Republic v Energy and Petroleum Regulatory Authority; Energy Dealers Association (Exparte) (Miscellaneous Judicial Review E028 of 2024) [2024] KEHC 15207 (KLR) (Judicial Review) (3 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15207 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS JUDICIAL REVIEW E028 OF 2024

JM CHIGITI, J

DECEMBER 3, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

ENERGY AND PETROLEUM REGULATORY AUTHORITY ..... RESPONDENT

AND

ENERGY DEALERS ASSOCIATION ..... EXPARTE

RULING

1. This is a ruling to the Respondent's Notice of Preliminary Objection dated 28th March, 2024.

Background;

2. In their Notice of Motion, the applicants are seeking inter alia: -

    i. An order of prohibition to prohibit the Director General of Energy and Petroleum Authority from making orders and directives that in on themselves would amount be tantamount to violation of the Applicant's members' rights to privacy and in any event discriminatory such as that directives communicated vide the letter dated 26th February 2024.

    ii. An order of Mandamus to compel the to apply the laws and regulations and in doing so to give directives uniformity to all players within the energy sector without discrimination or favoritism.

iii. An order of Certiorari do issue to quash the decision of the Respondent herein, Energy and Petroleum Regulatory Authority communicated to the Applicant's members vide the letter dated 26 February 2024.

The Respondents' case;

3. In opposing the application, the Respondent took out a Notice of Preliminary Objection dated 28th March 2024 predicated on two (2) grounds for determination:

   i. This court lacks jurisdiction to adjudicate over this matter

   ii. The Applicant has come before this court without exhausting the alternative remedies available to them as required under Article 159 (2)(c) of *the Constitution*

4. It is its case that Section 11 (e) of the *Energy Act*,2019 mandates it to make and enforce directions to ensure compliance with the Act and with the conditions of licenses issued under the Act.

5. It is its case that According to the First Schedule of the Petroleum (Liquefied Petroleum Gas) Regulations,2019, under the requirements for license of Storage and Filling of LPG in cylinders, requirement 23 provides that the license applicant is required to provide proof of installation of intrinsically safe non-obscured Closed Circuit Television (CCTV) cameras at the filling area with access given to the Respondent via a web based portal.

6. Further the Second Schedule of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019, under the requirements for renewal of license of Storage and Filling of LPG in cylinders, requirement 16 provides that the license applicant is required to provide proof of installation of intrinsically safe non-obscured Closed Circuit Television (CCTV) cameras at the filling area with access is given to the Respondent via a web based portal, prior to renewal of their license.

7. The Respondent argues that pursuant to section 11 (e) of the *Energy Act*, 2019, the Respondent wrote to some of the Applicant's members and other LPG Storage and Filling facilities via letters dated 26th February 2024 and 5th April 2024 directing them to comply with the provisions of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019.

8. It posits that the communication to provide proof of installation of intrinsically safe non-obscured Closed Circuit Television (CCTV) cameras at the filling area was being done in phases and all licensed LPG storage and filling facilities have been duly notified to comply with the requirement.

9. Aggrieved by the Respondent's communication, the Applicant filed the present suit seeking Judicial Review reliefs.

10. It is its case that the communication was lawful and was not intended to harm the Applicant's members' businesses, but rather to comply with legislative requirements, protect the public against hazardous LPG cylinders brought to the market and to ensure effective execution of the Respondent's mandate.

11. Additionally, the Respondent's communication was legal and within its mandate as provided for in sections 11 (e) of the *Energy Act*, 2019 and the Petroleum (Liquefied Petroleum GasRegulations,2019).

12. The Respondent argues that the business of storage and filling of LPG in cylinders poses a real and present danger to the public at large, as evidenced by the increased cases of unauthorized refilling and rising number of accidents involving LPG and therefore such businesses should be placed under close surveillance, monitoring and oversight.

13. It is its case further that the communication by the Respondent is not a decision capable of Judicial Review but rather was a communication by the Respondent for purposes of ensuring compliance with the requirements laid out in legislation and it the Applicant has moved to this court challenging legality of a legislation and disguised the same as a judicial review proceeding.

14. The Respondent invokes Section 36 of the *Energy Act*, 2019, section 85 and section 117 (6) of the *Petroleum Act*, 2019, expressly provide that if any licensee is aggrieved by the actions/ decisions Respondent, they are required to seek redress at the Energy and Petroleum Tribunal in the first instance. These provisions provide that the Tribunal shall have appellate jurisdiction over the decisions of the Respondent.

15. The Respondent also argues that TheBlack's Law Dictionary, 9th Edition defines jurisdiction as the "Court's power to entertain hear and determine disputes before it." On the other hand, the Halsbury's Laws of England,4t Edition, Vol 9 defines jurisdiction as the "...the Authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision."

16. Reliance is placed in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & others (2012) EKLR states as follows:

> " A Court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus a Court of Law only exercises jurisdiction as conferred to it by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law"

17. The Respondent also relies on the case of Owners of Motor Vessel Lillian S. vs. Caltex Oil(Kenya)Limited [1989] KLR where Nyarangi J. A stated, inter alia:-

> " Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. The Respondent submits that there is a duly constituted Energy and Petroleum Tribunal which is a competent, alternative forum that is accessible, timely, and effective which the Applicant ought to have approached. It is the respondent's case that the Applicant has not exhibited any special circumstances or facts that would warrant this court to exercise its jurisdiction to hear and determine the matter.

19. In Republic v Energy Regulatory Commission & 2 others [2018] eKLR Majanja, J as he then was declined to exercise the court's jurisdiction as the Applicant had not demonstrated any exceptional circumstances facts that would call upon the Court to by-pass the statutory structures for the resolving the dispute provided under the *Energy Act*,2019.

20. The Respondent also relies on Samuel Kahiu v Muktar Mahat, Deputy Administration Police Commander (D.A.P.C) Athi River & 3 others /2018] eKLR, where Odunga, J opined that:

> " It has been held time and again 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."

21. The Respondent argues that the Applicant has come before this court without exhausting the alternative remedies available to them. Exhaustion of alternative remedies is a constitutional imperative under Article 159 (2)(c) of *the Constitution* and it has also been exemplified by emerging jurisprudence on the subject.

22. Reliance is placed in the case of Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

> " 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."

23. The Respondent submits that the that this Court lacks jurisdiction to adjudicate over this suit in its entirety.

The Exparte Applicant's case;

24. It is its case that The substantive judicial review motion challenges the impugned administrative action on the ground that it infringes on the LPG gas business owners' constitutional right to privacy in this case protection of confidential business trades and secrets.

25. It argues that the First and the Second Schedule of the Petroleum (Liquefied Petroleum Gas) Regulations state that during an application for issuance of a license or renewal of license, the Authority shall require proof of installation of intrinsically.

26. It argues that the *Energy Act* and the *Petroleum Act* do not have any specific substantive provisions on the requirement for proof of installation of intrinsically safe non-obscured Closed Circuit Television (CCTV) cameras at the filling area with access given to the Authority via a web-based portal and thus in the absence of the substantive provision, there is no obligation to be bound by the internal dispute mechanism in the said Acts.

27. Reliance is placed in the case of NGOs Coordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) where Mohammed K Ibrahim, SCJ in his dissenting opinion stated as follows on exhaustion of statutory dispute mechanisms.

> " The NGO Coordination Act did not contemplate the reservation of a name to be one of the decisions that were appealable under section 19 of the NGO Coordination Act. There were no substantive provisions for the approval of names under the NGO Coordination Act, rather the name reservation process was governed by regulation 8 of the NGO Coordination Regulations, 1992.
>
> That was unlike the *Companies Act*, No 17 of 2015 which had the entire Part V containing sections 48 to 68 dedicated to regulating the choice of names and the reservation process for companies. Section 19 of the NGO Coordination Act was intended to deal with substantive decisions of refusal or cancellation of registration.

The appellant was not dealing with the registration of the proposed NGO but with the question of whether the name(s) that the 1st respondent sought to reserve for the proposed NGO were acceptable. The contested decision to refuse to reserve the name was made solely administratively and in accordance with the NGO Regulations rather than the NGO Coordination Act. It therefore did not attract the dispute resolution mechanism provided for under section 19 of the NGO Coordination Act.

Before an aggrieved party could be bound by such a system, a statute had to expressly provide for an internal dispute settlement procedure. In the instant suit, there was no clear mechanism of appeal or remedy within the NGO Coordination Act concerning the reservation of a name or names of a proposed NGO.

> 46. In the instant case, the administrative action concerned was the "refusal to approve the 1st respondent's name." So then, does the relevant statute, that is the NGO Coordination Act, provide for a dispute resolution mechanism for the administrative action concerned? The answer is in the negative. Unlike the *Companies Act*, the NGO Coordination Act does not anticipate that the reservation of names is an administrative action which will attract the dispute resolution mechanism provided for under section 19. In other words, there are no substantive provisions on approval of names under the NGO Coordination Act. In addition, from the provisions of regulation 8, it is obvious to us that there are no administrative mechanisms to which the 1st respondent ought to have exhausted, following the director's decision under the said regulation.
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> 48. The above finding, notwithstanding, we note that the petition before the trial court concerned interpretation and application of *the Constitution*, a jurisdiction bestowed upon that court. The "minister" therefore, did not have the jurisdiction to entertain issues such as the constitutionality of the decision taken by the director and the NGO Coordination Board. Therefore, itis our finding that the suit before the High Court was proper."

28. It argues that The impugned administrative decision herein has breached the constitutional rights to privacy of trade and business secrets which constitutional claims are beyond the jurisdiction of the energy and petroleum tribunal necessitating the filing of the application herein before this High Court.

29. The Ex Parte Applicant submits that the application is properly before this Court and that the preliminary objection fails accordingly.

Analysis and determination:

This court shall determine whether or not it should uphold or dismiss the Notice of Preliminary objection.

30. Section 36 (1) of The *Energy Act* provides that:

    1. The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.

    2. The jurisdiction of the Tribunal shall not include the trial of any criminal offence.

    3. The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.

4. The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.

5. The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

6. The Tribunal shall hear and determine matters referred to it expeditiously.

31. Section 37(1) of the said Act stipulates that:

1. The Tribunal may, on its own motion or upon application by an aggrieved party, review its judgments and orders.

2. Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of a court of law.

3. Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.

32. Section 85 of the *Petroleum Act*, 2019, provides that A person aggrieved by the action of the licensing Appeal against authority in— refusing to grant or renew a licence, permit or authority. action of a licensing certificate or revoking a licence, permit or certificate; or imposing conditions on a licence, permit or certificate; or refusing to replace or amend a licence, permit or certificate, may, within thirty days of receipt of written notification, appeal to the Tribunal.

33. Section 117 (6) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority in midstream and downstream petroleum operations and in exercise of its functions may refer any matter back to the 2019 Authority or any licensing authority for re-consideration.

34. Section 9 of the *Fair Administrative Action Act*, provides that:

> "(2) 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.
>
> (3) 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 subsection (1)."

35. Odunga J (as he then was) in Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] Eklr held as follows;

> "40. 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."

36. In Speaker of the National Assembly –Vs- Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling), the Court of Appeal stated as follows:

> " 15. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."

37. In the case of Clifford Keya v Jackline Ingutiah & 5 others; Atieno Aoko & 3 others (Interested Party) [2022] eKLR;

> " The doctrine of exhaustion is applicable to constitutional Petitions. If successfully raised, it is a complete bar and a Court will not move an inch ahead. There are, however, instances where the doctrine will be inapplicable.
>
> The doctrine of exhaustion traces its origin in Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution.
>
> The doctrine is further entrenched in Section 9 of the *Fair Administrative Action Act*; 2015 which provision forbids the High Court from assuming jurisdiction in matters where a party does not exhaust internal remedies except where exceptional circumstances for exemption are proved to exist."

38. The Respondent is bound by the principles of fair administrative action under Article 47 of *the constitution* in its decision making process.

39. The decisions that are made by the Respondent are all decisions whether or not the same flow from the substantive legislation, the schedule or the regulations to the Act.

40. All the regulatory functions of the respondent are facilitated and guided by the regulations. To argue that the decisions that are tied to the regulations cannot be challenged under the internal redress mechanisms is misplaced.

41. The case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, that:

> " 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: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).
>
> Illegality is when the decision making authority commits an error of law in the process of taking the decision 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....

42. In order to determine whether the applicant has a case, the decision of the respondent must be assessed and measured alongside the principles as enunciated in the Pastoli case (supra) being illegality, irregularity and procedural impropriety.

43. In the case of Republic v Baringo North Sub-County Alcoholic Drinks Regulation Committee Ex parte Applicant Daniel Chelagat t/a Chemchem Distributors & another [2021] eKLR, where Hon. Justice J.M Bwonong'a made a sound lengthy finding as such;

> " 17. It also follows that the ex parte applicants rightly sought and were granted leave by this court to challenge the refusal to renew their licences.
>
> 1. I find as persuasive the decision of the court in Mohamed Ali Baadi & Others v. Attorney General & 11 Others [2018] eKLR a four-judge bench of the high court (Nyamweya, Ngugi, taden & Mativo, JJ.) stated a sfollows:
>
> "94. While our jurisprudential policy is to encourage partiesto exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See the Speaker of National Assembly vs James Njenga Karume [41]), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia [42] it was held that:
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> "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

44. The Applicant has not demonstrated that the Tribunal is not accessible or that it will not get redress before the Tribunal.

45. Section 36 (1) of The *Energy Act* provides that The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.

(4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.

(5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

(6) The Tribunal shall hear and determine matters referred to it expeditiously.

46. It is clear from the wording of Section 36 that the Tribunal is accessible, has the power to issue diverse orders not limited to injunctions. The Section enjoins the Tribunal to hear and determine matters referred to it expeditiously.

47. The Applicant has failed to show this court how the Tribunal would not have determined a dispute emanating from disputes like the one forming the cause of action in the instant suit.

48. The *Energy Act* and the *Petroleum Act* are special pieces of legislation that have the objective of ensuring that all the citizens and consumers of the energy products are safe at all times.They are aimed securing interalia public Safety, emergency preparedness, Emergency preparedness measures Disaster preparedness, prevention.

49. The requirements and the purpose of non-obscured Closed Circuit Television (CCTV) cameras is aimed at achieving such statutory goals. To argue that disputes emanating from the implementation of such safety equipment are not subject to alternative dispute resolution mechanisms cannot hold water.

50. Article 159 presents a water tight access to justice tool that cannot be subjected to restrictions that fall short of the requirements of Article 24 of *the Constitution* which the Applicant has not argued. In any event the right to Privacy is not absolute.

51. In Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

Disposition:

52. This court lacks jurisdiction to determine this suit as a result of failure on the part of the Applicant to lodge an appeal under Section 36 (1) of The *Energy Act* which provides that The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.

53. Section 36 (4) stipulates that The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.

    (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

Order:

1. The Notice of Preliminary Objection is upheld.

2. This suit is hereby struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2024.

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J. M. CHIGITI (SC)

JUDGE