



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 529 OF 2014**

**WILLIAM ODHIAMBO ABOK.....PETITIONER**

– VERSUS –

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY,**

**MINISTRY OF ENERGY & PEROLUEM.....2<sup>ND</sup> RESPONDENT**

**ENERGY REGULATORY COMMISSION....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petition contests the Energy (Liquefied Petroleum Gas) Regulations, 2009 which created and established, among others, the LPG Cylinder Exchange Pool and the LPG Cylinder Exchange Pool Committee.

2. The facts of this Petition are that by a Legal Notice No. 121 of 24<sup>th</sup> July, 2009, the 2<sup>nd</sup> Respondent published the Energy (Liquefied Petroleum Gas) Regulations, 2009 pursuant to powers conferred on him by Section 102 of the Energy Act, No. 12 of 2006. The 2<sup>nd</sup> Regulations established the LPG Cylinder Exchange Pool and the LPG Cylinder Exchange Pool Committee. The Petitioner contends that the basic foundations of the Energy (Liquefied Petroleum Gas) Regulations, 2009 and the structures it created in the form of LPG Exchange Pool and LPG Exchange Pool Committee violate the Constitution, the Bill of Rights and the Statutes that support the Bill of Rights and the national values and principles of governance set out in the Constitution.

3. The Petitioner, therefore, filed this petition seeking the following reliefs;

**a) A declaration that the provisions of regulations 14(1), (2), (3), (4), (5), (6) and (8) of the Energy (Liquefied Petroleum Gas) Regulations, 2009 are inconsistent with the Competition Act No. 12 of 2010 and the Sale of Good Act Cap 31 of the Laws of Kenya and/or they are ultra vires the powers given to the Minister, the 2<sup>nd</sup> Respondent herein to make regulations by Section 102 of the Energy act, 2006 and are null and void.**

**b) A declaration that the LPG Exchange Pool is unconstitutional and therefore null and void.**

**c) A declaration that the LPG Exchange Pool Committee is unconstitutional and therefore null and void.**

**d) An order of certiorari to bring before this Honourable Court and quash the Energy (Liquefied Petroleum Gas) Regulations, 2009 as contained in Legal Notice No. 121 of 24<sup>th</sup> July, 2009.**

**e) An order of prohibition restraining the Respondents from in any way setting up an LPG Exchange Pool or any such body.**

**f) Any other reliefs or orders his honorable Court may deem appropriate.**

***1<sup>st</sup> and 2<sup>nd</sup> Respondents' Response***

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by **Eng. Joseph K. Njoroge** on 19<sup>th</sup> February, 2015 and filed in court on the

same date. He deposed that prior to the enactment of the Energy Act, 2006 there were no specific rules and regulations covering the different activities in the distribution chain for Liquefied Petroleum Gas (“LPG”) hence the distribution chain for LPG in the country was experiencing problems associated with mushrooming of illegal and unlicensed filling sites managed and owned by unscrupulous businessmen who have constructed substandard filling sites without regard to existing legal requirements and that they filled cylinders belonging to legally licensed companies without their consent.

5. That in order to address those challenges, the 3<sup>rd</sup> Respondent in consultation with stakeholders, developed specific regulations covering the full LPG distribution chain and the regulations were finally gazetted under Kenya Gazette Supplement No. 50 dated 24<sup>th</sup> July, 2009 as Legal Notice No. 121 of 2009 known as the Energy (Liquefied Petroleum Gas) Regulations, 2009.

6. He further stated that the regulations created structures that would aid in the proper and efficient management of the LPG sector to wit the LPG Exchange Pool and the LPG Exchange Pool Committee which do not in any manner violate the principles of governance and the provisions of Article 10 of the Constitution. Lastly, he stated that the process of enactment of the Legal Notice No. 121 of 2009 was conducted legally and the same is not in conflict with any constitutional provisions neither does it promote any monopoly amongst the LPG marketers.

### ***The 3<sup>rd</sup> Respondent’s response***

7. The 3<sup>rd</sup> Respondent opposed the Petition by filing a Replying Affidavit sworn by **Edward Kinyua** on 9<sup>th</sup> March, 2015 and filed in court on the same date. He deposed that the activities undertaken by the LPG Exchange Pool and the LPG Exchange Pool Committee are purely operational and technical to facilitate the exchange of cylinders and the 3<sup>rd</sup> Respondent oversees the activities of the Cylinder Exchange Pool and the Cylinder Exchange Pool Committee to ensure that the interest of stakeholders in the energy industry including consumers are taken care of. He further deposed that no complaint has been raised with the 3<sup>rd</sup> Respondent or with the Competition Authority regarding the operations and activities of the Cylinder Exchange Pool and the Cylinder Exchange Pool Committee. He contended that the Petition was, therefore, premature and the mechanisms provided by law to address any complaint the Petitioner may have were not exhausted.

8. **Mr. Kinyua** further stated that the Petitioner’s property rights or those of consumers have not been infringed in any way and that the issues raised by the Petitioner are moot. He contended that the Petitioner has not demonstrated which of his rights have been violated by the impugned regulations. Lastly, the deponent argued that given the very nature of gas and its potential to be hazardous if not well handled, the restrictions on entry into the industry are legitimate restrictions under Article 24 of the Constitution in order to protect the interests of the general public and consumers of the product.

### ***Petitioner’s submissions***

9. **Mr. Okoth**, learned counsel for the Petitioner, submitted highlighting their written submissions that the basic foundations of the Energy (Liquefied petroleum Gas) Regulations, 2009 and the structures they have created in the form the LPG Exchange Pool and the LPG Exchange Pool Committee violates the Constitution, the Bill of Rights and the Statutes that support the same Bill of Rights and the national values and principles of governance set out in the Constitution and, therefore, the impugned regulations are inconsistent with Article 2(4) of the Constitution and are invalid, null and void *ab initio*. He further submitted that the impugned regulations violate Article 10 of the Constitution. He relied on the cases of **Peter O. Ngoge t/a P. O Ngoge & Associates vs Ammu Investment Company Limited, High Court Misc. Civil Application No. 745 of 2009.**, **Republic –vs- The Attorney General & Another ex parte Francis Chachu Ganya JR Misc. Application No. 374 of 2012, and Doctors for Life International –vs- Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11** among others.

10. On whether regulation 7 of the impugned regulations violates the provisions of Article 40 of the Constitution on the right to protection of acquisition and ownership of property, **Mr. Okoth** submitted that the impugned regulation are unconstitutional and repugnant to the constitution in so far as the same purports to take away the right to property arbitrarily and without any lawful justification. He relied on the cases of **Mtana Lewa –vs- Kahindi Ngala Mwaqandi (2015) eKLR, IPPT20110714, ECJ, Viking as v Kosan Gas, Union of Civil Servants & 2 Others v Independent Electoral and Boundaries Commission (IEBC) & another (2015) eKLR and S v Makwanyane & Anor.**

11. Learned counsel also submitted that the impugned regulation in as much as it precludes, without reasonable basis, a huge majority of Kenyans from the LPG Pool, is discriminatory and violates the provisions of Article 27 of the Constitution. He relied on the case of **Pravin Bowry v Ethics and Anti-corruption Commission Cause No. 1168 of 2012** and the case of **Veronica Muthio Kioko v CUEA, Industrial Cause No. 1161 of 2010.**

12. In a nutshell, he submitted that the impugned regulations from any form of construction were inconsistent with Article 24, 27, 28, 40, 46, 47 and 50 of the Constitution and are unconstitutional and, therefore, null and void and urged the court to allow the petition.

### ***1<sup>st</sup> & 2<sup>nd</sup> Respondents’ Submissions***

13. **Mr. Obura**, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Cabinet Secretary for Energy had powers to make the Energy (Liquefied Petroleum Gas) Regulations, 2009 by virtue of Section 102(a) of the Energy Act in consultation with the Energy Regulatory Commission.

14. On whether the said regulations were unconstitutional, learned counsel submitted that all statutes come with a presumption of constitutionality and the Petitioner must discharge the burden of proving that a statute is unconstitutional and that the Petitioner has not discharged that burden. He relied on the case of **Law Society of Kenya v Attorney general Nairobi Petition No. 318 of 2012 (unreported).**

15. **Mr. Obura** further submitted that the regulations are not an end in themselves since there is the LPG Exchange Pool Agreement in which

accountability mechanisms are set out, operations relating to the LPG Cylinder Pool and the manner in which the six representatives are chosen from among the members. It was his submission that the right to property under Article 40 of the Constitution is not absolute and can be limited under the provisions of Article 24. He contended that the regulation prohibiting any person from filling a cylinder without permission of the cylinder owner is meant to prevent mushrooming of illegal and unlicensed filling sites. He urged court to dismiss the Petition with costs.

### **3<sup>rd</sup> Respondent's submissions**

16. **Mr. Aloo**, appearing on behalf of the 3<sup>rd</sup> Respondent, submitted that the petition raises no constitutional issue requiring to be addressed by this Court; that existence or non-existence of an alleged monopoly is not a matter for this Court since there is other forum at which the issue ought to have been raised. It was his contention that while an infringement of the constitution might in certain cases give rise to the redress provided under it, it is not a general substitute for the normal procedures for invoking judicial control of administrative action. He relied on the case of **Bethwell Allan Omondi Okal –vs- Telkom (K) Limited (Founder) & 9 Others (2013) eKLR** and **Re Application by Bahadur (1986) L.R.C (Const.) 297** among others.

17. Learned counsel further submitted that the Court ought to resolve disputes on a constitutional basis only when a remedy depends on the constitution and urged the court to adopt the doctrine of constitutional avoidance. He relied on the United States Supreme Court decision in **Ashwander v TVA U.S 288, 345-48 (Baranders J. concurring) (1936)**. Counsel contended that the petition does not meet the requirement of Article 22, 258 or any other Article of the Constitution. He urged court to apply the principles in the Court of Appeal and Supreme Court case of **Mumo Matemu v Trusted Society of Human Rights & 5 Others (2013) eKLR** and **Mumo Matemu v Trusted Society of Human Rights & 5 Others (2014) eKLR** respectively.

18. He submitted that the Petitioner had not complied with the basic tests of constitutional references as set out in the case of **Anarita Karimi Njeru v Republic (1976-80) 1KLR 1277**. He contended that the Petitioner had not shown evidence of a limitation on a fundamental right of the Petitioner with regard to the right to property under Article 40 of the Constitution.

19. Lastly, learned counsel submitted that the Energy Regulatory Commission oversees the activities of the Cylinder Exchange Pool and the Cylinder Exchange Pool Committee to ensure that the interests of stakeholders in the energy industry, including consumers, are taken care of and that the impugned Legal Notice No. 121 of 2009 is clear on this. In the circumstances, he urged the court to consider the nature of the industry being regulated and to dismiss the Petition.

### **Determination**

20. I have considered the petition; the responses and submissions. I have also considered the authorities relied on. The issue that arises for determination is whether the impugned regulations are unconstitutional.

21. The petitioner has contended that they are while the Respondents have held a different view. They contend that the Petitioner has not demonstrated the extent of invalidity of the regulations to call for the court's declaration of such invalidity.

22. The Petitioner has impugned the Energy (Liquified Petroleum Gas) Regulations, 2009, on grounds that some of its provisions, namely; regulations 7(1), (2), 14(1) and 14(8) are unconstitutional. The Petitioner has, therefore, sought to have them nullified as well as the entire regulations contained in Legal Notice No. 121 of 24<sup>th</sup> July 2009.

23. The impugned regulation 7 provides that (1) ***a person shall not fill LPG in Cylinder without the permission of the cylinder or brand owner*** and (2) that ***a person shall not alter the branching, deface, damage repair or submit for maintenance on LPG cylinder without the authority of the brand owner.***

24. The petitioner has contended that the effect of the above provisions is akin to taking away the right to property. In their view, once a person purchases an LPG cylinder, he/she acquires property rights in the LPG cylinder and any restrictions introduced by regulations 7 is volatile of the person's right to property contrary to Article 40 of the Constitution.

25. I do not agree with the Petitioner that regulation 7(1) (2) has the effect of violating the right to property. The regulations must be read in context. It bars anyone from filling the cylinder without the permission of the cylinder or brand owner. That in my view, controls where the cylinder is filled and by whom. The person who purchased the cylinder does not take it to a filling plant. He does not necessarily know where the cylinder is refilled. All he wants is a refilled cylinder and he cares less where it has been filled or by whom. In that case, therefore, the regulation is intended to control the refilling of cylinders and, in my view, this is to the advantage of consumers who have to be sure of the safety and quality of the gas they use.

26. With regard to regulation 7(2), I do not also see any inconsistency with the constitution as to render it constitutionally invalid. This is because the regulation prohibits alteration of branding, defacing damaging repairing or submitting the cylinder for repairs without authority of the brand owner.

27. LPG cylinders are branded products of particular companies and, therefore, their brands must be protected. Invalidating this regulation would mean that one would be free to deface or damage the cylinder or repair it or submit it for maintenance anywhere without any consequences which is exposing consumers to risks.

28. This would have the singular effect of jeopardizing not only quality of the LPG cylinders but also lives of consumers. LPG cylinders contain highly inflammable liquid gas hence the quality and standards of the cylinders should never be compromised. Those who are to repair and maintain them must be highly qualified for the job and only brand owners would guarantee this. If this requirement is to be

considered as an infringement to the right to property, then as long as it would ensure the quality of the cylinders and the safety of consumers that would be justifiable in terms of Article 24 of the constitution.

29. The other complaint the Petitioner has is on the constitutionality of regulation 14. Regulation 14, establishes an LPG Cylinder Exchange Pool to regulate the exchange of LPG cylinders among LPG marketing companies. Sub regulation (2) states that the management of LPG Cylinder Exchange Pool is to be vested in the LPG Exchange Pool Committee while sub regulation (3) is on the membership of the LPG Cylinder Exchange Pool Committee. The members comprise (1) a representative from the Ministry of Energy, a representative from Kenya Bureau of Standards, and six representatives from LPG marketing companies.

30. Regulation 14(4) requires the committee, with the approval of the Energy Regulatory Commission, to draw a LPG Exchange Pool agreement to govern the relationship among LPG marketing companies and the operations of the pool. Sub regulation (5) prohibits a person from conducting business of filling and whole selling of LPG in cylinders unless he/she is a member of the exchange pool.

31. Sub regulation (6) on the other hand, requires members of the LPG Cylinder Exchange Pool to accept or recognize for exchange a cylinder belonging to another member. Sub regulation (7) is to the effect that a person desirous of joining membership of the LPG cylinder Exchange Pool, has to make an application to the Commission to be accompanied by evidence of ownership of a minimum of 5,000 cylinders of a particular brand conforming to KS.20- - 200- or unified values for liquefied petroleum Gas cylinders for domestic use – specifications, have a valid license from the Commission and evidence of adherence to Ks 06-896 on the specifications for periodic inspection, testing and maintenance of transportable gas containers.

32. Regulation 14 has been criticized on a number of grounds, including being discriminatory in violation of Article 27 of the constitution, lack of public participation, inclusiveness, transparency, accountability and that it is non- democratic. The impugned regulation establishes a pool for purpose of making it easier for consumers to exchange cylinders as well as acceptability of cylinders among marketing companies. I do not see any unconstitutional effect in the establishment of the pool.

33. Regarding the membership, it is clear that there were to be drawn from the Ministry responsible, the Kenya Bureau of Standards and marketing companies. The Ministry represents policy issues, Kenya Bureau of Standards, quality and standards, while those from the marketing companies represent the industry. The regulation makes room for one to apply to join the pool but has to meet certain capacity requirements as well as standards in terms of ability to deal on the products.

34. This, in my view, cannot be deemed to be discriminatory or non-inclusive. One has to appreciate that this is a sensitive sector with many challenges hence it requires fairly strict controls for the benefit of the people. Article 27 of the constitution prohibits discrimination in absolute terms. However for it to be unconstitutional, the act must result into unjustified discrimination. Keeping out those who have no ability to carry out business in LPG cylinders for the sake of standards and safety, is in my view, permissible discrimination. Moreover, this is private entrepreneurship and anyone who wants to take part in it has the right to apply in terms of regulation 14(7) and (8) so long as he/she meets the requirements.

35. The fact also that one cannot take part in the business of filling and wholesaling LPG in cylinders unless that person is a member of the pool is in my considered view, justifiable. This is because the pool is to facilitate recognition and exchange of cylinders among the members. If one is not a member of the pool and without being a signatory to the agreement that was developed by the Committee among the marketing companies, it would make it difficult to participate in the exchange programme that the pool was to come up with.

36. In that case, it is not every provision which appears on the face to be constitutional that must be declared so. The court has a duty to read a provision to conform with the constitution and only declare unconstitutional that which it must. The court must also take into account public policy; safety and well-being in considering whether or not to declare a provision unconstitutional.

37. In the circumstances, I am unable to agree with the petitioner that the impugned regulations are constitutionally invalid. Consequently this petition is declined and dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of January 2019**

**EC MWITA**

**JUDGE**