THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 048 OF 2014

FUELEX UGANDA LIMITED:::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

THE ATTORNEY GENERAL
THE MINISTER OF ENERGY &
MINERAL DEVELOPMENT **::::: RESPONDENTS**
THE COMMISSIONER, PETROLEUM
SUPPLY DEPARTMENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

This is an application for Judicial Review. It was filed by Fuelex Uganda Ltd represented by M/s Birungyi, Barata & Associates who were later joined by M/s Tumusiime, Kabega & Co. Advocates, against three respondents to wit the Attorney General, the Minister of Energy and Mineral Development and the Commissioner Petroleum Supply Department, all represented by the Attorney General.

The Notice of Motion is brought under SS. 41 and 42 of the Judicature Act and Rules 3, 2, and 6 of the Judicature (Judicial Review Rules 2009. The reliefs sought in the application are:

1. A declaration that the decision of the Commissioner Of Petroleum Supply Department of 16th April 2014 revoking the Applicant Petroleum License was irregular and unlawful.
2. A declaration that the Commissioner Petroleum Supply Department is in any event obligated to comply and follow the four step penalty process prescribed by the Petroleum (Marketing and Quality Control) Regulations under which proven offences are to be dealt with.
3. A declaration that the decision of the Commissioner Of Petroleum Supply Department of 16th April 2014, revoking the Applicant Petroleum Operating License was irregular, unlawful, high handed and unfair.
4. A declaration that the applicant was not afforded a hearing and that the lack of a fair hearing made the actions of the respondent unfair and unlawful.
5. An order of certiorari quashing the decision of the Commissioner Petroleum Supply, Department of 16th April 2014 revoking the Applicant Petroleum License.
6. Costs of the suit.

The Notice of Motion is supported by the affidavit of one Jane Rugambwa the Country Manager of the applicant company from which the grounds of application can be deduced as follows:

1. The applicant company carrying out the business of petroleum import and trading have been issued a petroleum operating license and trading under the name and style of “FUELEX”.
2. On 7th March 2014, the Commissioner Petroleum Supply Department in Ministry of Energy and Mineral Development made a decision that the applicant was smuggling fuel and had evaded taxes. The Commissioner published the said letter in the New Vision Newspaper of 11th March 2014 subsequently served the same on to the applicant.
3. On 18th March 2014 the applicant through its lawyers appealed the decision of the Commission to the Minister of Energy and Mineral Development under S. 41 of the Petroleum Supply Act on grounds of bias, discriminative treatment and harassment; procedural irregularity in arriving at that the conclusions and decisions made condemning the applicant without a hearing.
4. On 16th April 2014 the Minister of Energy and Mineral Development served upon counsel for the applicant a letter advising that it completes the process before the commissioner and then make a further appeal if necessary to the Minister.
5. On the same day, the commissioner instead made a further decision against the applicant terminating the applicant’s Petroleum Operating License with effect from 2nd May 2014.
6. That the decision was irregular, unfair and wrongful as it was biased, discriminative in treatment and amounted to harassment, and was procedurally irregular in arriving at the conclusions and decisions made and condemning the applicant without a fair hearing and skipping the four step penalty process.

7. That the applicant has never been charged with an offence under the Petroleum Supply Act or any regulations made there under nor has it been tried and/or found guilty of any offence thereunder.

In respondents' affidavit in reply sworn by Rev. Justaf Frank Tukwasibwe a Commissioner of Petroleum Supply, the background information was given about the reason for revocation of the applicant's license. That it was preceded by a receipt of reports from one Peter Kitimbo the Field Supervisor of the Fuel Marking and Quality Control Program that the applicant's staff at Lweza refused and/or declined to witness, sign or accept any document served on them in line with the field monitoring procedures. That upon receipt of the reports, the deponent issued a Default Notice to the applicant in conformity with the provisions of the Petroleum Supply Act of 2003 and Regulations made thereunder requiring the applicant to remedy and/or mitigate the default within a period of 30 days from the date of notice. The applicant's Manager at Lweza on 10th March 2014 refused to acknowledge receipt of the default notice upon which the deponent opted to effect service of the default notice through the New vision Newspaper. That this notice was procedural and not a decision and the timelines lapsed without receipt of the required response from the applicant. Following the failure of the applicant to respond to the notice within 30 days and/or a repeat of the defaults the commissioner made a decision to revoke the applicant's license No. MEMD/POL/0205 and MEMD/POL/0206. That the said decision was regular, fair, devoid of any bias, none discriminative and lawful.

The commissioner further depones that the publication of the default notice in the media on 11th March 2014, was issued in good faith. That the applicant refused and/or defaulted to respond to the contents of the default notice as required by law.

At the hearing of the application, court allowed respective counsel to file written submissions in support of their respective cases.

I have considered the said submissions, the law applicable and the case authorities cited for my assistance. In resolving this application, I will start with what appears to be a preliminary point of law raised by Mr. Bafirawala learned counsel for the respondents as to whether the second and third respondents are proper parties to this application. Learned counsel for the applicant did not address this issue in their submissions. Upon consideration of the submissions by Mr. Bafirawala, I was in agreement with him that it is a general rule that a party to a suit must be a person capable in law of either suing or being sued. A party is a technical term which refers to those persons for whom a legal suit is brought whether in law or in equity and it means the plaintiff or defendant or applicant or respondent. There could as well be interested persons who are not necessarily parties to given suits.

In the instant case, the second and third respondents do not qualify to be parties to this suit in view of the clear provisions of Article 250 (1) (2) of the Constitution of Uganda which provides that:

"250(1) where a person has a claim against the Government, that claim may be enforced as a right by proceedings taken against Government for that purpose.

(2) Civil proceedings by or against Government shall be instituted by or against the Attorney General and all documents required to be served on the Government for the purpose of or in connection with those proceedings shall be served on the Attorney General."

Both the second and third respondents are not legal persons capable of suing and or being sued in law in view of the above clear constitutional provisions. For all intents and purposes, these proceedings are suit. A suit is defined in S. 2 of the Civil Procedure Act to mean proceedings commenced in any manner prescribed.

In the instant case, the Minister of Energy and Mineral Development and the Commissioner Petroleum Supply Department were wrongly sued because the decision complained of was a governmental decision. Therefore the first respondent the Attorney General is the appropriate respondent under S. 10 of the Government Proceedings Act. I wholly agree with the decision by my brother Justice Musoke - Kibuuka J. in **Peter & Vs The Permanent Ministry of Lands, Housing and Urban Development, Misc. Cause No. 78 of 2009** wherein he commented thus;

"Court thinks that the emerging practice whereby litigants in Judicial Review proceedings tend to present any non-persons as respondents to applications is wrong. Of course court can issue a Judicial Review Order against non-legal entity. That is clearly part of the essence of the objective of the supervisory jurisdiction of the High Court to ensure that the machinery of government operate in a proper manner. But that should not mean that non-legal entities should be parties to Judicial Review proceedings. The law requiring that only legal entities may be parties to civil proceedings -------- remains in place in all instances of civil proceedings, Judicial Review inclusive."

I will consequently strike out the second and third respondents with costs.

I will go ahead and decide the main application. As rightly alluded to by respective counsel, the remedy for Judicial Review is not concerned with the merits of the decision complained of but rather the decision making process itself. The purpose is to ensure that the individual is given a fair treatment by the authority to which he has been subjected. In order to succeed in an application for Judicial Review the applicant has to show that the decision or act complained of is tainted with illegality,

irrationality and procedural impropriety. ***Twinomuhangi Vs Kabale District and ors. [2006] HCB Vol.1 130, 131.***

In the instant application, the applicant is challenging the process leading to the cancellation of its license. That the process flouted the law and the rules of natural justice.

From the facts before me it is apparent that the cancellation of the applicant's license followed the issuance of a default notice. This procedure is provided for under Regulation 16 of the Petroleum Supply (General) Regulations of 2009. The relevant portions of Regulations 16 (1) (2) thereof is as follows;

> ***"16, suspension or revocation of permit or license***
>
> ***(1) The commissioner may in accordance with Section 23(a) and (b) of the Act suspend or revoke a permit or license issued under these regulations where the holder:***
>
> > ***(a) fails to comply with the terms and conditions of permit or license in particular, those concerning.***
> >
> > ***(i)----------***
> >
> > ***(ii) ----------***
> >
> > ***(iii) ----------***
> >
> > ***(iv) ----------***

(v) Adulteration of petroleum products.

(vi). Smuggling.

(vii) ---------- or

(viii) tax invasion.

(b) ----------

(c) Violates in a material respect, any provision of the Act or other written law concerning the protection of fair competition and a free petroleum product market; or

d) Repeatedly fails in any material respect to comply with any other requirement of the Act or fails to remedy or mitigate previous failures contrary to the orders issued by the commissioner or any authorized authority under the Act.

(2) The commissioner shall not suspend or revoke a permit or license on a ground referred to in sub-regulation (1) unless

> ***(a) the commissioner has served on the holder of a permit or license a default notice specifying the grounds on which the permit is liable to be suspended or revoked.***

(b) The holder has failed within a period of thirty days from the date from which the default notice was served or such other period as the commissioner may allow, to remedy the default specified or, where the default is not capable of being remedied, has failed to offer in respect of the default reasonable compensation or mitigation; or

(c) the matter has been referred to the Committee for its advice."

From the wording of the above regulations and as rightly submitted by learned counsel for the respondent, it is correct to contend that the Commissioner Petroleum Supply Department is mandated by law to suspend or revoke a permit or license after issuance of a default notice to a holder of a license or permit. Issuance of a default notice is just part of the procedural step towards suspension of the license. The function of the default notice is to notify the license holder about the grounds on which the license is liable to be suspended and require the license holder to put in place remedial measures to rectify the default pointed out within a period of 30 (thirty) days.

According to the evidence on record contained in the affidavit in reply by Rev. Justaf Frank Tukwasibwe, it was averred that the applicant was trading in unmarked petroleum products at

Lweza, Ntungamo and Kasese in the levels of 98%, 95%, and 61% respectively which amounted to dumping and/or tax invasion. That during the monitoring exercise the staff of the applicant station at Lweza refused and/or declined to witness, sign or accept any document in line with the field monitoring procedures. The applicant was required to remedy and or mitigate the default within a period of 30 days from the date of the default notice. But the Applicant's Manager at Lweza refused to acknowledge receipt of the default notice on 10th March 2014 which prompted the respondent to publish the default notice in the press that is the New vision Newspaper of 11th March 2014. When the default notice lapsed the Commissioner tasked the Fuel Marketing and Quality Control Program to avail him with the latest report on the state of affairs at the applicant's retail network and the report revealed that the default were still persisting. This prompted the Commissioner to revoke the applicant's license. This evidence has not been challenged by the applicant. Nowhere has the applicant suggested or denied that it was not in possession of unmarked petroleum products contrary to the provisions of the Petroleum (Marking and Quality Control) Regulations, Statutory Instrument 56 of 2009.

I agree with the learned counsel for the respondent that the default notice issued by the commissioner and published in the print media was not a decision within the meaning of Regulation 16 of the Petroleum Supply (General) Regulations but rather a procedural mechanism set out by law to control petroleum

products dealers. How a decision of the commissioner is reached is set out in S. 41 (1) of the Petroleum Supply Act of 2003. It is reached after the holder of a license or permit was served with a default notice and has failed within 30 days to remedy the default.

In the instant case the procedure through which the right to be heard is provided in the law and the regulations applicable to dealers in the petroleum products. It is a specialized procedure unlike that which applies to ordinary violations. In this case, upon receipt of the default notice as published in the New Vision of 11th March 2014 after the applicant refused service, the applicant ought to have complied with the time limits set out in the default notice which is a replica of Regulations 16 (2)(b) of the Petroleum Supply (General) Regulations. This was the opportune moment that the applicant had to explain whether or not it was in default as established by the monitoring team from Uganda National Bureau of Standards (UNBS) and the Ministry of Energy and Mineral Development and if so to remedy the default. Instead the applicant neglected, refused, and/or defaulted in this respect. The applicants were aware of this requisite procedure but instead of observing the statutory time limits set out in the Petroleum Supply (General) Regulations as contained in the default notice, it chose to prematurely apply for administrative review to the Minister of Energy and Mineral Development pursuant to S. 41 of the Petroleum Supply Act 2003. Indeed the Minister correctly advised the applicants on

the steps the applicant should have taken to remedy the situation. This communication is comprised in annexture 'C' to the application and annexture 'I' to the affidavit in reply and I will quote the relevant text:

> ***"I have studied your request for administrative review and default notice together with the relevant laws and the following are my observation and responses:***
>
> ***As you will learn, the default notice (in accordance with Section 16 (2)(a) & (b) of the Petroleum Supply (General) Regulations, 2009 is part of the decision making process in the event a license holder's failure to comply with set laws, regulations, and license terms and conditions.***
>
> ***The default notice was intended to notify you of the defaults identified at your facilities following regular monitoring and inspection of the quality of fuel on the market. Scientific data gathered as a result of fuel testing revealed non-compliance with set standards contrary to set laws and regulations.***
>
> ***Further, the default notice was intended to give you an opportunity to remedy the defaults within the time frame prescribed by the Commissioner, failure for which, the Commissioner would then proceed to make a decision. I am hoping that you are taking the necessary steps to remedy the said defaults within the prescribed time frame.***

Also note that your request for judicial review from me is misplaced as judicial review in this matter lies with the High Court. For further information on this please refer to Section 42 of the Petroleum Supply Act 2003.

It is my opinion therefore that the commissioner be given opportunity to comply with the procedural fairness to enable him reach a decision in regard to the issue at hand.

In the event that you are dissatisfied with the decision therefrom, you may apply for administrative review from me under Section 41 of the Petroleum Supply Act.

Premised on the above, I am inclined to disallow your request for administrative review at this point in time on the basis that your request is prematurely brought.

Signed.

Eng Irene Muloni (MP)

MINISTER OF ENERGY & MINERAL DEVELOPMENT.

After the commissioner had finalized his role and reached a decision, the applicants ought to have invoked S. 41 of the Petroleum Supply Act 2003 which provides that:

> ***"41(1) Any person aggrieved by any decision of the commissioner or any officer authorized by the commissioner may within twenty one days after being notified of the decision request in writing an administrative review of the decision by the Minister.***
>
> ***(2) The Minister may within forty five days after receipt of the request for administrative review under this section confirm, set aside or vary the decision complained of.***
>
> ***(3) The Minister shall give reasons in writing for his or her decision on review under this section."***

Since the first application to the Minister for review of the decision of the commissioner was premature and the Minister referred the applicant back to the commissioner, then after the commissioner's decision, the applicant ought to have invoked S.41 of the Act and asked the Minister to review the Commissioner's decision.

In this case, the applicant did not refer the decision of the commissioner to suspend its license to the Minister for review

but instead they prematurely filed this application. This application ought to have been filed under S. 42 of the Petroleum Supply Act 2003 which provides that any person aggrieved by the rejection by the Minister of a request for administrative review under S. 41 or any direction or order by the Minister under the Act or any other act or admission by the Minister under the Act may within thirty days after receipt of notification of the act or decision complained of, or if the Minister fails to decide on an administrative review, within thirty days after the expiration of the period prescribed in Sub-section 2 of Section 41 apply to the High Court for Judicial Review.

In the instant case, alternative remedies existed for the applicant to explore before filing for judicial review. It was held in the case of ***R Vs Chief Constable of Mersevside Police Ex-parte Calveby & others [1986]1 All ER 257 at 263*** per Lord May L.J that:

> ***"I respectfully agree to the divisional court that the normal rule in cases such as this is that an applicant for Judicial Review should first exhaust whatever other rights he has by way of appeal."***

Similarly in ***Preston Vs IRC [1995] 2 All ER 327 at 330*** which was quoted with approval by Bamwine. J. (as he then was) in ***Micro Care Insurance Limited Vs Uganda Insurance***

Commission Misc. Application No. 0218 of 2009, Lords Scarman said:

> ***"My fourth position is that a remedy by way of Judicial Review is not available where an alternative remedy exists. This is a position of great importance. Judicial review is a collateral challenge; where parliament has provided appeal procedures, as in the taxing state, it will only be very rarely that the court will allow collateral process of Judicial Review to be used to attack an appealable decision."***

In the instant case, the law provides a procedure an aggrieved party by the decision of the commissioner must follow. The applicant has not pleaded that the remedy available is not adequate or shown any other sound reason not to have followed that procedure. The right procedure in this case was for the applicant to appeal to the Minister in the prescribed time before resorting to Judicial Review which is a discretionary remedy. Opting for Judicial Review as of course has to be discouraged and is wrong.

That notwithstanding, had the application been properly filed, I would find that it was within the mandate of the commissioner to decide the way he did after the applicant had failed to comply with the requirement of the default notice in the prescribed

time. The commissioner’s decision was not irregular, irrational, unlawful and unfair and or high handed, the commissioner dully complied with all the statutory steps before reaching a decision to revoke the applicant’s license.

Under S. 23 of the Petroleum Supply Act, a permit or license may be suspended by the commissioner where there is contravention of the provisions of the Act or any other enactment concerning the protection of occupational health, public safety, and the environment or for any other reasons stated or under the Act. The permit or license may be revoked by the commissioner where the holder fails to remedy or repeats any contravention of any provisions of the Act and regulations made under the Act concerning the protection of occupational health, public safety and the environment or any other reasons specified by or under the Act.

This is what the commissioner did as mandated. The applicants forfeited their right to be accorded a hearing when they ignored the default notice and they prematurely appealed to the Minister.

In the final analysis and for the reasons I have given in the ruling, I will order that this application be and is hereby dismissed with costs.

Stephen Musota

J U D G E

26.08.2014