REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 190 OF 2019

IN THE MATTER OF

ARTICLE 1, 2, 3(1), 19, 20, 22(1) & (2) (c), 23, 162(2)(a), 165(5)(b), AND 258(1) & (2)(c) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPALS OF GOVERNANCE IN ARTICLES 1, 2, 3(1), 10(1) & (2) (a) & (c), 27, 46, 47, 73, 232(1)(d) AND 259(1) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF

THE ALLEGED CONTRAVENTION AND VIOLATION OFTHE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 43, 46 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

THE CONSTITUTIONAL AND LEGAL VALIDITY OF REQUIREMENTS FOR EXPORT

AND

WHOLESALE OF JET A1 AND OTHER AVIATION PETROLEUM FUELS.

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

ENERGY & PETROLEUM REGULATORY AUTHORITY.....RESPONDENT

AND

PACIFIC AVIATION MANAGEMENT &

CONSULTING COMPANY LIMITED.....INTERESTED PARTY

JUDGMENT

PETITION

1. The Petitioners through a Petition dated 21st May 2019 supported by Supporting Affidavit by Okiya Omtatah Okoiti sown on the even date seek the following reliefs:-

i) A declaration that the requirements for Export and Wholesale of Jet A1 and other Aviation Petroleum Fuels, are a statutory instrument subject to the Statutory Instruments Act, 2013.

ii) A declaration that the requirements for Export and Wholesale of Jet A1 and other Aviation Petroleum Fuels are void and having not been subjected to the Statutory Instruments Act, 2013.

iii) A declaration that the Requirements for Export and Wholesale of Jet A1 and other Aviation Petroleum Fuels, which came into effect in January 2019 are unconstitutional and, therefore, invalid, null and void ab initio.

iv) An Order quashing the requirements for Export and Wholesale of Jet A1 and other Aviation Petroleum Fuels, which came into effect in January 2019.

v) An order that the costs of this suit be provided.

vi) Any other relief the Court may deem just to grant.

RESPONDENT'S RESPONSE

2. The Respondent is opposed to the Petition and in doing so filed a Replying Affidavit sworn by Edward Kinyua, the acting Director Petroleum and Gas at the Energy and Petroleum Regulatory Authority.

INTERESTED PARTY'S RESPONSE

3. The Interested Party filed response to the Petition through a Replying Affidavit by Enock Mageto Moywaywa, the Managing Directors of Pacific Aviation Management & Consulting Company supporting the Petition.

BACKGROUND

4. The Respondent herein through a Letter dated 4th April 2019; Ref: ERC/PET/2/EK/rb informed "all traders of Jet A1" that they had to comply by 30th April 2019, with the requirements for the export and wholesale of Jet A1 and other Aviation Petroleum Fuels (hereinafter "the requirements") which had come into effect in January 2019. The Respondents stated that after 30th April 2019 it would take stern action; including revocation of licenses, against non-compliant traders.

5. The Respondent through a letter dated 30th April 2019; Ref: ERC/PET/2/EK/rb, extended the decision for compliance within the new Jet A1 licenses requirements to 31st May 2019. The letters which affect "all traders of Jet A1" were addressed only to multinational, as though local resellers / wholesalers do not exist.

6. The requirements were not subjected to public participation contrary to ***Articles 10(2) & 23(1) (d) of the Constitution***.

7. The requirement were enacted through a process that did not comply with the statutory instruments Act.

ANALYSIS AND DETERMINATION

8. Upon consideration of the Petition, responses to the Petition, rival submissions and authorities relied upon, I find that the following issues arise for consideration:-

a) Whether the Petition is a bona-fide public interest litigation.

b) Whether the Court's jurisdiction has been prematurely invoked.

c) Whether the guidelines for export and wholesale of Jet A1 and other aviation fuels constitute statutory instruments

d) Whether the alleged guidelines were unconstitutional.

A. WHETHER THE PETITION IS A BONA-FIDE PUBLIC INTEREST LITIGATION.

9. The Petitioner and the Interested Party position is that ***Article 22 and 258 of the Constitution*** back the Public Interest doctrine and therefore anyone can institute proceedings for the protection of rights and fundamental freedoms and for the Protection of the Constitution. Public Interest litigation is meant to benefit the wider public.

10. In its article ***"Advancing human rights and equality through public interest litigation"*** accessed at http://www.pilsni.org/about-public-interst-litigaiton the PILS Project states that:-

> ***"Public interest litigation, or PIL, is defined as the use of litigation, or legal action, which seeks to advance the cause of minority or disadvantaged groups or individuals, or which raises issues of broad public concern.***
>
> ***It is a way of using the law strategically to effect social change. Despite the range of equality and human rights protections available in Northern Ireland, the reality is that not everyone has equal access to those rights and not everyone has the resources or capacity to challenge an abuse of their rights through the Courts.***
>
> ***By taking cases that can benefit disadvantaged groups or minorities that than just one person, PIL can be used to provide access to justice to those who are most in need of it and yet who find themselves furthest from it."***

11. The PILs project further state that public interest litigation provides access to justice, reforms the law, holds government to account, raises awareness, empowers the disadvantaged and saves costs.

12. According to Black's law Dictionary ***"Public Interest Litigation means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected"***.

13. While dealing with the question of ***"bona fides"*** of a Petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the ***Indian Supreme Court*** in the case of ***Ashok Kumar Pandey vs. State of West Bengal*** held as hereunder:-

> ***"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and /or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bonafies and not for personal gain or private motive or political motivation or other oblique consideration.t the court must not allow its process to be abused for oblique considerations. Some person with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The Petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."***

14. Similarly in the case of ***Thakur Bahadur Singh and Another vs. Government of Andhra Pradesh*** and … on 23 September, 1998 the Andhra High Court stated:-

> ***"5. PIL has been a significant American Development. The Council for Public Interest Law set up by the Ford Foundation in USA, in its Report (1976) at pp.6-7 defined PIL thus:-***
>
> ***"Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interest. Such groups and inters include the poor, environmentalists, consumers, racial and ethnic minorities, and others."***
>
> ***PIL programmes focus on policy-oriented cases, where a decision will affect large number of people or advance a major law reform objective. The consequences extend well beyond the particular litigants. PIL programmes are also designed to provide legal services to undeserved groups on matters of immediate concerns only to the parties directly involved…***
>
> ***8. PIL is essentially to ensure observations of the provisions of the Constitution or the law which can be best achieved to advance the cause of community or disadvantaged groups and individuals or public interest by permitting any person, acting bona fide and having genuine interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularise of Roman Law whereby citizen could bring such an action in respect of a public delict."***

15. Additionally in the case of ***People's Union for Democratic Rights & Others v. Union of India & Others (1982) 3 SCC 235*** it was observed that:-

> ***"Public interest litigation is essentially a cooperative or collaborative effort by the Petitioner, the State of Public authority and the Court to secure observance of Constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable Sections of the Society."***

16. The Respondent contend that this matter is one of competing public interests because at the heart of the functions of the Respondent is consumer protection which is a constitutionally guaranteed right under ***Article 45(1)(a) and (c), and (3).*** The very nature of the Respondent is to ensure that millions of Kenyans enjoy energy and petroleum products that are of reasonable quality and to take necessary measures in safeguarding the health and safety of all Kenyans in accessing and enjoying these products and services. The reason that such standards were set as regarding Oil Marketing companies (OMCs) that supply jet A1 fuel was based on the sensitive nature of such fuel and its use. It is contended that if the Respondent was to lower such standards, then it would be taking the chance of exposing a multitude of people to unmitigated risk should an accident arise from the same, contrary to the allegations of the Petitioner.

17. The Respondent further contend that the set requirements were not set to lock out any Oil Marketing Companies (OMCs) from the market, but rather to better secure all the interests of all stakeholders in the industry. As it stands, a majority of Oil Marketing Companies (OMCs) supplying and selling Jet A1 have complied with the new requirements.

18. The Respondent further pleads that the concerns of the Petitioner need to be considered against the backdrop of the general welfare of the Kenyan Society and not solely to secure profitability for a few individuals. Reliance of the aforesaid proposition is placed in the case of ***Latema Sacco & 23 others vs. National Transport & Safety Authority & 7 others; Uber Chap Chap & 2 others (Interested Parties) [2019] eKLR*** at para 29 and 32 respectively, where it was stated that:-

> ***"The public service transport sector is very important in this country. Its regulation, management and control is of significant importance to everyone. The issues raised in the application and Petition are not therefore moot. They go to the heart of the success of the sector when it comes to its regulation, control and management.***
>
> ***In dealing with the issue one must bear in mind that laws are made to regulate human conduct and that courts should only interfere where there is a clear case of invalidity and or serious violation or threat to violate rights and fundamental freedoms. In that regard, on the issue of fitting seat belts and speed governors the view I take is that it is for greater public good not to interfere at this interlocutory stage of the proceedings. That is an issue that should be decided upon hearing the Petition so that all parties are allowed to put their case across for the Court's determination after considering all relevant matter to the Petition."*** *(Emphasis mine)*

19. The Respondent further contend that the Energy Sector is a fundamental sector to the economy of the country and due to its nature it requires standards that protect not just market players but all Kenyans. Furthermore, the recommendation to implement market guidelines came from the Departmental Committee on Energy of the National Assembly following a complaint by Mr. Pius Omolo and Mr. Agoi Vedel on behalf of Oil Marketers in the country, claiming that there was an influx in the country of illegal Oil Marketing Companies. Mr. Pius Omolo and Mr. Agoi Vedel on behalf of Oil Marketers in the Country in their presentation before the Departmental Committee on Energy of the National Assembly, suggested that the Respondent set higher standards to ensure quality is maintained in the industry. It is also worth noting that the Petition tabled by the representatives of Oil Marketing companies (OMCs) proposed higher guidelines for market players in comparison to those laid down in the joint audit report. It is therefore clear that suggestions to raise the requirements for licensing came from Oil Marketing Companies (OMCs).

20. It is further submitted on behalf of the Respondent that the Petitioner has neither a keen appreciation of the technical and delicate nature of the supply and/or sale of Jet A1 nor of the fact that unregulated Jet A1 facilities can lead to loss of life, property and endanger the security of Kenya as a whole. The scale of the liability that would arise in such a situation informed the Respondent to err on the side of caution. It is urged that without prejudice to the foregoing, the Respondent was as a matter of fact reminding market players of international guidelines of which they are well aware of and setting out clearly that they should adhere to these guidelines. It should be appreciated that the Aviation industry is of such a nature that its operations traverse international borders and it would be in the interest of not only market players but Kenya as a whole, for it to be at par with such international standards and guidelines.

21. The Respondent contention is therefore that the Petition as framed is only geared towards antagonising the Respondent, which under law, is meant to secure public interests as regards the energy and petroleum industry. It is argued that the Petitioner is only using public interest to mask the individual interests that taint the Petition.

22. From the above I have no doubt that public interest litigation was designed to serve the purpose of protecting rights of the public at large, through vigilant action by public spirited persons and swift justice. But the profound need of this tool has bene plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The Courts therefore, need to keep a check on the cases being filed and ensure the bona fide interests of the Petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest litigation aren't violated. The constitution envisages the judiciary as ***"a bastion of rights and justice".***

23. It therefore follows that public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. I find that PILS is a unique phenomenon in the Constitutional jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns.

24. In the instant Petition the Petitioner contend that under ***Article 258(1) of the Constitution of Kenya***, takes away the notion of ***"locus standi",*** which means that an aggrieved party, demonstrating damage or harm can approach the court seeking legal remedy. It is further not in dispute that public interest cases encompass more than just the parties to a matter since public interest litigation is meant to benefit the wider public and not just the individual directly affected. It is therefore contended that this Petition was filed in public interest with a view to respect, uphold and defend the constitution and the law. It is further stated under ***Article 22(1) and (2) of the Constitution***, the Petitioner has ***"locus standi***" to institute these proceedings. It is Petitioner's averments that the Petition is filed in good faith to ***Article 3(1) of the Constitution*** to respect, uphold and defend the Constitution. Further it is noted that the Petition has met the tests of bona fide public litigation since the facts relied in the Petition are prima facie true and correct in the sense, that it is contended that the Respondent has violated clear provisions of the Constitution and Statutes. I find therefore that the Petitioner has demonstrated that this Petition falls within the public interest litigation.

25. In view of the aforesaid I find that the Petition herein is bon-fide public interest litigation and not for a personal benefit of the Petitioner.

B. WHETHER THE COURT'S JURISDICTION HAS BEEN PREMATURELY INVOKED.

26. The Respondent state that whereas it is not in dispute that this Court jurisdiction to hear and determine whether a right or fundamental freedom has been denied, violated, infringed or threatened, the Respondent contend that the Constitution should not be used to justify foregoing or ignoring other statutory remedies available to resolve disputes.

27. The Petitioner on his part urge that whereas any dispute resolution procedure laid down in statute should be exhausted first, whenever the bar of this Court's jurisdiction is raised due to the existence of such statutory procedures, the Court should examine the nature of the case and the reliefs sought, to determine whether or not the aggrieved party would get redress elsewhere.

28. To buttress the above the Respondent sought reliance in the case of ***Bernard Murage v Fineserve Africa Ltd & 3 others (2015) eKLR***, at para 55 in which the High Court held as follows:-

> ***"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."***

29. Similarly in the case of ***Fredrick Mworia v. District Land Adjudication Officer Tigania West/East & Others [2016] eKLR*** it was stated:-

> ***"it is veritably true that the Constitution protects all other laws, including in this case, the Land Adjudication Act. One cannot have his case and at the same time eat it. Once cannot file a constitutional Petition when one has refused and/or failed to exhaust, without proffering compelling reasons, the remedies provided under the Land Adjudication Act or any other Statutory Law."***

30. Additionally reliance is placed in the case of ***Counsel of County Governors v. Lake Basin Development Authority & 6 others [2017] eKLR*** at para 20 and 43 respectively where it was stated that:-

> ***"I am fully aware that where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, parties should to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court."*** *(Emphasis added)*

31. Looking keenly at the provisions of ***Section 36 (4) of the Energy Act 2019,*** it is provided that the ***Energy & Petroleum Tribunal*** shall have appellate jurisdiction over the decisions of the Energy & Petroleum Regulatory Authority or any licensing authority and can refer them back to the Authority for re-consideration. It is also provided that under ***Section 117 (2) of the Petroleum Act 2019***, that:-

> ***"any dispute arising from an upstream regulated function under this Act shall be referred to the Authority for determination in the first instance."***
>
> Further under ***Section 117 (6) of the Petroleum Act 2019***, that:-
>
> ***"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 Authority or any licensing authority for re-consideration."***

32. ***Section 25 of the Energy Act*** establishes the Energy and Petroleum Tribunal for the purpose of hearing and determining disputes and appeals in accordance with the Energy Act or any other written law.

33. ***Section 36 of the Energy Act 2019,*** provides:

> ***"(1) The Tribunal shall have jurisdiction to hear and determine matter 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."***

34. There is no dispute in this matter, that no party engaged in the supply and/or sale of Jet A1 lodged a complaint for that matter with the Respondent herein or with the Energy & Petroleum Tribunal regarding the guidelines as provided for under the ***Energy Act No. 1 of 2019 and the Petroleum Act No. 2 of 2019***. In particular, the Interested Party has not in any manner demonstrated that they made an effort to have the Respondent indulge their concerns as to the guidelines complained of, notwithstanding, that the Petition was displayed utter disdain for the specialised mechanisms and procedure put in place to address disputes arising within the energy and petroleum sector.

35. The Petitioner on his part has not shown or attempted to demonstrate that he has in any manner made an effort to engage the Respondent as pertains the alleged unconstitutional guidelines for export and wholesale of Jet A1 and other aviation fuels. The Petitioner has also failed to demonstrate that the Respondent and/or Energy & Petroleum Tribunal declined to afford him or the Interested Party a fair chance to air their grievances and resolve the same.

36. Looking at the Petition and considering its nature there is no doubt that the Petition is a matter which no doubt is highly technical in nature and which can be dealt with as provided for under the provisions of Energy Act. This matter calls for Constitutional avoidance. In the case of ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 others [2014] eKLR the Supreme Court,*** the Supreme Court observed and held as follows regarding constitutional avoidance (at paragraph 256, 257 and 258);

> ***"The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S. v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:***
>
> ***"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."***
>
> ***Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valey Authority, 297 U.S. 288,347 (1936)).***
>
> ***From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd Respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright – infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."*** *(Emphasis mine)*

37. I find in view of the principle of constitutional avoidance which entails that a Court should not determine a Constitutional issue, when a matter may properly be decided on another basis applicable in the matter this Petition need to be avoided by this Court. I find the Petition herein to be premature or not ripe for failure to comply with the doctrine of exhaustion which is a bar for this Court to hear and determine the Petition herein. The Petitioner herein failed to utilize clearly defined mechanisms by statute for resolving the dispute. The Petition herein is therefore premature.

C. WHETHER THE GUIDELINES FOR EXPORT AND WHOLESALE OF JET A1 AND OTHER AVIATION FUELS CONSTITUTE STATUTORY INSTRUMENTS

38. On the requirement of a statutory instruments under the ***Statutory Instrument Act, Section 2*** provides:-

> ***"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."***

39. Further under ***Section 3(1) of the Statutory Instrument Act (SIA)*** it is provided:-

"(1) This Act applies to every statutory instrument made directly or indirectly under the Act of Parliament or other written legislation."

40. The Petitioner at paragraph 9 of the Replying Affidavit deponed that under the ***Energy Act 2019***, the Respondent has the mandate to regulate the energy sector, and that it issued the requirements pursuant to that mandate, ***"giving effect to recommendations of the Departmental Committee on Energy of the National Assembly…."***[2]

41. It is contended by the Petitioner that the requirements are not mere executive orders but are subsidiary legislation made to regulate third parties in the local Jet A1 sector. They are not executive guidelines on the internal workings of Government, such as was the case in ***Republic v Attorney General; Law Society of Kenya (Supra).***

42. The Petitioners position is therefore that the requirements are a statutory instrument since the Respondent issued them ***"in the execution of a power conferred by or under an Act of Parliament"*** (being its mandate under ***Section 10 of the Energy Act, No.1 of 2019***).

43. The Respondent on its part contend that the guidelines set out by the Respondent were merely restating the requirements by the African Airlines Association including but not limited to Third Party Insurance set at USD.500 million for small equipment and USD. 1 billion for larger equipment. This is given the nature of the extent of liabilities that can accrue in the case of an accident. The above and other guidelines employed by the African Airlines Association is urged that are well known to all market players engaging in the supply and/or sale of Jet A1

fuel. I find the Respondent as such was not introducing anything new but as a matter of executing its administrative role, enforcing market standards that are well known to players within the aviation industry.

44. It is further urged by the Respondent that the Departmental Committee on Energy of the National Assembly in its report recommended at paragraph 4 and 5 that standards pertaining to export and sale of Jet A1 should conform to international standards.

45. It is clear from the above that the Respondent herein was only giving effect to these recommendations, which fact is captured in the Joint Report on Audit of Aviation Refuellers and Traders Operating in Kenya Airports. It is clear therefore that at no point does the Respondent draw force from any act of parliament in requiring compliance nor do they make reference that the requirements are made pursuant to a statute.

46. The Petitioner has not demonstrated the requirements are not executive orders but subsidiary legislation made to regulate third parties in the Jet A1 sector. The requirements are not statutory instruments as the Respondent did not issue them ***"in execution of a power conferred by or under an Act of Parliament".***

47. To buttress the above the Respondent placed reliance in the case of ***Republic vs. Attorney General; law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi (2019) eKLR*** in which P. Nyamweya J. at paragraph 26 and 27;-

> ***"26. From the definition given above of statutory instruments, and the powers granted to the Respondent, it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies.***
>
> ***27. There is no reference in the Circular dated 1st March 2018 to any statutory provision empowering the said Guidelines, or to indicate that the same were being made in exercise of any legislative powers. It is thus my finding that the said circular was not made in exercise of the legislative powers granted to the Respondent, and that its purpose was clearly stated to be explanatory. It is therefore not a statutory instrument as envisaged by the Statutory Instruments Act, and was therefore not subject to the procedure set out in the said Act as regards enactment of statutory instruments, including the requirements of consultation and publication."*** *(Emphasis added)*

48. I find that the guidelines being purely executive in character, giving effect to recommendations of the Departmental Committee on Energy of the National Assembly and reminding industry participants about well-known International Standards within the industry cannot be termed as subsidiary legislation made to regulate third parties in the local Jet A1 sector. The requirements are not a statutory instrument as they were not issued "in the exaction of a power conferred by or under an Act of Parliament as alluded to by the Petitioner.

49. It should however be noted as regards this matter that the Petition to the National Assembly was from representatives of Oil Marketers of Kenya which required the Respondent and the Kenya Civil Aviation authority to make their presentations on the subject of licensing of Oil Marketing Companies (OMGs) and requirements of such licensing. It was as such consultative process.

50. In view of the aforesaid I find that the guidelines for export and wholesale Jet A1 and other aviation fuels does not constitute statutory instruments.

D. WHETHER THE ALLEGED GUIDELINES WERE UNCONSTITUTIONAL.

51. The Petitioner contend that the Respondent violated the statutory instrument Act. It is further urged by the Petitioner that there is no evidence adduced to demonstrate that the Respondent invoked ***Section 22(2) (3) of the Statutory Instrument Act***, which would have exempted the requirements from the application of the Act.

52. The Petitioner further contend that ***Section 5 of the Statutory Instrument Act*** as regards a regulation making authority to make appropriate consultations with persons who are likely to be affected by a proposed instrument, before issuing it was violated.

53. The Petitioner and the Interested Party jointly and severally, urge the regulations introduced vide letters dated 4th April 2019 and 30th April 2019 were not subjected to public participation and that the Respondent introduced the new regulations through the back door instead of complying with ***Section 5(1) of the Statutory Instrument Act 2013***.

54. It is urged by the Petitioner that ***Section 5A of the Statutory Instruments Act*** required the new regulations to be subjected to public participation. It is provided under ***Section 5A of the Statutory Instruments Act*** (***SIA)*** that:-

"Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain-

> ***a) A statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of the Constitution;***
>
> ***b) A brief statement of all the consultations undertaken before the statutory instrument was made;***
>
> ***c) A brief statement of the way the consultation was carried consultation;***

d) An outline of the results of the consultation;

e) A brief explanation of any changes made to the legislation as a result of the consultation."

55. It is contended by the Petitioner that the Respondent has not produced any evidence to demonstrate that the requirements were subjected to public participation. At paragraphs 35 and 45 in ***Kenya Human Rights Commission vs. Attorney General & Another (2018) eKLR*** Justice Chacha Mwita, held that:-

"Once a Petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the Respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation…there was no attempt on the part of the Respondent to show that there was any semblance of public participation in the legislative process leading to the enactment of the impugned Contempt of Court Act. That being the state of affairs, the Court has no option but to agree with the Petitioner that there was violation of an important constitutional step in the form of public participation and the Act fails this Constitutional compliance step."

56. In the instant Petition, upon perusal of the Respondent's Replying affidavit of Edward Kinyua at paragraph 28 there is admission that there was no public participation and contended that there was sufficient stakeholder's consultation and public participation was carried out during the parliamentary process and that all persons whom new requirements affected were heard by the Committee before recommendations was made.

57. The Respondent in support of their assertion preceded to annex ***"exhibit EK2"*** which is a copy of the ***Report of the National Assembly's Departmental Committee on Energy***.

58. The Interested Party in support of requirements under ***Section 5 of the Statutory Instrument Act 2013*** placed reliance in the case of ***Keroche Breweries Limited & 6 others vs. Attorney General & 10 others (2016) eKLR*** where it was decided that the ***Alcoholic Drinks Control (Supplementary) Regulations, 2015*** did not comply with ***Section 5 of the Statutory Instrument Act, 2013*** for lack of appropriate consultations. the Court held,:-

"This provision is a clear reflection of the provisions of Article 10(2) of the Constitution 2010 which provides that one of the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever they inter alia enacts, applies or interprets any law and makes or implements public policy decisions is participation of the people …it is therefore clear that by definition, the Alcoholics Drinks Control Regulations, 2015 is a statutory Instrument hence subject to the provisions of Section 5(1) of the Statutory Instruments Act as read with Article 10(2)(a)… In fact according to the Petitioners, as a result of their implementation, the Petitioners incurred enormous losses. Therefore the regulations fell squarely with the contemplation of Section 5(1) of the Statutory Instruments Act. In this case there is no evidence that the Alcoholics Drinks Control Regulations 2015 were subjected to the process of public participation as mandated under Article 10. Further, the said regulations were expressed to take effect immediately. Such direction clearly violated both the constitution and statutory edicts."

59. Further reliance was placed in the case of ***Samuel Thinguri Waruathe and 2 others vs. Kiambu County Government & 2 others*** where Odunga J stated that:-

"…public view ought to be considered in the decision making process and as far as possible the product to the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. In other word the end product ought to be owned by the public."

60. The Respondent in response to the Petitioners averments states that contrary to the allegations of the Petitioner, presenting the guidelines was a consultative process. There is need to look at the matter in a wholesome manner. The genesis of the matters presented in this Petition began with a Petition from representatives of the Oil marketers in Kenya to the National Assembly to look into the allegation of permeation of illegal suppliers of jet fuel into the Kenyan market. This resulted in the Respondent as well as the Kenya Airports Authority being summoned to present their cases in connection to the Petition before the Departmental Committee on Energy of the National Assembly. This resulted in the Departmental Committee on Energy of the National assembly making recommendations which prompted action on the part of the Respondent, the results of which have led to this Petition. The key stake holder namely, representative of the Oil marketing Companies, the Energy & Petroleum Regulatory Authority, the Kenya Airports Authority and the Departmental Committee on Energy of the National Assembly were involved in establishing a way forward in securing the interests of the market players, quality and safety within the Industry.

61. On forms of facilitation of appropriate degree of participation the Respondent places reliance in the case of ***Okiya Omtatah Okoiti vs. Commissioner General, Kenya Revenue Authority & 2 others (2018 eKLR*** at para 97, where the Court held:-

"The forms of facilitating an appropriate degree of partition in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. <u>What amounts to a reasonable opportunity will depend on the circumstances of each case."</u> *(Emphasis added)*

62. Being guided by the above cases and considering the circumstances of the instant Petition, I find that the need of guidelines came from the Oil Marketing Companies. It is worth to note the manner in which the decision to present the guidelines, that complied with international standards, was armed at, was in a consultative manner.

63. Upon consideration of the Petition I find that the Petitioner has not demonstrated that the standard forming the subject of this Petition

were geared towards discriminating any actor within the industry. I further find that indeed compliance is in actual fact required of all Oil Marketing Companies that supply and/or sell Jet A1. Reliance is placed in decision by Hon. Justice Mwita in ***Jacqueline Okeyo Manani & 5 others v. Attorney General & another (2018) eKLR*** which adopted the enunciation of the Supreme Court which stated in ***Communication Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others [2014] eKLR*** at paragraph 349, that;-

> ***"[…..] the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement […]"***

64. I find that in the instant Petition, the Petitioner cannot claim he was denied the right to fair administrative action, yet he has intentionally and blatantly disregarded other methods of seeking redress set up within the energy sector. I find that the Petitioner has not established a succinct nexus within which to found this Petition. The guidelines are well known to market players. By requiring that all market players adhere to these standards does not amount to an undue bias but rather it is geared toward security and quality as regards the supply and/or sale of jet A1.

65. To buttress the above reliance is placed in the case of ***Communication Commission of Kenya & 5 others vs. Royal media Services Limited & 5 others, [2015] eKLR,*** where it was stated that***:- "the Constitution should be interpreted in a holistic manner, within its context, and in its spirit."***

66. It is worth to note while ***Article 258*** and ***Article 3(1) of the Constitution*** empower the Petitioner to protect the Constitution while it is under threat, it is also incumbent upon him to demonstrate with sufficient clarity the manner in which such threat has occurred. I find the Respondent in enforcing the guidelines was acting in an impartial manner, informed by reason, acting upon the recommendations of the Departmental Committee on Energy of the National Assembly and was geared toward closer bringing Kenya's aviation industry to operate at par with international standards. The Respondent's actions demonstrates its willingness to not only secure the best interest of both the consumer and the seller but also to uphold the dignity and honour of Kenya in the international platform of the aviation industry.

67. Upon consideration of the parties rival submissions I find that the guidelines are well within the operations of the Constitution. I further find that the Petitioner has failed to adequately demonstrate that indeed the alleged guidelines are unconstitutional.

68. ***The upshot is that the Petition dated 21st May 2019 is without merits. I find the Petition is a bona-fide public interest litigation. Accordingly the Petition is dismissed and I direct each party to bear its own costs.***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF NOVEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA