



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E1118 OF 2020**

**PROTO ENERGY LIMITED.....APPLICANT**

**VERSUS**

**ENERGY AND PETROLEUM REGULATORY AUTHORITY.....RESPONDENT**

**AND**

**LAKE GAS LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**LAKE OIL LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**RULING**

1. Proto Energy Limited, the Applicant herein, is a limited liability Company incorporated in Kenya under the provisions of the Companies Act, and is engaged in the business of supply of liquefied petroleum gas (LPG) and in cylinders and other related businesses. The Energy and Petroleum Regulatory Authority, (the Respondent) is a statutory body established under Section 9 of the Energy Act, and exercising licensing authority over the petroleum business under section 74 of the Petroleum Act, Act No.2 of 2019. Lake Gas Limited and Lake Oil Limited, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, are a limited liability companies incorporated in Kenya under the provisions of the Companies Act, that are engaged in the business of supply of liquefied petroleum gas (LPG) and cylinders, and licensees of the Respondent.

2. The Applicant also claims that the 2<sup>nd</sup> Interested Party is the licensee number EPRA/LPG/2442 for the storage and wholesale of LPG in cylinders issued by the Respondent, which license was set to expire on 20th November 2020. The Applicant accordingly filed the application that is the subject of this ruling, being a Chamber Summons application dated 15<sup>th</sup> October 2020, seeking seeking the following orders :

- 1. THAT leave be granted to the ex-parte Applicant to institute Judicial Review proceedings for an Order of Prohibition against the Respondent to prohibit it from licensing and or renewing any and all licenses for the storage, filing & wholesale of liquefied petroleum gas in cylinders of the Interested Parties herein.**
- 2. THAT the grant of leave hereby operates as a stay of the decisions of the Respondent to license and or renew any and all licenses for the storage, filing & wholesale of liquified petroleum gas in cylinders of the Interested Parties herein.**
- 3. THAT all necessary and consequential orders or directions be given.**
- 4. THAT the costs of this application be in the cause.**

3. The said application is supported by a statement dated 15th October 2020, and a verifying affidavit sworn on even date by Nicholas Kokito, the Applicant's Legal Services Manager. This Court gave directions that the said application be canvassed *inter partes*, and that parties file responses and submissions thereon. The Applicant thereupon filed submissions dated 13th November 2020. The Respondent on their part filed Grounds of Opposition dated 27th January, 2021 while the Interested Parties filed a replying affidavit sworn on 18th January, 2021, by Nagib Hussein, its Director. The said parties did not file any submissions on the application.

4. A summary of the parties' respective cases on the leave and stay orders sought is set out in the following sections.

**The Applicant's Case**

5. The Applicant averred that it is a liquified petroleum gas (LPG) marketing company licensed as such by the Respondent, a party to the LPG Cylinder Pool Agreement dated 1st February 2012, and a member of the LPG Cylinder Exchange Pool. The Applicant contended that in discharging its mandatory obligations under the said agreement, it extended credit facilities by transferring its cylinder deposit to the 1<sup>st</sup> Interested Party to the tune of Kshs. 87,002,420.08 as at 4th August, 2019. Further, that pursuant to the said agreement, it also incurred storage expenses in storing cylinders of the 1st Interested Party to the tune of Kshs. 2,742,571,500.00 as at 4th August, 2020 which storage charges continue to accrue.

6. According to the Applicant, the Respondent is prohibited and enjoined from licensing or renewing LPG licenses of parties with outstanding debts from the operations of the LPG Cylinder Exchange Pool under Rule 10 of the Seventh Schedule of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019. Further, that the 1<sup>st</sup> Interested Party has not paid the debts due to the Applicant accrued pursuant to its obligations under the LPG Cylinder Exchange Pool Agreement, and the Applicant being a creditor to the 1<sup>st</sup> Interested Party has not written any letter of confirmation of clearance of debt. Be that as it may, the 1<sup>st</sup> Interested Party's branded cylinders that accrued the pool debts are now with the knowledge and acquiescence of the Respondent, being filled, marketed and distributed by the 2<sup>nd</sup> Interested Party, in a move calculated to defeat the legal obligations of the 1<sup>st</sup> Interested Party emanating from Legal Notice Number 100 of 2019.

7. The Applicant further contends that the Respondent has renewed licenses for the storage, filling and wholesale of liquified petroleum gas in cylinders of Hashi Energy Limited and Ola Energy Kenya Limited who owe vast sums of money to the Applicant as a result of the operations of the LPG Cylinder Exchange Pool, and it is reasonably apprehensive that the Respondent will also renew the license of the 1st and 2nd Interested Parties and their related companies. Therefore, that should the Respondent renew the LPG license of the Interested Parties herein prior to settling of their LPG Pool debts, or obtaining from the Applicant a letter of clearance of the said pool debts, that decision will be contra statute and unreasonable.

8. Lastly, the Applicant acknowledged that appeals from licensing decisions of the Respondent lie with the Energy and Petroleum Tribunal but the same is yet to be constituted. The Applicant further averred that it is currently sustaining immense losses due to the failure of the 1st Interested Party to settle its LPG Pool debts and would continue to do so if the Respondent proceeds and renews the said LPG licenses prior to them settling the accrued debts.

#### **The Respondent's Case**

9. The Respondent opposed the Applicant's application on grounds that Section 10 (a) of the Energy Act gives it the mandate to issue, renew, modify, suspend or revoke licenses, and the Applicant cannot therefore direct it on how to perform its duties. Be that as it may, it was contended that all licenses held by the Interested Parties have expired and an application for renewal has not been made. In their view, the application is anticipatory in nature as no application has been made by the Interested Parties for renewal of the licenses yet and therefore the application does not meet the threshold for issuing orders of prohibition.

10. The Respondent further contended that the application seeks to curtail its mandate by asking this Court to direct it not to do that which it ought to. Be that as it may, it was argued that the issues raised therein can be raised at the time when the Interested Parties will present their applications for renewal. As such, that the application is frivolous, unmerited, an abuse of the court process and is aimed at circumventing the law.

#### **The Interested Parties' Case**

11. The Interested Parties case is that the instant application is fatally defective, an abuse of the court process and should be dismissed *in limine* as it is based on conjecture. They denied that there are any credits advanced under the exchange pool arrangement, and averred that the cylinder exchange pool was majorly established for purposes of facilitating exchange of cylinders to grant LPG consumers a choice in exchanging their cylinders for filled ones. Further, that the cylinder exchange pool operations procedure was that cylinders were to be exchanged on the basis of cylinder for cylinder and not money as alleged by the Applicant.

12. According to the Interested Parties, there is no provision whether in the Energy (Liquefied Petroleum Gas) Regulations, 2009 or the exchange pool agreement, for hoarding of another member's cylinders. Instead, that it was incumbent upon a member holding another member's cylinder to notify the other of the cylinders in their custody for purposes of collection, whether the refundable deposit was paid for or not. Therefore, that it is malicious and contrary to the exchange pools instruments of operations for the Applicant to hoard their cylinders and claim storage charges, and is only meant to affect the Interested Parties' LPG market. In any event, that the Applicant never notified the Interested Parties herein of the cylinders in their possession belonging to the 1st Interested Party for collection purposes.

13. It was further averred that the object of the LPG cylinder exchange pool was to promote fair competition in the LPG market as provided in the Legal Notice No. 114 of 2006, and the Interested Parties referred the court to the decision in **William Odhiambo Abok v AG, Petition No. 529 of 2014**, where the Energy (Liquefied Petroleum Gas) Regulations, 2009 were challenged. Further, that the exchange pool arrangement as established under Legal Notice No. 121 of 2009 was for regulation of the exchange mechanism, and it operated strictly on the doctrine of privity of contract. As such, the allegations made herein by the Applicant are based on contractual arrangements and this court is therefore not the right forum to determine the dispute.

14. Therefore, that the right forum for the Applicant's grievances is the commercial division for recovery of the alleged debt. It was also averred that the Applicant has come to this court with unclean hands since it was to cease from collecting the 1<sup>st</sup> Interested Party's cylinders with the enactment of the Petroleum (Liquefied Petroleum Gas) Regulations 2019, but continued to do so. Therefore, that the 1st Interested Party is only liable for its cylinders declared within one month of coming into force of the Regulations, and the alleged claim cannot form a basis for the orders sought.

15. Lastly, it was averred that the Applicant is in breach of section 24(2)(c) and 57 of the Competition Act for engaging in unconscionable business conduct, by demanding a higher and unconscionable refundable cylinder deposit, and its major object, aim and or desire is to apply

predatory tactics to muzzle the Interested Parties out of the business.

### **The Determination**

16. The Applicant's counsel cited the case of **Republic v County Council of Kwale & Another Ex-parte Kondo & 57 Others (1998) 1 KLR (E&L)** in submissions, where it was held that the purpose of the application for leave to apply for judicial review is firstly, to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless and secondly, to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. Counsel further relied on the cases of **Republic vs Inland Revenue Commissioners Ex-parte National Federation of Self Employed and Small Businesses Ltd (1982) AC 617** and **Republic vs Kenya Revenue Authority Ex-parte Keycorp Real Advisory Limited (2019) eKLR** for the same proposition.

17. Counsel went on to submit that the act by the Respondent to renew licenses of the Interested Parties with respect to the filling and marketing of Lake Gas branded cylinders, despite clear evidence of the 1<sup>st</sup> Interested Party's indebtedness to it is illegal, unfair and irrational and contrary to section 77(2) of the Petroleum Act No. 2 of 2019 and paragraph 10(1) of the Seventh Schedule of the Energy (Liquified Petroleum Gas) Regulations, 2019. On whether the leave granted should operate as stay, counsel cited Order 53 Rule 1 (4) of the Civil Procedure Rules and submitted that the decision whether or not to grant a stay is an exercise of judicial discretion that must be exercised judiciously. To that end, counsel cited the case of **R (H) v Ashworth Special Hospital Authority (2003) 1 WLR 127** where it was held that the purpose of stay was to preserve the *status quo*. Counsel further submitted that the main factor that is relevant in granting stay is whether or not the decision or action sought to be stayed has been fully implemented.

18. Also cited were the cases of **George Philip M. Wekulo v Law Society of Kenya & Another, Kakamega (2005) eKLR**; **R v Capital Markets Authority Ex-parte Joseph Mumo Kivai & Another, (2012) eKLR**; **Jared Benson Kangwana vs Attorney General, Nairobi HCCC No. 446 of 1995**; and **Taib A. Taib vs The Minister for Local Government & Others (2006) eKLR**, for the proposition that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded.

19. Counsel further submitted that it is only where the decision in question is complete that the court cannot stay the same, as was held in the cases of **Republic v Cabinet Secretary for Transport & Infrastructure & 4 Others Ex-parte Kenya Country Bus Owners Association & 8 Others (2014) eKLR** and **James Opiyo Wandayi v Kenya National Assembly & 2 Others (2016) eKLR**. Counsel also cited the case of **Sun Africa Hotels Limited & Another v Kenya Revenue Authority & 2 Others (2018) eKLR** where the court held that where the action or decision is implemented, then the court needs to consider the completeness or continuing nature of such implementation.

20. Therefore, that while the Respondent is yet to renew the license of the 1<sup>st</sup> Interested Party, every evidence suggests that it will do so. Further, that the harm being occasioned to the Applicant by any decision to renew the license of the Interested Parties by the Respondent is of a continuing nature, yet the Interested Parties have in their possession customer deposits for its cylinders which are now being stored at the Applicant's expense.

21. I have considered the Chamber Summons application dated 15<sup>th</sup> October 2020 and the arguments thereon by the parties, and note that the applicable law for leave to commence judicial review proceedings, namely *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the said leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

22. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

- (1) whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
- (2) whether the claimant has capacity to bring a claim for judicial review;
- (3) whether the claimant has a sufficient interest to bring a claim for judicial review;
- (4) whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
- (5) whether the claim is otherwise an abuse of process;
- (6) whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
- (7) whether the claim has been brought promptly;
- (8) whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.

23. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Other grounds that may influence the exercise of the Court's discretion in this regard are the

availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

24. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) I WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

25. In the present application, two arguments have been fronted by the Respondent and Interested Parties against the exercise of this Court's discretion to grant leave, which must be addressed. The first is that of the amenability of the dispute herein to resolution by judicial review, and the second is that at the application is premature.

26. On the first argument, it is evident that the indebtedness or otherwise of the Interested Parties to the Applicant is contested, and will require to be resolved first, before the legality or otherwise of the Respondent's intended actions and decisions with respect to the licensing of the Interested Parties can be determined. The dispute as regards the indebtedness is one that can only be resolved through examination of the parties' evidence in this regard and legal argument thereon in a normal civil trial process, and not through judicial review proceedings.

27. In addition, as is admitted by the Applicant, and confirmed by the Respondent, no decision has been made by the Respondent to license the Interested Parties. Therefore, this application is a purely speculative exercise, as there is no existing decision or action on the part of the Respondent that raises justiciable issues for resolution by judicial review. To this extent, this Court finds that the Applicant's grievance is not amenable to judicial review.

28. This finding also leads me to the next argument as regards the present application being premature. The Respondent has not embarked on any decision making process or a particular course of action, or indeed made any preliminary steps that can be subject of a judicial review application. It is an established principle of equity that a Court will not act in vain. The instant application is to this extent not only premature, but also clearly in abuse of the process of Court.

#### **The Disposition**

29. In the premises, it is the finding of this Court that the Applicant's has not demonstrated an arguable case and its application by Chamber Summons dated 15<sup>th</sup> October 2020 is not merited for the foregoing reasons.

30. I accordingly order as follows:

**I. The prayers sought in the Applicant's Chamber Summons dated 15<sup>th</sup> October 2020 are hereby declined, and the said application is hereby dismissed.**

**II. The Applicant shall pay the Interested Parties' costs of the Chamber Summons dated 15<sup>th</sup> October 2020.**

31. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE 2021**

**J. NGAAH**

**JUDGE**