



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT ATMERU

MERU ELC CASE NO. 163 OF 2014

FORMERLY NAIROBI ELC NO. 1330 OF 2014

MOHAMUD ILTARAKWA KOCHALE.....1ST PLAINTIFF
KOCHALE SOMO CHALE.....2ND PLAINTIFF
ISSA JITEWE GAMBARE.....3RD PLAINTIFF
DAVID TOMASOT ARAKHOLE.....4TH PLAINTIFF
WILLIAM LENGOYIAP.....5TH PLAINTIFF
SEKOTEY SEYE.....6TH PLAINTIFF

VERSUS

LAKE TURKANA WIND POWER LTD.....1ST DEFENDANT
MARSABIT COUNTY GOVERNMENT.....2ND DEFENDANT
THE ATTORNEY GENERAL.....3RD DEFENDANT
CHIEF LAND REGISTRAR.....4TH DEFENDANT
THE NATIONAL LAND COMMISSION.....5TH DEFENDANT
AARON ILTELE LESIANNTAM.....1ST INTERESTED PARTY
HENRY PARASIAN SAKALPO.....2ND INTERESTED PARTY
STEPHEN NAKENO.....3RD INTERESTED PARTY
JOB LMALSIAN LENGOYA.....4TH INTERESTED PARTY
DAIR LENTIPAN.....5TH INTERESTED PARTY

(suing on behalf of the residents of Laisamis Constituency and Karare Ward Marsabit County)

RULING

1. This is a ruling on the plaintiffs' application for contempt of court dated 25 August 2018 against the 1st defendant. The court has considered the Plaintiffs' notice of motion dated 25 April 2018 brought under sections 1A, 1B, and 3A of the Civil Procedure Act (Cap. 21), Order 51 of the Civil Procedure Rules, Sections 3, 4 (1), 5 (b), 27(b), (k), 28, 29 and 30 of the Contempt of Court Act, 2016 and all enabling provisions of the law for contempt of court. By the said application, the Plaintiffs sought to have the 1st Defendant and its directors punished for alleged contempt of the orders made on 22 October 2014 and extended on various dates thereafter.

2. The application was supported by the supporting affidavit sworn by the 6th Plaintiff, SekoteySeye, on 25 April 2018 and his further affidavit sworn on 26 April 2018 and the various exhibits thereto. It was contended that the 1st Defendant had wilfully violated the various court orders which restricted its project activities to 87.5 acres out of the suit property. The Plaintiffs contended that the 1st Defendant had exceeded that portion and utilized about 39,912.5 acres in violation of the various court orders. Copies of various court orders and photographs depicting some of the developments and installations on the suit property in support of the application were proffered.

3. The 1st Defendant filed a notice of preliminary objection dated **22August 2018** stating that the application was fatally defective for failing to name each of its directors in the application. The 1st Defendant also filed a replying affidavit sworn by RizwanFazal on 22 August 2018 in opposition to the application. It was contended that there was absolutely no evidence on record to demonstrate the alleged contempt and that the photographs and orders exhibited did not demonstrate that the 1st Defendant had exceeded the acreage of 87.5 acres. The 1st Defendant exhibited a copy of a report from its geospatial experts known as Ramani Geosystems which indicated that the area utilized by the project was only 82.6 acres as at 2017 which was well below the allowed acreage. The court was consequently urged to disallow the application.

4. Although there were no orders sought against the 2nd Defendant in the application, it filed a replying affidavit on 10 April 2019 in response thereto. The said affidavit was objected to by the Interested Parties on the basis that it had been filed out of time and without leave of court. It was further contended that it was filed long after the 1st and 2nd Defendants had closed their respective cases hence its admission would be prejudicial. By a ruling dated and delivered on 21 January 2020 the court upheld the objection and consequently struck out the said replying affidavit.

5. The record shows that the Plaintiffs filed their written submissions dated 28 March 2019 on 29 March 2019 whereas the 1st Defendant filed its submissions dated 22 August 2019 on 23 August 2019. The record further shows that the concerned parties highlighted their respective submissions on 2 January 2020.

6. The court has considered the said application, the response thereto as well as the submissions of the parties. The court is of the opinion that the main question for determination is whether or not the contempt alleged on the part of the 1st Defendant has been proved to the required standard. The court fully concurs with the Plaintiffs' contention that court orders must be obeyed by all concerned persons who are legally bound by them. The court also agrees with the Plaintiffs that all contemnors must be punished. However, before an alleged contemnor can be punished the contempt must be proved against him to the required standard.

7. The standard of proof in such proceedings was articulated by the Court of Appeal in the case of **Mutitika v Baharini Farm Limited [1985] KLR 227** as follows:

'...We agree with Mr. Khaminwa's submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature...'

8. So, what evidence did the Plaintiffs tender to demonstrate the alleged contempt on the part of the 1st Defendant? The only evidence which was availed by the Plaintiffs in a bid to demonstrate that the 1st Defendant had exceeded the acreage of 87.5 consisted of copies of several court orders and photographs of some developments and installations on part of the suit property. The photographs did not indicate the size of the suit property covered by the developments. There was no surveyor's or other expert's report which was tendered to indicate the area under development. On the other hand, the 1st Defendant exhibited a copy of a report from geospatial experts indicating that the area under development was approximately 82.6 acres. In the absence of a report to the contrary or a more authoritative report, the court is inclined to accept the 1st Defendant's report and evidence as representing the situation on the ground.

9. The court does not accept that the 1st Defendant's evidence at the trial that 40,000 acres was required for the project whereas 110,000 acres was required as a buffer zone as evidence of the alleged contempt. The court also declines the Plaintiffs' invitation to undertake a mathematical calculation of the area covered by each wind mill and multiply it by the number of turbines. The burden of proof lay with the Plaintiffs hence it was their duty to secure competent experts to prepare the necessary reports. The court is thus not satisfied that the Plaintiffs have proved the contempt alleged against the 1st Defendant to the required standard. Accordingly, the Plaintiffs' application dated 25 April 2018 must fail and the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT MERU THIS 19THDAY OF OCTOBER, 2021 IN THE PRESENCE OF:

CA: Susan Lomwa

James Lomurut

Francis Ndegwa

Wetangula & James Wairoto for 1st defendant

Amina Hashi for the Plaintiffs

Minishi for the 2nd Defendant

Janet Kungu h/b Jackline Njuguna for the 5th Defendant

Patrick Kiprop for the Interested Parties

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P.M. NJORGE [PJ] J.G. KEMEI, J, Y.M. ANGIMA, J,