12th January, 2024. They responded on 17th January 2024 and were invited for a hearing on 1st March 2024. The 1st Respondent on 18th March 2024 in its decision resolved to suspend its license.
34. The 14th Interested Party was also found to have committed similar offences on 16th February 2024 leading to its facility being sealed off. A Notice to Show Cause was issued on 29th February 2024 which they responded to on 7th March 2024. It is said that this party also has pending criminal proceedings. Upon review of the matter with regards to its Mombasa facility by the 1st Respondent and review of evidence, the 14th Interested Party's gas plant was re-opened on 12th March 2024.



35. The 19th Interested Party's fault was having its Eldoret plant located within a 200 - meter radius from a residential area as discussed herein above. This party was equally informed of the 1st Respondent's planned action vide the Notice to Show Cause dated 7th November 2023 which was not responded to. Its license was suspended for 3 months. Thereafter, it was noted that this party had committed the offence of refilling LPG into cylinders belonging to other brand owners without their consent. This led to sealing off of the gas plant. It's plant in Nyeri is however open and operational.
36. It is deponed that contrary to the Petitioner's material non-disclosure, the 6th, 7th, 18th, 20th and 21st Interested Parties gas plants are open and operational. Similarly, that the 19th Interested Party vide a letter dated 14th March 2024 informed the 1st Respondent that its consent had not been sought prior to filing this suit. The attendant dates listed by the Petitioner with regard to the sealing off and closure of the plants are also noted to be erroneous.
37. It is their contention that the instant Petition and application primarily seeks to curtail its statutory mandate yet the same is based on falsified facts and material non-disclosure by the Petitioner. For this reason, they are supposed to be an abuse of the Court process and hence should be struck out.

Interested Parties case

38. The Interested Parties, Director Boniface Murimi Muriithi filed a replying affidavit sworn on 19th March 2024 in support of the Petitioner's application. The Interested Parties reiterated the Petitioner's averments.
39. In addition, it is deponed that prior to the 1st Respondent sealing off and closing their gas plants, they had not breached the conditions of their licenses or provisions of the law. It is stressed that they have the right to carry out their legitimate business without unnecessary interference from the 1st Respondent.
40. They likewise assert that in the circumstances of this case, the 1st Respondent is guilty of violating the provisions of *the Constitution*, the *Petroleum Act*, 2019 and the Fair Administrative Actions Act.

Petitioner's Submissions

41. The Petitioner through N.M. Kamwendwa and Company Advocates filed submissions dated 29th February 2024.
42. In response to the challenge to the Petitioner's lack of locus standi, Counsel submitted that the Petitioner is vested with the requisite standing to file the instant Petition. It was argued that *the Constitution* expanded the definition and scope of locus standi thus enabling persons such as the Petitioner to file the instant suit. Reliance was placed in *Mumo Matemo-vs-Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR where it was held that:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the constitution* by necessity and logic broadens access to the courts. In this border context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this; we agree with the



superior court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*."

43. Like dependence was placed also in *Sollo Nzuki v. Salaries and Remuneration Commission & 2 others* [2019] eKLR and *Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya* [2014] eKLR.
44. Counsel relying on Articles 3(1), 22 and 48 of *the Constitution* also submitted that public interest litigation permits and grants one locus standi to file such suits. Reliance was placed in *Mumo Matemu* (supra) where it was held that:
- “It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. In *John Wekesa Khaoya v Attorney General*, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):
- “ ... the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by *the Constitution* in Articles 22 and 258 of *the Constitution* which ensures unhindered access to justice...”
45. On conservatory orders, Counsel submitted that *the Constitution* under Article 23(2)(c) provides that one of the remedies that can be issued by the Court for matters filed under Article 22 is conservatory orders. This is likewise provided under Rule 23 of *the Constitution* of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules, 2013.
46. Counsel as such stated that the principles that ought to be satisfied before grant of conservatory orders were outlined as follows in *Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others* [2015] eKLR:
- “a. the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice;
- b. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights;
- c. and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory;
- d. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.”
47. Comparable dependence was placed in High Court Petition No.16 of 2011, *Nairobi- Centre for Rights Education and awareness (CREAW) & 7 others*.
48. Counsel applying these principles to this matter submitted that the Interested Parties were lawfully licensed by the 1st Respondent yet their gas plants were sealed off and closed without regard for due process. To be precise, it is argued that Section 81 of the *Petroleum Act*, 2019 mandates the 1st Respondent to give notice to the Interested Parties before sealing off and closing their premises.



Equally, Section 81 (3) of the Act obliges the 1st Respondent to make clear and specify the relevant conditions for the license which the breach relates including the acts, omissions that constitute the contravention. It is argued that the 1st Respondent violated this provisions and Articles 10, 27, 47, 49 and 50 of *the Constitution*. Accordingly, Counsel submitted that the Petitioner has satisfied the threshold for grant of this orders.

Respondents' Submissions

49. Principal State Counsel Stephen Terell in the submissions dated 19th March 2024, reiterated the contents of the 1st Respondent's affidavit submitted that the application and Petition offend the doctrine of exhaustion. He argued that the Petitioner and the Interested Parties failed to comply with Section 85 of the *Energy Act* which establishes an appeals mechanism against the 1st Respondent's decisions. Reliance was placed in *Mustafa Tobiko Ole Tampul v Hassan Ole Naado & 17 others* [2021] eKLR where it was held that:

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

50. It was submitted that the 1st Respondent's actions were instigated in public interest and in line with its mandate. The Court was asked to take judicial notice of the 1st February 2024 unfortunate where there was an explosion of a LPG gas truck at Mradi area at Embakasi. The incident claimed the lives of 6 Kenyans while injuring 200 others. With this in mind, the 1st Respondent resolved to seal off and temporarily close the 1st, 4th, 5th, 8th, 9th, 10th, 11th, 13th, 15th, 16th, 17th and 18th Interested Parties gas plants as they were located within a 200-meter radius from residential areas. It is submitted that this was duly communicated to these parties as evidenced in the 1st Respondent's annexure DKB 1A-10.

51. With regard to the 2nd, 3rd, 12th, 14th and 19th Interested Parties, Counsel submitted that the 1st Respondent were found to be in violation of the offenses stipulated in the Act as detailed in the Replying affidavit. On the other hand, Counsel submitted that contrary to the Petitioner's material non-disclosure, the 1st Respondent revealed that the 6th, 7th, 20th and 21st Interested Parties facilities were never sealed and closed and have been open and operational.

52. Considering this, it is contended that the orders sought in view of these parties are anchored on falsehoods. It is averred thus that the effect of this non - disclosure goes to the root of the matter and as such this Court ought not entertain the matter at hand. Reliance was placed in *Peter Owino Anino v John Oriedo Anino* [2021] eKLR where it was held that:

“.....But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility



is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

53. Like dependence was also placed in *Gabriel Kariuki Gitonga & 2 others v Redken Wells Ltd & 11 others* [2021] eKLR.

Interested Parties Submissions

54. On 4th March 2024, Shaban Associates LLP filed submissions for the Interested Parties in support of the Petitioner’s case. These Parties equally adopted the Petitioner’s submissions. Counsel in addition submitted that Article 50 of *the Constitution* guarantees a person the fundamental right to a fair hearing before an adverse decision is taken. Reliance was placed in *Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others* [2013] eKLR where it was held that:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect.”

55. Similar reliance was placed in *Onyango Oloo Vs. Attorney General* [1986 -1989] EA 456).
56. It was further submitted that Article 47 of *the Constitution* guarantees each person the right to a fair administrative action that is procedurally fair. According to Counsel the 1st Respondent did not issue any reason for interfering with the Interested Parties businesses and so was in violation of this right and the dictates of the Fair Administrative Actions Act. Reliance was placed in *Republic v Energy and Petroleum Regulatory Authority & another; Smart Gas Energy Limited (Exparte) (Judicial Review 6 of 2021)* [20211 KEHC 71 (KLR) (26 August 2021) (Judgment) in this regard.

Analysis and Determination

57. The only singular issue for determination in this application is:

Whether Conservatory Orders sought should be granted.

58. The law on issuance of conservatory orders in constitutional petitions is anchored on Article 23(2) (c) of *the Constitution* as read with Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which states as follows:

Conservatory or interim orders.

1. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.
2. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.



3. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.
59. In *Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR the Court defined a conservatory order as follows:
- “A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”
60. In *Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional Petition (2016) eKLR the Court summarized three main principles for consideration when dealing with such applications as follows:
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
 - b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interest must be considered before grant of a conservatory order.
61. Likewise, in *Board of Management of Uhuru Secondary School* (supra) it was stated that:
25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....
 26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....
 28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....
 29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....
 30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others* [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.
 31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant



material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless.”

62. Correspondingly, the Court in *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (2017) eKLR noted as follows:

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

63. Turning to the facts before the Court, it is not in denied that the 1st Respondent has a statutory mandate to regulate the Interested Parties. What is in dispute is the manner in which the 1st Respondent exercised that mandate in which it sealed off and closed the Interested Parties gas plants.

64. The Petition thus raises a fundamental question of law regarding exercise of statutory mandate by a state organ, the question being, whether it complied with established constitutional standards.

65. On whether sufficient cause has been demonstrated for issuance of conservatory order, it has been stated that in ascertaining whether a prima facie case has been established the Court is a limited scope in determining the issues raised. This was aptly captured in *Kevin K Mwiti & others v Kenya School of Law & others* [2015] eKLR where it was held that:

“51. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application.”

66. For this reason, the issue of locus standi and doctrine of exhaustion which may be dispositive of the entire Petition is inappropriate to decide at the application stage.

67. In this matter, the Petitioner alleges that the 1st Respondent did not issue a notice, did not grant a hearing or issue written reasons for its actions, an act that amounted to revoking the Interested Parties licenses since they cannot operate their facilities.

68. In this regard, the *Petroleum Act* provides as follows under Section 81:

Revocation of licence or permit



1. The licensing authority may suspend or revoke a licence or permit where:
 - a. the undertaking or the execution of the works related thereto has not commenced at the expiry of the period specified in the licence or permit, or at the expiry of any extended period which the Authority may allow;
 - b. it is satisfied that the licensee is either not operating in accordance with the terms and conditions of the licence, permit or the provisions of this Act; or
 - c. the licensee is adjudged bankrupt.
2. Unless otherwise specified in the licence or permit, the licensing authority may give a licensee fourteen days' notice to show cause why the licence or permit should not be revoked.
3. A notice under subsection (2) shall—
 - a. set out the relevant condition of the licence or permit or the requirement of the Act to which the breach relates;
 - b. specify the acts, omissions or other facts which, in the opinion of the Authority or the licensing authority, constitute a contravention of the conditions of the licence or permit or requirements of the Act, and the reasons why the licensing authority is of the opinion that any of the circumstances mentioned under subsection (1) have occurred or arisen; and
 - c. be served upon the licensee at the licenses' principal place of business and shall take effect from the date of service.
4. The licensing authority shall determine the matter within thirty days from the expiry of the notice.
5. A suspension or revocation of a licence or permit shall not indemnify the licensee against any penalties for which such person may have become liable under the Act.

69. The 1st Respondent was duty bound to comply with the above provision prior to taking any action relating to the licensees. In this matter, it is averred that the Interested Parties gas plants were sealed off and closed contrary to this provision.

70. A perusal of the 1st Respondent's adduced evidence in the annexures discloses that although letters were issued to the some of the Interested Parties being the 1st, 4th, 5th, 9th, 11th, 12th, 15th, 16th, 17th and 19th, the same was done after the premises and had been sealed off already. The content of the letters dated 26th, 27th and 29th February and 7th March 2024 communicated the closure of the premises and thus not a notice for the inspection or intended audit of the facilities.

71. The other correspondence shared related to the 2nd, 12th, 14th and 19th Interested Parties on commission of criminal offences. These letters gave notices to these parties to present their cases vide a Notice to Show Cause. This in my view indicates there was a notice issued that conveyed intention to take action on breach of the licence conditions by 1st respondent.



72. The Applicant/Petitioner has presented an arguable case that meets the threshold for issuance of conservatory order to preserve the rights and fundamental rights and freedoms protected in the Constitution in regard to a portion of some but of the interested parties. The Court in *Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others* (2014) eKLR, described this situation as follows:
- “To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”
73. The exercise of a statutory mandate has to be done within the strict confines of the law and with utmost good faith it is injurious to the public interest and against the principle of legality for a public body to apply the law in an arbitrary manner.
74. The Supreme Court in *Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others* (2014) eKLR acknowledged the utility of conservatory orders in protecting public interest by stating that;
- “conservatory orders’ bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”
75. In this regard the Court has the duty to balance the interests of the Petitioner and the Respondents. The Petitioner is challenging what he seems to be arbitrary exercise of statutory power. On the other hand, the 1st Respondent asserts that is legally mandated to execute its regulatory function as dictated by the law.
76. Having considered all the facts presented at this preliminary assessment level, it is my considered view public interest tilts towards the need for a conservatory order in respect to some of the Interested Parties where notice appears to have been coming after the sealing had been done. The unfortunate incident on 1st February 2024 at Mradi area, Embakasi is not an excuse to disregard the law in dealing with the licensed dealers. The incident should be seen as a wakeup call to the licensing authority to be more scrupulous in the assessment of the would-be licensees and in enforcing the conditions of licence which must however conform with the legal requirements rather than a knee-jerk reaction. Being a regulatory body, the 1st Respondent must be conscious of the rights and demands of Article 47 before taking adverse action against any of its licensees’.
77. For these reasons, the Court finds that the Petitioner has satisfied the threshold for grant of the conservatory orders in respect of the following interested Parties- 1st, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, 17th, 18th, 20th, and 21st Interested Party.
78. As for 2nd, 3rd, 12th, 14th and 19th interested party, I am persuaded that reasonable cause has been demonstrated and that notices in form of notice to show cause in respect of alleged criminal offences



had been issued against them spelling out the intended action. Consequently, I do hereby grant orders that:

- a. Pending the hearing and determination of this Petition, a conservatory order is hereby issued directing the 1st Respondent to re-open and/or unseal the Interested Parties Liquefied Petroleum Gas (LPG) storage and filling plants of the following interested parties if the licenses are still valid unless there is future or subsequent non-compliance with Act or breach of conditions of licence which must be dealt with strictly in accordance statutory procedures under the *Energy Act*, No. of 2019. The Interested Parties to which this order applies are 1st, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 15th, 16th, 17th, 18th, 20th, and 21st interested Party.
- b. This conservatory order does not apply to 2nd, 3rd, 12th, 14th and 19th interested party.
- c. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 18TH DAY OF JULY, 2024.

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L N MUGAMBI

JUDGE

