



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 38 OF 2019

IN THE MATTER OF: AN APPLICATION FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: JUDICIAL REVIEW UNDER SECTIONS 8 AND 9

OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA AS READ

WITH ORDER 53 CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY NGAYAU MUTIA

AND CHAI MUTIA FOR ORDERS OF JUDICIAL REVIEW

BETWEEN

1. NGAYAU MUTIA

2. CHAI MUTIA.....APPLICANTS

VERSUS

KENYA PETROLEUM REFINERIES LIMITED.....RESPONDENT

RULING ON NOTICE OF PRELIMINARY OBJECTION DATED 20/01/2020

1. By a Notice of Motion dated 4/12/2019 the Ex parte Applicant herein sought an order of mandamus compelling the Managing Director and/or Chief Executive Officer of the Respondent to forthwith effect and/or cause to be effected payment of decretal amount awarded to the Applicant, NGAYAU MUTIA and CHAI MUTIA in Mombasa pursuant to the judgment delivered on the 5/4/2019 in CMCC NO. 4768 of 2003 by the Honourable Mr. F. Kyambia, Senior Principal Magistrate, in the sum of Kshs. 1,511,412.00 plus costs of Kshs. 343,970.00 amounting to Kshs. 1,855,382.00 and interest at court rates of 14% from the date of the said judgment up to 30/9/2019 (174 days) amounting to Kshs. 123, 827.70 all totaling to Kshs. 1,979,209.70 plus further interest from 1/10/2019 till payment in full, and also costs of the Judicial Review proceedings.

The Response

2. The Respondent in response filed a Notice of Preliminary Objection dated 20/1/2020 stating that the proceedings herein are fatally defective as the Respondent does not constitute Government and that the Government Act Cap 40 does not apply to the Respondent. This is

the Notice of Preliminary Objection which is the subject matter of this Ruling.

Submissions

3. The matter came up for Hearing on 11th March, 2020. The Respondent's Learned Counsel M/s Kamomi submitted that the Notice of Preliminary Objection raises two issues being that the Respondent does not constitute the Government as defined under the Government Proceedings Act and therefore the Judicial Review is fatally defective. Counsel submitted that the Respondent is a state corporation however, a body corporate with perpetual succession and as such can sue and be sued in its own capacity and as such CAP 40 of the Government Proceedings Act is inapplicable. Counsel further submitted that Section 12 of the Government Proceedings Act provides for the Attorney General to be enjoined in Civil Proceedings which is not the case in the proceedings herein. He referred to **Grenstar Sytems Limited vs. Kenyatta International Convention Centre (KICC) & 2 Others [2018]** as well as **Okiya Omtata Okiiti & Another vs. Attorney General & 7 others [2013]** where it was held that just because a particular party is a state corporation does not in itself mean it is proof of the government, therefore the Preliminary Objection ought to be allowed and proceedings herein struck out.

4. Mr. Tindika, learned Counsel for the Applicant submitted that the Respondent is a State Corporation which therefore means executing orders would be through an order of Mandamus to compel the CEO to make payment. That the application is properly before Court and that Section 12 of the Government Proceeding Act does not apply in these proceedings and therefore the Preliminary Objection ought to be dismissed.

Determination

5. The issue raised for determination is whether or not the Respondent is a State Corporation and whether Section 12 of the Governments Proceedings Act applies to the Respondent.

6. In defining a State Corporation it is important to note that the Respondent is indeed one having been established under the Ministry of Energy. It is fifty percent owned by the Government of Kenya and carries out the business of refining crude oil and operates the sole refinery in Kenya and some of its products are also supplied to consumers in Uganda and Rwanda.

7. On whether the provisions of Section 12 Government Proceedings Act does apply to the Respondent, the Respondent relies on **Grenstar Sytems Limited vs. Kenyatta International Convention Centre (KICC) & 2 Others [2018]** where it was held that just because a particular party is a state corporation does not in itself mean it is the government. **Association Of Retirement Benefits Scheme vs. Attorney General & 3 Others [2017] eKLR** cited with approval the Indian Supreme Court case of **International Airport Authority of India & Others (1979) SC.R 1042** in which the test for determining whether an entity was a Government body or not, Court stated as follows:-

“(a) Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government.

(b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;

(c) It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State.

(d) Whether the body has deep and pervasive State control,

(e) Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and

(f) If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.”

8. Further Munyao J in **Kimoi Ruto & Another vs. Samuel Kipkosgei Keitany & Another 2014 eKLR**, held: -

“..It will be seen from the above that State Corporations may be established by the President (Under S.3) or through an Act of Parliament. They are ordinarily body corporate with capacity to sue and to be sued and with capacity to hold property. I find it difficult to hold that they should be considered as “government” because if they were, then litigation would be governed by the Government Proceedings Act (CAP 40) and I am more prepared to hold that they are not strictly “Government”, unless the context otherwise prescribes, but rather, that they are independent agents of Government, formed by government in order to undertake and perform certain functions on behalf of government, which functions cannot adequately or efficiently be performed within the structure of Government Ministries.”

9. This Court is satisfied that as much as the Respondent undertakes and performs functions of the government the same does not necessarily mean that the Respondent constitutes the government and as such it does not fall under Cap 40 of the Government Proceedings Act and as such provisions of Section 12 do not apply. Of great importance however, is that one of the means of executing against a State Corporation is through an order of mandamus to compel the Chief Executive Officer of the Corporation to settle a decree. Therefore, the Judicial Review application before the court is properly founded because there is no other way provided through which a citizen can compel the said State Corporation to settle the decretal amount due. And even if there exists another way of effecting execution, that will be the subject of the application herein for the compelling order of mandamus sought therein.

10. The upshot therefore is that the Notice of Preliminary Objection dated 20/1/2020 is hereby dismissed with costs in the cause.

That is the Ruling of the Court.

Dated, Signed and Delivered at Mombasa this 19th day of May, 2020.

E. O. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Tindika for Applicant

N/A for Respondent

Mr. Kaunda- Court Assistant