



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 6 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR THE  
JUDICIAL REVIEW ORDERS OF CERTORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF THE ENERGY ACT, NO. 1 OF 2019**

**AND**

**IN THE MATTER OF THE PETROLEUM ACT, NO. 2 OF 2019**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE  
FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF ARTICLES 1,2,10,47,50,53,258,259,  
AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**SMART GAS ENERGY LIMITED.....APPLICANT**

**VERSUS**

**THE ENERGY AND PETROLEUM REGULATORY AUTHORITY.....1ST RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT**

**RULING**

1. The *Ex Parte* Applicant filed a Chamber Summons dated 29/03/2021 seeking the following orders:

1) *That this Application be certified as urgent and the same be heard Ex Parte*

2) *That the Honourable Court be pleased to admit the instant application and filed under certificate of urgency to be heard during this Easter Recess.*

3) *That leave do issue to the Applicant to apply for*

a. An order of *MANDAMUS* compelling the Respondents herein to reopen and/or unseal the Applicant's Liquefied Petroleum Gas (LPG) cylinder refilling, plant located at Industrial Area within Nakuru County by removing all seals they placed on the said plant of 25th March, 2021.

b. An order of *CERTIORARI* to remove into this Honourable Court and quash the decision of the Respondents to close and/or seal the Applicant's Liquefied Petroleum Gas (LPG) cylinder refilling plant located at Industrial Area within Nakuru County by removing all seals they placed on the said plant on 25th March 2021.

c. An order of *PROHIBITION* to prohibit Respondents from unilaterally closing, sealing and/or in any manner interfering by and raid with the Applicant's operation in relation to Applicant's Liquefied Petroleum Gas (LPG) cylinder refilling plant located at Industrial Area within Nakuru County.

4) That the leave so granted do act as a stay of the Respondents decision to seal and/or close the Applicant's Liquefied Petroleum Gas (LPG) cylinder refilling plant located at Industrial Area within Nakuru County by directing them to remove the seals interfering with the normal operations of the Applicant's operations within the plant.

5) That this Honourable Court be pleased to order the OCS Kaptembwa Police Station, Nakuru to assist in the enforcement of (4) hereinabove.

6) That costs of and incidental to the Application be provided for

7) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

2. The Application was filed during the Court recess so it was placed before the Regional Duty Judge, Gikonyo J. sitting in Narok for orders or directions. On 31/03/2021, the Learned Gikonyo J. certified the matter urgent and granted leave for the *Ex Parte* Applicant to bring the substantive Judicial Review Application in accordance with Order 53 of the Civil Procedure Code. With regard to prayer 4 in the Chamber Summons, the Learned Judge directed that the prayer be heard separately at Nakuru Law Courts where the matter had been filed.

3. The matter was originally placed before Chemitei J. but the Learned Judge was away from the station due to bereavement. It therefore came before me as the Presiding Judge due to the expressed urgency of the matter. I directed Counsel for the *Ex Parte* Applicant to serve the Respondents and return for inter partes hearing on prayer 4. The parties filed skeletal submissions at the Court's directions.

4. In the affidavit of Stephen Mwangi Kang'ethe, a Director of the Applicant, and its Application, the *Ex Parte* Applicant says that it is registered with the Energy and Petroleum Regulatory Authority (the 1st Respondent herein) to carry out the business of dealers in the storage, filing, and distribution of Liquefied Petroleum Gas (LPG) cylinder and allied business. Mr. Kang'ethe says that on 25th March, 2021, the Respondents raided the Applicant's Liquefied Petroleum Gas (LPG) Cylinder Refilling Plant located at Industrial Area within Nakuru County and unilaterally sealed and/or closed the Plant, which actions are greatly injurious to the Applicant's operations and/or conduct of business.

5. The *Ex Parte* Applicant believes that the Respondents' actions are "marred with irregularities having been carried out without regard of the due process and are aimed at harming the Applicant's business enterprise." It further claims that the Respondents have not provided any reason that would justify interference with the Applicants business and/or trade, contrary to constitutional requirements and the Fair Administrative Act.

6. The *Ex Parte* Applicant finds the Respondents' actions to be illegal, arbitrary and unreasonable; and further argues that the power "as purportedly exercised by the 1st Respondent does not exist in law and therefore the decision emanating therefrom is null."

7. The *Ex Parte* Applicant says that it provides employment to hundreds of Nakuru residents who currently remain without employment and thereby leaving them without any means of livelihood in the middle of a raging COVID – 19 Pandemic; and that it is therefore in the interest of justice and salient provisions of the constitution protecting the Applicant's right to carry on business that the orders sought be granted.

8. The 1st Respondent filed Grounds of Opposition dated 27/04/2021 and skeletal submissions of even date. I will not rehash the Grounds of opposition here because it impermissibly pleads factual issues in the absence of an affidavit. However, the Grounds of opposition raises three important issues that are important in determining whether conservatory orders that stay operates as stay should be issued:

a) First, the 1st Respondent says that the decision by the 1st Respondent was lawful and was taken pursuant to its mandate as provided in sections 11(j); 11(m); and 22(4) of the Energy Act, 2019.

b) Second, the 1st Respondent states that it found that the 1st Respondent has committed criminal offences for which its director, Stephen Kang'ethe Mwangi has been charged in ***Nakuru Chief Magistrate's Court Criminal Case No. E1082 of 2021*** with two offences related to alleged unauthorized refilling of liquefied petroleum gas cylinders without brand owners' consent and being in possession of seals and wraps bearing similar markings to another brand owner without written consent of the brand owner. The 1st Respondent states that the Suit Premise and the exhibits contained therein are exhibits in the criminal case and also subject to mandatory forfeiture under section 120(a) and (b) of the Petroleum Act, No. 2 of 2019.

c) Third, and perhaps most importantly, the 1st Respondent submits that the Court lacks jurisdiction to entertain the present suit on account of section 36(4) of the Energy Act and section 117(6) of the Petroleum Act, 2019. The two statutory provisions, read together, the 1st Respondent submits, expressly provides that matters such as the subject case should be referred to the Energy

Tribunal.

9. Curiously, the *Ex Parte* Applicant did not respond to any of the three issues raised by the 1st Respondent. Instead, the *Ex Parte* Applicant submitted on the question whether the decision or action sought to be stayed has been completed and therefore capable of being stayed. They also submitted on public interest being an overriding factor in such applications and pointed out that the Applicant employs approximately one hundred people who are likely to remain home indefinitely until the dispute is resolved. In light of the Pandemic, the *Ex Parte* Applicant argues, an order for stay should be granted to sustain the livelihoods of these employees.

10. This being, in essence, an interlocutory application for interim relief, I am must be careful not to prematurely pre-judge any contested facts in deciding whether the order sought is merited. As I understand it, though not expressly called so, what the Applicants seek are, in essence, conservatory orders: they are meant to maintain the *status quo* in terms of the enjoyment of particular rights which the Applicants say are violated pending the hearing and determination of the main suit on account of the argument that if such *status quo ante* is not maintained, the fundamental rights of the Applicants will be irredeemably or at least seriously imperiled.

11. To this extent, the judicial posture of the Court at this stage is the one suggested by Musinga J. (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

*...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.*

12. For an *Ex Parte* Applicant to succeed in persuading the Court to grant the order that the leave to bring Judicial Review Application should serve as stay of the decisions and actions of the 1st Respondent, they need to demonstrate at least three things:

a) That the intended Judicial Review Application is arguable or that it raises a *prima facie* case;

b) There is a real risk that the Applicants will suffer irredeemable or serious prejudice as a result of the alleged illegal or unlawful action by the Respondents. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission**, Mombasa HC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR**. The prejudice to be suffered must be one which is preventable and one which, but for the action sought by the Court, would “render the Applicant helpless or hapless in the eyes of the wrong to be visited upon him.” See **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**.

c) Public interest concerns accord with the grant of the orders sought. See **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014**.

13. Regarding the last element, Odunga J., after a summary of our case law, in **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR**, put it felicitously thus:

*It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination, especially where the Court is being called upon to exercise judicial discretion.*

14. In the present case, the 1st Respondent has impleaded that the Court does not have jurisdiction to hear the case by dint of section 36(4) of the Energy Act. In essence, the 1st Respondent has pleaded that the suit is debarred by the Exhaustion Doctrine.

15. The *Ex Parte* Applicant has not responded to this line of argument. I note, however, that section 25 of the Energy Act establishes the Energy and Petroleum Tribunal, and section 36 provides for the said Tribunal's jurisdiction as follows:

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.*

16. The Authority referred to in section 36 is the 1st Respondent. This plainly raises the question whether the Doctrine of Exhaustion would have required the *Ex Parte* Applicant to first seek recourse at the Energy Tribunal. Without the benefit of its arguments on the question, I am unable to determine even on a prima facie basis that the Court has jurisdiction. Without this prima facie determination, it would be impossible to conclude that conditions exist for the grant of the interlocutory relief sought.

17. Additionally, I have noted from the Court records in *Nakuru Chief Magistrate's Court Criminal Case No. E1082 of 2021* that Stephen Kang'ethe Mwangi and one other person were charged with two offences related to the present suit on 22/03/2021. They pleaded not guilty before the Honourable Munyi on the same day. This is a material fact which they did not disclose to the Court in Mr. Kang'ethe's affidavit of 29/03/2021 or in any subsequent Court filings. This is a relevant factor in making a determination whether an equitable remedy is merited.

18. The ineluctable conclusion is that the Court is unable to grant prayer 4 in the Chamber Summons dated 29/03/2021 at this time. Instead, the Court will prioritize the hearing of the substantive Judicial Review Application. In this regard, **the Court directs as follows:**

**a) The *Ex Parte* Applicant is hereby directed to file and serve the Notice of Motion within seven (7) days of today.**

**b) The Respondents are granted fourteen (14) days from the date of service of the Notice of Motion to file their response.**

**c) Directions on hearing will be given on 03/06/2021.**

19. Orders accordingly.

**Dated at Nakuru this 6th day of May, 2021**

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**JOEL NGUGI**

**JUDGE**