



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CONSTITUTION PETITION NO 4 OF 2016

SKYMATT SUPERMARKET LIMITEDPETITIONER

AND

ENERGY REGULATORY COMMISSIONRESPONDENT

JUDGMENT

In its petition dated 13/6/2014 the petition prays for the following reliefs;

- a) Declaration that the purported inspection and subsequent sealing of the petitioners services station was not proper or procedural.**
- b) A declaration that the respondent's direction to the Kenya Revenue Authority was without any legal basis and threatens the petitioners social and economic right guaranteed under article 43(1) of the constitution.**
- c) A declaration that the respondents directive to the Deputy Commissioner to cancel its license without giving the petitioners a hearing violates the petitioner's right to fair administrative action guaranteed under article 47(1) of the constitution.**
- d) Costs of this petition.**

The respondent on its part raised several issues denying that the petitioner was entitled to the orders sought and that there were no constitutional rights of the petitioner breached. The affidavit of one Festus Gitonga the petitioner'S director supported the petition. He averred that the Petitioner runs a petrol station on a retail basis under the name and style of Mogas Kitale service station. That on 14/4/16 it purchased 10,000 litres of diesel from the Kenya pipeline depot at Eldoret worth Kshs 682,000. That on the same date the respondent agents took samples from its diesel pumps for analysis and concluded that it had been adulterated. They then proceeded to close the petrol station and advised the Kenya Revenue authority to impose stiff penalties against it. It also advised the Deputy county commissioner Trans Nzoia West sub county to suspend the petitioner's petrol retail Petroleum license. The petitioner argued that the said action by the respondent was unmerited and was not given adequate notice to respond and that it breached several articles of the constitution especially on Economic and Social Rights. It argued that its freedom to work and operate business was breached and it was not granted the right to be heard.

On its part the respondent vide the replying affidavit of one Edward Kinyua sworn on 22/6/2016 averred that truly the respondent through its agents M/S Kenya Bureau of Standards and SGS Kenya Ltd and barked by the Energy Act No. 2/2006 (Cap 314 Laws of Kenya) undertook a routine inspection of the petrol station. Samples from the diesel pumps were taken at the petitioners station and when analysed were found to contain some chemical which confirmed of adulteration. Under the relevant provisions of

the Act it proceeded to order the closure of the petrol station.

He further deposed that all the while the petitioners director was present from the taking of samples as well as closure of the station.

The said affidavit has attached the analysis from SGS Kenya Ltd as well as letter of apology from the dealer, Mogas Kenya Ltd dated 10/5/2016 which further cancelled the petitioners operation and the fact that it had paid penalty as demanded by KRA.

The above assertions were not disputed by the petitioner including the fact that it was not longer dealing with the station as his dealership had been cancelled by Mogas Ltd.

I have perused the entire pleadings as well as the submissions herein. I would agree with the respondent that the entire petition has been overtaken by events since as it standards now the issue is between the petition and Mogas Ltd. However it is still worthwhile to interrogate whether there was any merit in the petition. The petitioner had already acknowledged that it had a contract agreement with Mogas Ltd to run the station. The respondent on the other hand seemed to have been carrying out its routine statutory obligations as provided under the Energy Act. Can a statutory entity carrying out its obligations be deemed to have breached any provisions of the conclusion? I do not think so. The respondent using its servants as well as SGS Kenya Ltd and KRA simply proceeded to carry out its obligation. It found out that the fuel was adulterated, a fact not denied by the petition. How then did it breach a constitutional provisions? What was it supposed to do if not to protect the wider public, the consumers of the fuel products sold by the Petitioner?

Dressing everything under the title “Breach of Fundamental Constitutional Rights,” in my view does not wash. Some contractual obligations like those expected between the petitioner and Mogas Ltd cannot be termed Constitutional provisions. More importantly, the respondent is the defender of Public good and weight against the interest of the petitioner, it was imperative that the steps it took were in accord with its statutory obligations. Nor do I find any of the enumerated constitutional Provisions breached. It is now trite law that any breach of the Constitutional provisions ought to be clearly established. Mere narration as in this case in my view are abuse of the courts process. It would have been reasonable and arguable for the petitioner to file a normal civil suit against the respondent as was clearly stated in the now famous case of *Anarita Karimi Njeru Vs Republic (1979) eKLR* where the court said;

“we would, however again stress that if a person is seeking redress from the High court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.....”

Clearly in this petition there is no breach of any constitutional provisions at all proven by the petitioner. All the respondent did was exercising its statutory mandate. If the petitioner was aggrieved it should have filed a normal suit. Needless to say, the petitioner fully participated in the process as one can deduce from the paper trail on record which were copied to it.

In the premises and without touching on the other issues raised by the respondent in particular I do find the petition unmeritorious for not only having been overtaken by events but fundamentally no provisions of the constitution were breached by the respondent.

The same is hereby dismissed with costs to the respondent.

Delivered this 15th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Waweru for the Petitioner

No appearance for the Respondent

Kirong – Court Assistant