

**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE’S COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO. E1477 OF 2022**

EASI COOKING GAS LIMITED.....PLAINTIFF

**VERSUS**

CLIVE CETEWAYO MUTISO.....1<sup>ST</sup> DEFENDANT

ANTI-COUNTERFEIT AUTHORITY.....2<sup>ND</sup> DEFENDANT

INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> DEFENDANT

ENERGY & PETROLEUM REGULATORY AUTHORITY.....4<sup>TH</sup> DEFENDANT

INDEPENDENT GAS DEALERS ASSOCIATION OF KENYA.....INTERESTED PARTY

**RULING**

**BACKGROUND**

Vide the plaint dated 10<sup>th</sup> March 2022 the plaintiff sought for the following reliefs;

- i. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves, officers, agents, servants, or any person acting under that office from entering into the business premises of the plaintiff, impounding, searching, locking up, or seizing Liquefied Petroleum Gas cylinders , or impounding motor vehicles of the plaintiff or its customers or anything else from the plaintiff’s business premises and/or causing any nuisance, harassing, intimidating, or in any manner interfering with the plaintiff’s business.
- ii. General damages for trespass.
- iii. Costs of the suit.
- iv. Any other relief the court may deem fit to grant.

Simultaneous with the suit, the plaintiff filed the Notice of Motion Application dated 10<sup>th</sup> March 2022 in which they sought for interim order of injunction similar to the one sought in the main suit save that it be limited to the hearing and determination of the application and subsequently, the main suit.

The 2<sup>nd</sup> defendant filed the Preliminary Objection dated 23<sup>rd</sup> May 2022 raising the following points of law;

- i. This court lacks the requisite subject matter jurisdiction
- ii. This court lacks the requisite jurisdiction to issue the orders sought in the plaint and the Notice of Motion application.

The Preliminary Objection was disposed of by way of written submissions. Only the plaintiff, the 2<sup>nd</sup> defendant and the 4<sup>th</sup> defendant filed their submissions. The plaintiff's submissions are dated 4<sup>th</sup> July 2022, the 2<sup>nd</sup> defendant's submissions are dated 9<sup>th</sup> June 2023 while the 4<sup>th</sup> defendant's submissions are dated 14<sup>th</sup> June 2023.

I do not wish to reproduce the submissions by each party in this ruling. I will only highlight the position taken by each party.

The plaintiff vide their submissions reproduced the averments in their pleadings and urged that on the strength of the issues raised in the pleadings, the Preliminary Objection be dismissed and the matter do proceed before this court. Several decided cases were cited to support the position.

The 2<sup>nd</sup> defendant who raised the Preliminary Objection addressed themselves to two limbs of the issue of jurisdiction. The first one was from Constitutional perspective. They argued that the issues raised by the plaintiff in the pleadings are constitutional in nature and which this court lacks jurisdiction to entertain. They relied on the provisions of Articles 23 and 165 of the Constitution of Kenya 2010, which confer jurisdiction on the High Court to hear and determine matters related to violation, denial or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. That the issues also relate to the Fair Administrative Act and cannot

be handled by this court. Counsel submitted that the court cannot grant an injunction against the Government under Order 29 Rule 2(d).

The second limb of the defendant's argument was the doctrine of exhaustion which dictates that where there is an administrative remedy under a statute, then a claimant must first seek relief from the relevant administrative body before judicial intervention. To this end the 2<sup>nd</sup> defendant urged that the plaintiff having admitted to have been registered by the Energy and Petroleum Regulatory Authority, ought to have sought redress before the Energy and Petroleum Tribunal which has original civil jurisdiction in disputes arising from the Energy Act, 2019. Similarly, several decided cases were cited to support the position.

The 4<sup>th</sup> defendant on their part submitted that the Section 25 of the Energy Act, 2019 establishes the Energy and Petroleum Tribunal which is mandated to hear and determine disputes and appeals arising from the energy and petroleum sectors. Section 36 of the same Act provides for the jurisdiction of the Tribunal. The plaintiff being a Licensee of the 4<sup>th</sup> defendant and the nature of the allegations against the 4<sup>th</sup> defendant's constitute an appeal against the 4<sup>th</sup> defendant's action or in-action. That the plaintiff is the Licensee while the 1<sup>st</sup> and 2<sup>nd</sup> defendants are third parties hence the dispute should be handled by the Tribunal. They submitted that the plaintiff had not exhibited any special circumstances that could warrant the invocation of the jurisdiction of the court. That the plaintiff came to court before exhausting the alternative remedies available to them. They cited a number of decided cases to buttress their argument.

## **ANALYSIS AND DETERMINATION**

The Black's Law Dictionary 11<sup>th</sup> edition defines a preliminary objection as follows;

***“In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”***

It is trite law that a Preliminary Objection must raise pure points of law or matters which are not subject to adduction of evidence. The most prominent point of law that falls within the ambit of a Preliminary Objection is jurisdiction.

In the celebrated case of Owners of the Motor Vessel “Lillian S” – v – Caltex Oil (Kenya) Ltd [1969] KLR, Nyarangi JA held, inter alia as follows;

***“.....Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

It is not in dispute that the plaintiff is registered by the 4<sup>th</sup> defendant under License Number EPRA/LPG/10088 to carry out the business of storage and filling of Liquefied Petroleum Gas (LPG) cylinders (**EASI BRANDED CYLINDERS ONLY**) as per the License.

It is alleged that on 5<sup>th</sup> February 2022, the 1<sup>st</sup> and 2<sup>nd</sup> defendants with the assistance of the 3<sup>rd</sup> defendant’s officers raided the plaintiff’s business premises and seized several LPG cylinders. According to the plaintiff, the actions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were unjustified, illegal and unlawful as they were not sanctioned by the 4<sup>th</sup> defendant as the Statutory body mandated to regulate the business hence the suit now before court.

The issue for determination is whether the claim by the plaintiff amounts to a dispute subject to the jurisdiction of the Energy and Petroleum Tribunal.

Under Section 11 of the Act, the Energy and Regulatory Authority has among others, the power to issue, renew, modify, suspend, or revoke licenses and permits for all undertakings and activities in the energy sector.

Section 25 of the Act establishes the Energy and Petroleum Tribunal whose jurisdiction is outlined under Section 36 of the Act as follows;

***“1. To hear and determine all matters referred to it, relating to the energy and petroleum sector arising under the Act or any other Act.***

***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 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 the power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.”**

Section 37 (2) of the Act goes on to provide that judgements and orders of the Tribunal shall be executed and enforced in the same manner as judgements and orders of a court of law while Sub-section 3 thereof provides that any person aggrieved by a decision of the Tribunal may, within 14 days from the date of the decision or order, appeal to the High Court.

The reliefs sought by the plaintiff in their plaint are as follows;

- i. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves, officers, agents, servants, or any person acting under that office from entering into the business premises of the plaintiff, impounding, searching, locking up, or seizing Liquefied Petroleum Gas cylinders , or impounding motor vehicles of the plaintiff or its customers or anything else from the plaintiff’s business premises and/or causing any nuisance, harassing, intimidating, or in any manner interfering with the plaintiff’s business.
- ii. General damages for trespass.
- iii. Costs of the suit.

To my mind the prayers sought in the plaint and even the application fall within the purview of reliefs grantable by the Tribunal upon consideration of the dispute as presented.

I concur with the 2<sup>nd</sup> and 4<sup>th</sup> defendants’ position that the plaintiff has acted in contravention of the doctrine of exhaustion which has a Constitutional and Statutory underpinning. I am also in agreement with the 4<sup>th</sup> defendant’s contention that the plaintiff failed to demonstrate any special circumstances that could justify the invocation of the court’s jurisdiction. The plaintiff did not plead any steps he had taken in seeking redress from the Tribunal which were frustrated by either the Tribunal or the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants. To my mind, such frustration from the

relevant Statutory bodies could have amounted to special circumstances to warrant the court's intervention. The plaintiff came to court without first pursuing that alternative which ought to be the first point of call.

Lastly, I reject the 2<sup>nd</sup> defendant's contention on the Constitutional and Administrative imperatives of the issues raised in the plaintiff's pleadings. A look at the pleadings illustrate a civil claim capable of being adjudicated over by the Tribunal. If that argument is sustained, then even the Tribunal will have no jurisdiction. The plaintiff did not seek to revoke the decision of the Authority or challenge their action neither did they plead any Constitutional remedy. Thirdly, I also reject the argument that the plaintiff cannot seek an injunction against the Government. Section 3 of the Counterfeit Act which establishes the 2<sup>nd</sup> defendant (Anti-Counterfeit Authority) makes it a body corporate with a common seal and perpetual succession capable of suing and being sued. As such an order of injunction, where demonstrated as deserving, can be issued against them.

The upshot of the above analysis is that the Preliminary Objection dated 23<sup>rd</sup> May 2022 is upheld. The plaintiff's suit is before the wrong forum and it is struck out for want of jurisdiction.

This file is as a consequence marked as closed.

It is so ordered.

Dated at Isiolo this 29<sup>th</sup> day of May 2023.

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**E. TSIMONJERO**

**SENIOR RESIDENT MAGISTRATE**

Judgement delivered via email on this 29<sup>th</sup> day of May 2023.

**Court Assistant: Hawa**

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**E. TSIMONJERO**

**SENIOR RESIDENT MAGISTRATE**