



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

PETITION NO.4 OF 2019

IN THE MATTER OF ARTICLES 56, 47,46,43,28 AND 27 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 7,8 AND 10 OF THE ENERGY ACT 2019

BETWEEN

SORA WAMBILLE.....1ST PETITIONER

GEORGE BARASA 2ND PETITIONER

VERSUS

RENEWVIA ENERGY KENYA LTD ENERGY & PETROLEUM.....1STRESPONDENT

REGULATORY AUTHORITY.....2NDRESPONDENT

CABINET SECRETARY MINISTRY OF ENERGY.....3RD RESPONDENT

AND

DREAM EP GLOBAL (K) LTD.....INTERESTED PARTY

J U D G M E N T

INTRODUCTION

The two petitioners in their petition dated 6.8.2019 state that they have brought the petition on behalf of their Ngurunit and Korr communities who reside in Marsabit County. The petition seeks the following orders:-

- a. A declaration that the failure by the Respondents to supply the Ngurunit and Korr communities with electric energy when requisite infrastructure is in place is unconstitutional as it offends and contravenes the provisions of Article 56, 47,,46, 43, 28 and 27 of the constitution.**
- b. A declaration be made that the failure by the respondents to implement the memorandum of understanding between the Ngurunit and Korr communities and the 1st respondent dated 20th September, 2018 continues to marginalize the said communities and is in contravention of Articles 56, 47,46, 43, 28 and 27 of the Constitution.**
- c. An order of Mandamus to forthwith issue to compel the 2nd respondent to ensure implementation of the memorandum of understanding between the Ngurunit and Korr communities and the 3rd respondent dated 20th September, 2018.**
- d. An order of Mandamus to forthwith issue to compel the 2nd and 3rd respondents to issue the 1st respondent with a licence with respect to their application for provision of electricity with respect to Ngurunit site of Marsabit County.**

e. An order of Mandamus to forthwith issue to compel the 2nd and 3rd respondents to undertake public participation with respect to the 1st respondent's application to public participation for provision of electricity with respect to Korr site of Marsabit County

f. That the costs of and incidental to this petition be awarded to the petitioners against the respondents.

g. That the honourable Court be pleased to grant such further order or orders as may be just and appropriate.

The petition is supported by the affidavit of the 1st petitioner sworn on the 6.8.2019. The 1st respondent filed a replying affidavit sworn by **Gordon Oliech Odhiambo** on the 12.9.2019. The 2nd respondent responded to the petition by a replying affidavit sworn on the 14.9.2019. The 3rd respondent filed a notice of Preliminary Objection dated 19.9.2019 and also filed a replying affidavit sworn by **Dr. Engineer Joseph K. Njoroge CBS** on the 1.11.2019. The interested party was allowed to join the proceedings by consent of all the parties. The interested party filed a replying affidavit sworn by **Dennis Ochieng Keya** on the 16.10.2019. Parties agreed to determine the petition by way of both written and oral submissions.

THE PETITIONER'S CASE

The petitioners contend that the Ngurunit and Korr communities (hereinafter referred to as the **two communities**) have been marginalized in terms of infrastructure, social and economic amenities which includes water and electric power. The 2nd and 3rd respondents are charged with the responsibility of ensuring that the two communities have supply of clean and reliable electric power but have failed, neglected or have refused to supervise and ensure that the 1st respondent discharges his contractual obligations. The two communities in their attempt to uplift their living of standard and improve their quality of life entered into a Memorandum of Understanding with the 1st respondent for the provision of electricity supply at reasonable rates. The communities provided land, manpower and skill to ensure that the necessary infrastructure is developed by April 2019. The communities' hopes have been shattered and curtailed because although the necessary infrastructure is in place they cannot enjoy the use of power supply due to the 2nd respondent's actions. The 2nd respondent pursuant to Section 10 (1) of the Energy Act has the responsibility of regulating the generation, importation exportation, transmission, distribution, supply and use of electrical energy within the Republic of Kenya.

It is the petitioner's case that the 2nd and 3rd respondents have abdicated their responsibility to ensure that power is supplied to the two communities and have continued to frustrate the project as envisaged in the Memorandum of Understanding signed on the 20th September, 2013. Under Section 11 of the Energy Act the 2nd respondent has all the powers to renew, modify, suspend or revoke permits and licences for all undertakings and activities in the energy sector. The 2nd and 3rd respondents have failed to issue a licence to the 1st respondent in contravention of the law and that has infringed on the petitioner's Constitutional rights. The two sites had been cleared for off grid solar Plant but the 2nd and 3rd respondents have failed to grant the licence. Further, it is contended that the respondents' have failed to put in place affirmative action programmes aimed at ensuring that the two communities access electric energy. Such inaction amount to contravention of Articles 27, 28,43,46,47,and 56 of the Constitution.

Mr. Ambani, learned Counsel for the petitioner's, submitted that the two communities fall within the definition of marginalized community provided under Article 260 of the Constitution. Under that Article marginalized community is defined as:

a. A community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole.

b. A traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole.

c. An indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or

d. Pastoral persons and communities, whether they are-

i. Nomadic; or

ii. A settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;

Counsel maintain that the Korr and Ngurunit communities are small communities which have been marginalized. Their population is relatively small and have been unable to participate fully in the social and economic activities in Kenya. The respondents are jointly and severally contravening Article 27 of the Constitution by failing to facilitate access to electric energy to the two communities. Such actions amounts to discrimination. Counsel relies on the case of **John Mbugua & two others (suing as the officials of the Internally Displaced Persons Association) V Attorney General (2017) eKLR** where the Court stated:-

Article 27 of the Constitution guarantees to all persons the right to equality and freedom from discrimination. All persons are created equal and none should receive preferential treatment. Discrimination is the preferential treatment accorded to person in comparable positions on one or more of the grounds prohibited by the Constitution or the basis of an unreasonable distinction and without any lawful justification.

It is further submitted that Article 21 (3) of the Constitution enjoins all state organs and all Public Officers to address the needs of vulnerable groups in our society which include members of minority or marginalized communities. It is over 56 years since independence and the two communities are yet to have the privilege of getting and using electricity. The two communities are being discriminated by the respondents. It is also contended that the respondents' actions also infringe on the petitioners' rights under Article 47 of the Constitution by treating them unfairly through their administrative failings. There are no reasons given as to why the Electric Energy project is not operational. Article 204 (2) of the Constitution allows the National Government to use the equalization fund to provide basic services which include electricity to marginalized areas. The 1st respondent applied for a licence to generate and supply power to the two communities but there is no evidence that the licence application was rejected. The application for the Ngurunit site was approved yet no works have been seen on the ground. With respect to the Korr site there is no appeal for the refusal to grant the licence.

Although the 2nd respondent in its reply admit that the Ngurunit site application has been approved, it is still holding on to the licence. This is contrary to the provisions of Section 121 (2) of the Energy Act which calls upon the 2nd respondent to process all applications for a licence within 60 days. There is no any other justification for the holding of the licence other than to perpetuate further marginalization to the Ngurunit community. Counsel contend that even if there is an objection by a party on the Korr site, Section 120 of the Energy Act requires the 2nd respondent to hear the objection and make its decision known within 30 days after the hearing. The application for a licence for the Korr site was lodged on 30.10.2018 and the objection was received on the 1.11.2018. There is no good reason given as to why the objection has not been heard and determined. The only reason is to continue keeping the Korr community in the dark. The 3rd respondent has abdicated its responsibility and obligation under section 7 of the Energy Act which provides that the Government shall facilitate the provision of affordable energy services to all Kenyans and the Cabinet Secretary is supposed to develop and implement a fair, transparent and equitable strategy to ensure that all households are connected to electricity supply by 2030. The respondents continue to frustrate the project envisaged in the Memorandum of Understanding thereby denying the two communities electric energy and this amounts to different treatment from other Kenyans and discrimination. Counsel further contend that the only remedy available to the petitioners is orders of Mandamus to be issued against the respondents. Counsel relies on the case of **Kenya National Examination Council Vs Republic Ex-parte Geoffrey Gathenji & 9 others (1997) eKLR** where the court cited a paragraph from *Halsburys Laws of England 4th Edition volume 1 at page 11 paragraph 89* which states as follows:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end the justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing the right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

THE 1ST RESPONDENTS CASE

The 1st respondent states that he was engaged in the business of financing and developing solar hybrid rural electrification projects in disadvantaged communities which have no access to electricity in Kenya. On 20.9.2018 1st respondent signed a Memorandum of Understanding with the Korr community for the construction and operation of a decentralized power generation and distribution of infrastructure at Korr on commercial basis. The respondent was to construct wayleaves and road access where applicable and acquire all permits, licences, and approvals for the project at its own cost. The respondent in line with the terms of the Memorandum of Understanding with the Korr community submitted to the 2nd respondent an application for tariff approval, construction permit and a visit for public participation on 1.11.2018. The 2nd respondent failed to visit the site and conduct public participation and has also failed to approve the tariff and grant the construction permit to the 1st respondent. This action has rendered the 1st respondent incapable of fulfilling his obligations under the first Memorandum of Understanding.

It is also the 1st respondent's case that on the same date of 20.9.2018 it signed a Memorandum of Understanding with the Ngurunit community for the construction and operation of a decentralized power generation and distribution infrastructure in Ngurunit. The same process as the Korr community Memorandum of Understanding was followed. And on 1.11.2018 an application for tariff approval, construction permit and site visit for public participation was made.

Mr. Simiyu, Counsel for the 1st respondent maintain that the Memorandums of Understanding (MOUs) were signed between the two communities and the 1st respondent. The contracts were however frustrated by the acts of omission and commission of the 2nd respondent thereby making it impossible for the 1st respondent to perform its obligations under the contracts. Counsel relies on the case of **Kenya Airways Limited V Satwant Singh Flora (2013)eKLR** that was cited by the Court of Appeal in the case of **Five Forty Aviation Limited V Erwan Lanoe [2019]eKLR** where it was and stated:

“.....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contracts and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.

According to the 1st respondent the delay to implement their agreement is wholly attributable to the 2nd respondent's failure, negligent or refusal to abide by the law.

2ND RESPONDENT'S CASE

The 2nd respondent filed a replying affidavit sworn by **Leonard Yegon** on 24.9.2019. It is the 2nd respondent's position that the petition is premature and the review and evaluation of the tariff application is actively ongoing. The 1st respondent submitted his application for tariff approval for his proposed solar mini-grid project located in Ngurunit in Marsabit county on 30.10.2018. On 1.7.2019 the 1st and 2nd respondents conducted a stakeholder engagement at Ngurunit. The approval process is at the tail end of an internal technical evaluation. With regard to the Korr site, an application for tariff approval of the proposed solar mini-grid by the 1st respondent was received on 30.10.2018. On 1.11.2018 the 2nd respondent received an objection lodged by Dream EP Global (K)Limited (the interested party) herein. The objector alleged that it had already obtained clearance from the previous County Government in 2016 for the same site and had obtained approvals from the County Government and the Ministry of Energy to generate power at Korr. On 6.7.2017 officers from the 2nd respondent visited the Korr Solar Power Project set up by the interested party for purposes of getting feedback from the residents. On 1.3.2018 the Marsabit County Government allocated the Korr site to the 1st respondent despite the fact that the previous county government had approved and allocated the same site to the interested party. The confusion created by the county government left the 2nd respondent in a quandary because the tariff application submitted by the interested party was already undergoing internal technical review. The process cannot be completed as there is a dispute over the site between the 1st respondent and the interested party. The 2nd respondent is not a party to the Memorandums of Understanding between the 1st respondent and the two communities.

Mr. Asuma, Counsel for the 2nd respondent submitted that the court lacks jurisdiction to determine the petition. The petition revolves around issuance and/non issuance of electricity generating licence to the 1st respondent. Such issues are dealt with by the 2nd respondent first. Thereafter once a decision has been made an aggrieved party can lodge an appeal under section 24 of the Energy Act to the Energy and Petroleum Tribunal. The court will thereafter have jurisdiction to deal with the decision of the Tribunal. The petitioners prematurely approached the court before exhausting the statutory mechanisms. It is further submitted that the dispute arises from the Memorandum of Understanding dated 20.9.2018 which contain a dispute resolution mechanism. The court lacks jurisdiction under section 6 of the Arbitration Act. Under the Memorandum of Understanding every dispute is to be subjected to mutual discussions to iron out the issues and if such a dispute is not settled within 30 days then an arbitration process takes place. That process has not been finalized.

It is also submitted that there is no violation of the petitioner's Constitutional rights and fundamental freedoms. The petitioners' allege that they are a minority and a marginalized group and their rights under Article 56 of the Constitution which obligates the state to put in place affirmative action have been breached. It is submitted that the government has put in place measures to ensure that all Kenyans receive electricity by 2030 as provided under section 7 (3) of the Energy Act. The petitioners have failed to provide particulars and evidence on how their rights under Articles 43,46 and 47 have been breached. Counsel relies on the case of **Anarita Karimi Njeru V Republic (No.1) [1979] KLR 154** where it was stated as follows:

“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.” (see also Meme V Republic & another [2004] 1 KLR 637

Counsel for the 2nd respondent contend that the petitioners have failed to disclose any violation or breach of the constitution or breach of any right and fundamental freedom. The petitioners are seeking orders of mandamus. The factors to be considered by the court before such orders are given were restated in the case of **Republic V National Employment Authority and 3 others Ex-parte Middle East Consultancy Services Limited (2018) eKLR** where the Court cited with approval the Canadian case **Apotex Inc. V Canada (Attorney General)** where the test for the writ of mandamus to issue is stated as follows:

- i. There must be a public legal duty to act**
- ii. The duty must be owed to the applicants**
- iii. There must be a clear right to the performance of that duty, meaning that**
 - a. The applicants have satisfied all conditions precedent; and**
 - b. There must have been:**
 - i. A prior demand for performance;**
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and**
 - iii. An express refusal, or an implied refusal through unreasonable delay;**
 - iv. No other adequate remedy is available to the applicants.**
 - v. The order sought must be of some practical value or effect;**
 - vi. There is no equitable bar to the relief sought**
 - vii. On a balance of convenience, mandamus should lie**

It is further submitted that the petition is premature and untenable. The applications over the sites are active and undergoing scrutiny before the technical committee. The court cannot bypass the statutory frame work and compel the issuance of the licence. Section 121 of the Energy Act provides the statutory consideration by the 2nd respondent before issuing a licence. The court has inadequate technical knowledge to compel the issuance of the licence. Counsel relies of the case **West Kenya Sugar Company Limited V Kenya Sugar Board and another (2014)eKLR** where the Court of Appeal stated as follows:

[38] the High Court was ill equipped to decide whether or not the conditions for granting a licence had been met; some of the information provided in the application for a licence was of a technical nature. Conditions stipulated in section 15(109b) of the Act refers to technical experience and capacity. Those factors could only have been properly evaluated by persons well versed in matters pertaining to sugar industry and the application of the policy of the Act. The factors that the High Court took into consideration were some of the matters that the KSB could have taken into consideration in dealing with the application for a licence or could have been considered in subsequent proceedings had KSB considered and rejected the application. From the foregoing we are satisfied that KSB had not abused the power of licensing and that the High Court made a fundamental jurisdictional error of law by usurping the licensing discretion of the licensing authority and substituting it with its own decision. It has no jurisdiction to do so.

Counsel also relies on the case of **Middle East Consultancy Services Limited (Supra) [2018] eKLR** where it was stated as follows:

59. It is common ground that an order of Mandamus will issue to compel a person or body of person who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. The exparte applicant has no legal right to have his application processed without being subjected to the processes laid down in the law. Mandamus is a judicial command requiring the performance of a specified duty which has not been performed. The first and fourth respondents have not refused to act. In fact it is the ex parte applicant who seeks to circumvent the legal process by purporting to seek registration without being subjected to the legal processes which includes vetting.

It is contended further that both the 1st respondent and the interested party claim to have been cleared by the county government of Marsabit. This has made it impossible for the 2nd respondent to process the application for tariff assessment. It is the 2nd respondent's position that it cannot be compelled to undertake the exercise. Reference is made to the case of **Kenya National Examination Council V Republic ex-parte Geoffrey Gathenji Njoroge & others Civil Appeal No. 266 of 1996(1997)eKLR** where the court held as follows:-

“...Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

THE 3RD RESPONDENT'S CASE

Mr. Kiongo, learned counsel for the 3rd respondent relied on the replying affidavit sworn by **Dr. Engineer Joseph K. Njoroge CBS**. Counsel maintain that the Energy Act provides for the procedure to be followed and therefore the court lacks jurisdiction to entertain the petition. The petitioners have not demonstrated how they have tried to resolve the issues through the relevant institution before coming to court. The petitioners are not patient enough to wait for a decision. The Memorandum of Understanding has a dispute resolution mechanism which states clearly what should be done. This is in line with the constitution which allows dispute mechanism. The orders being sought by the petitioners are discretionary. The court may deny them even when they are warranted. The government works on a budget and planning. That is why a target of 2030 to connect everyone with power was placed. The 3rd respondent has not refused to facilitate power connection to the petitioners. The Alternative Dispute Mechanism under the Energy Act include mechanism under individual contracts such as Memorandum of Understanding. The two petitioners have not tendered any evidence to demonstrate that they have the proper authority to bring the petition on behalf of the Ngurunit and Korr community. The 3rd respondent is not a party to the MOUs. The failure to licence the 1st respondent is attributable to the lack of the county government of Marsabit consent to the development of the project. The 3rd respondent in corroboration with other development partners, has initiated programs to provide energy to marginalized counties. Some schools and dispensaries in Ngurunit and Korr have benefited from this programme. There is a world bank group supported project known as the **Kenya Off-Grid Solar Project (KOSAP)** which is focused on 14 marginalized counties as defined by the Commission for Revenue allocation in 2016. There is also another development partner, GIZ which is promoting the putting up of electricity mini grid and the 1st respondent was selected by this partner to put up the mini grid in Korr and Ngurunit. However the development partners are expected to comply with relevant rules in acquiring the necessary licenses and permits. The 3rd respondent and other Government Departments are working towards universal access of electricity by 2022. The government has allowed the private sector players to provide electricity to the two communities of Ngurunit and Korr.

THE INTERESTED PARTY'S CASE

Mr. Hassan appeared for the interested party. Counsel relied on his written submissions as well as the affidavit of **Dennis Ochieng Keya** sworn on the 16.10.2019. According to the interested party, in June 2016 it obtained a contract from the Marsabit county to develop a county wide strategy for power generation and supply using renewable sources. On 13.4.2017 a gazette notice was published relating to setting up a mini grade at Korr. Stakeholder meetings was held and equipment for setting up the mini grid imported from the United Kingdom arrived in Kenya in October, 2017. Surveys were conducted. Unfortunately after the 2017 general elections the new county government proposed that the Korr site be undertaken jointly with another player namely GIZ under its prosolar programme. On 13.4.2018 the Ministry of Energy gave the Korr site to GIZ without the knowledge of the interested party. The interested party had already signed a land lease agreement with the Marsabit county on 19.4.2019. The interested party submitted its tariff application for the Korr site on 3.5.2019. On 1.6.2018 the interested party submitted its bid for the Ngurunit site. On 5.7.2018 the interested party was informed by the county government that the Korr site was no longer available for development and investment. No reasons were given.

Counsel for the interested party submit that the Energy Act 2019 under Section 25 provides for the Energy and Petroleum Tribunal. The Tribunal has jurisdiction of reversing decisions of the 2nd respondent and any other licensing authority. Therefore the matter is not ripe to be heard before the court. Counsel relies on the case of the **Speaker of National Assembly V Karume (1992)KLR 21** where the court held:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

Counsel also relies on the case of **Mui Coal Basin Local Community (2015)eKLR** where the Court held:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courtsthis accords with Article 159 of the Constitution which command Courts to encourage alternative means of dispute resolution.”

It is further submitted that the petitioners have other adequate remedies. There has been no outright refusal by the 2nd respondent to issue the licence. The petitioners are only aimed at circumventing the laid down procedures to get the licence despite the interested party having a better claim to the licence. The court cannot grant an order of mandamus where there is an alternative remedy. The interested party undertook all the required steps for the issuance of the licence and is prepared to establish the mini grid as compared to the 1st respondent. The Marsabit County government is expected to honour the agreement signed between the interested party and the previous county government.

The Petition raises the following issues:-

- i. Whether this Court has jurisdiction to determine the dispute.
- ii. Whether the petitioner's constitutional rights and fundamental freedoms have been violated.
- iii. Whether the orders being sought should be granted.

With respect to the first issue, there are two limbs being fronted by those maintaining that the Court lacks jurisdiction to determine the dispute. The first one is that the Memorandums of Understanding between the petitioners and the 1st respondent have a Dispute Resolution Mechanism which ought to be followed first. This has not been done. The second aspect is that the Energy Act provides for a procedure to be followed when an application for tariff or licence is made to the relevant Authority. Should the application be denied, any aggrieved party has a right of Appeal to the energy Tribunal established under section 25 of the Energy Act. The 3rd respondent's preliminary objection dated 19th September, 2019 is mainly grounded on the issue of jurisdiction and the competency of the petition. The Preliminary Objection by the interested party dated 16th October, 2019 deals with the substance of the petition as it is grounded on whether orders of mandamus can be granted.

The Memorandums of Understanding between the first respondent and the two communities were signed on 20th September, 2018. The Memorandums of Understanding have a section titled **“RESOLUTION OF DISPUTES.”** Under that section, disputes or differences of any kind whatsoever shall be settled at the first instance by way of mutual discussions between the contracting parties within thirty (30) days. If the dispute cannot be settled within that period then it shall be settled through Arbitration in accordance with Kenyan Laws.

The nature of the petition is that the 2nd and 3rd respondents have abdicated their duties and responsibilities to ensure that the two communities enjoy their right to be connected to electrical energy. Since the 2nd and 3rd respondents are not parties to the Memorandums of Understanding, they cannot be subjected to the dispute resolution mechanism provided under the MOUs. The petitioners are also alive to the fact that the 1st respondent who is a contracting party to the Memorandums of Understanding cannot perform its obligations without the clearance by the 2nd and 3rd respondents. Taking the 1st respondent through the dispute resolution mechanism under the MOUs would not help the petitioners. I do therefore find that even if the Memorandums of Understanding provide for a dispute resolution mechanism, the same is not the proper and effective remedy or course to be taken by the petitioners. That mechanism is strictly meant to resolve issues arising between the two contracting parties and cannot be enforced on third parties.

The second line of argument propounded by the 2nd and 3rd respondents as well as the interested party is that the Energy Act has a dispute resolution Mechanism. Section 9 of the Act establishes the Energy and Petroleum Regulatory Authority. Section 10 of the Act provides for the several functions of the authority. Under Section 11 (a) and (c) the Authority has power to:

- (a) Issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector,
- (c) Set, review and adjust electric power tariffs and tariff structures and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment.

Section 24(1) of the Energy Act states as follows:-

1. A person aggrieved by a decision of the Authority may appeal to the Tribunal within thirty days of receipt of the decision.

Other Sections of the Energy Act relevant to the petition are Sections 117, 120 and 121. Section 117 of the Act states as follows:

117. A person who wishes to carry out the generation, exportation, importation, transmission, distribution and retail supply of electricity must apply for a licence as the case may be to the Authority in accordance with the provisions of this Act.

Provided that a person shall not require any authorization to generate electrical energy for own use of a capacity not exceeding one megawatt.

Section 120 States:

120. The Authority may hear any objections in public, at a time and place of which not less than fifteen days' notice shall be given to the applicant and to every objector and the Authority shall make known its decision regarding any objection within thirty days after the hearing.

Section 121 (2), (3) and (4) of the Act states as follows:

121.(2) The authority shall process all applications for a licence within sixty days after the Authority confirms to the applicant, in writing, that the application is complete.

(3) The Authority shall, where it refuses to grant a licence, give the applicant a statement of its reasons for the refusal within seven days of the refusal.

(4) An aggrieved party shall have right of appeal to the Tribunal within thirty days of the decision of the Authority.

The 1st respondent submitted its application for the production and transmission of electricity for the Ngurunit and Korr Communities on 1.11.2018. According to the 2nd respondent that application is being processed. The petitioners are not involved in the lodging of the application by the 1st respondent for the required permits and licences. No decision as to whether the applications have been rejected or denied has been made. The petitioners are of the view that the 2nd and 3rd respondents are guilty of acts of omission and commission and opted to approach the court for orders of mandamus so as to compel action by the two respondents. The Energy Act does not specifically provide for a laid down procedure on how third parties who are not involved in the applications lodged before the Authority can file their complaints. Section 36(1) of the Energy Act empowers the Tribunal to hear and determine all matters referred to it relating to the energy and Petroleum sector. Section 36 (3) states as follows:

36(3): The Tribunal shall have original Civil jurisdiction on any dispute between a licensee and a third party or between licensees. Section 36(4) provides for the appellate jurisdiction of the Tribunal in relation to decisions made by the Authority.

The petitioners could not have approached the Tribunal by way of an appeal since no decision has been made by the Authority. Similarly, the petitioners could not have complained to the Tribunal against the first respondent since the 1st respondent is not yet a licensee. The petitioner could not complain to the Authority as they are not the ones who lodged the applications for licences and permits. All what the petitioners could do is to be patient and wait for the Authority to make its decision. They felt that the timelines provided under the Energy Act had lapsed and opted to approach the Court so as to compel action. I am satisfied that the petitioners are entitled to approach the Court and cannot be referred back to the Authority or Tribunal. The court has jurisdiction to entertain their complaint. The jurisdiction of the Court to entertain such petition is not ousted by the provisions of the Energy Act. The petition is intended to force the 2nd and 3rd respondents issue a licence to the 1st respondent. The Petitioners' grievances cannot be referred to the Tribunal since no decision has been made. Although the petitioners can be considered as third parties under the Energy Act, their grievance is that the delay is denying them access to electricity yet the 1st respondent is ready and capable of supplying it to the communities. The Court has jurisdiction to determine the dispute.

The second issue is whether the petitioner's constitutional rights and fundamental freedoms have been violated. The petition is brought under Articles 27, 28, 47 and 56 of the Constitution and sections 7,8 and 10 of the Energy Act, 2019. Article 27 of the Constitution provides for the right to Equality and freedom from discrimination. The petitioners contend that the delay in approving the license amount to discrimination and differential treatment. The two communities have to be treated equally like any other Kenyan Communities and be supplied with electricity. Article 28 of the Constitutional provides for the right to Human dignity and the right to have one's dignity respected and protected. Article 46 relates to consumer rights while Article 47 involves the right to fair administrative action. Article 56 provides for minorities and marginalized group. Article 56(e) provide for the right of marginalized groups to have reasonable access to water, health services and infrastructure.

The petitioners rights to fair administrative action has not been breached. The Authority has delayed to process the application for licence by the 1st respondent. However, the 2nd respondent's actions cannot be held as deliberately meant to frustrate the two communities and in turn violate the petitioners Constitutional rights. Similarly, the petitioners right to Human dignity under Article 28 has not been breached or violated. It would be imprudent for this court to hold that the delay or failure to supply the two communities with electric power 56 years after independence is a violation of their right to human dignity. Section 7 of the Energy Act requires the National Government to facilitate the provision of affordable energy services to all Kenyans. That duty cannot be fulfilled within a short time as it entails financial expenditure. Section 6 of the Energy Act requires the relevant Cabinet Secretary to publish a report on the implementation of the National Integrated Energy plan. The Government target is to ensure that all households are connected to power supply by the year 2030 as stated in section 7 (3) of the Energy Act.

From the pleadings of all parties and from the rival submissions, I do find that there is no deliberate policy on the part of the 2nd and 3rd respondents to discriminate against the petitioners. The Government is in the process of installing the required energy infrastructure and power installation for the two communities. There is no violation of Article 56 of the Constitution.

The Black's Law Dictionary, (10th Edition) defines "**Mandamus**" as a "**writ issued by a court to compel performances of a particular act by a lower court or a government officer or body.**" The petition is seeking declaratory orders as well as orders of mandamus. Prayer (c) of the petition is seeking an order of mandamus to compel the 2nd respondent to ensure that the Memorandum of Understanding between the two communities and the 1st respondent signed on 20th September, 2018 is implemented. Prayer (d) seeks an order of mandamus to compel the 2nd and 3rd respondents issue a license to the 1st respondent so that electric power is provided to the two communities. Prayer (e) further seeks an order of mandamus to compel the 2nd and 3rd respondents to undertake public participation.

The question which follows is whether the Court should grant the orders being sought. The underlying reasoning on the part of the petitioners is that whereas an objection was lodged for the Korr site, there is no objection to the Ngurunit site. Why can't the 1st respondent be licenced to install power at the site. The petitioners also maintain that the timelines set out in the Energy Act have been surpassed without any good reasons. All applications for licence are required to be processed within sixty (60) days after the Authority confirms to the applicant in writing that the application is complete. There is no evidence as to whether the 1st respondent was informed in writing that its applications for the two sites are complete. The applications were lodged in November, 2018. The sixty (60) days period start operating after the application for a licence has been subjected to technical evaluation and deemed to be complete under Section 119(5).

Under section 119(5) the Authority is required to evaluate the application for licence within fifteen (15) days and inform the applicant whether it is complete. Once that is done section 121 (2) takes effect and the Authority has to process the applications within sixty (60) days. The time limit for applications is therefore the 15 days for evaluation and making a decision on the completeness or otherwise of the application and the sixty days of processing the applications deemed complete. That gives a total time limit of 75 days from the date an application for a licence is received. The applications by the 1st respondent were received on 1.11.2018. The petition was filed in Court on 9th August, 2019. The 2nd and 3rd respondents were therefore required to have made decision on the application for the licences before August, 2019.

With regard to situations where objections are raised, the Authority is required to give fifteen (15) days notice before hearing the objection. The notice is given to both the applicant and the objector. Upon hearing the objection, the authority is required to make known its decision within thirty (30) days after the hearing. Section 120 of the Energy Act does not specifically state that the objection and the decision of the Authority must be heard and determined within thirty (30) days. The 30 days period is meant to facilitate the making of the decision after hearing the dispute. The effect of section 120 of the Act is that no time limit is given for the hearing of the objection after it is filed. Objections are filed just like cases filed in court. The time limit for the hearing of those objections is not given.

The 2nd and 3rd application for the Ngurunit site is at the tail end of technical evaluation while that of Korr is affected by the objection lodged by the interested party. Having found that there is no time limit for processing of the objection, the court cannot compel the 2nd and 3rd respondents to process the objection within a given time. The objection also affects the County Government of Marsabit which is not a party to these proceedings.

In the case of **Republic V Director General of East African Railways Corporation, Ex parte Kaggwa [1976-80] I KLR 654**, Justice Chesoni, at page 663 observed as follows:

Mr. Shields drew our attention to the passage in Prem's Law of Writs in India, England and America(2nd Edn), page 385 which was quoted with approval in Shah V Attorney General (No 3)[1970] E A 543, 549, which says:

Mandamus does not lie against a public officer as a matter of course. The Courts are reluctant to direct a writ of mandamus against executive officers of a Government unless some specific act or thing which the law requires to be done has been omitted. Courts proceed with extreme caution for the granting of the writ which would result in interference by the Judicial department with the management of the executive department of the Government.

The Court has discretion in determining whether an order of mandamus should be granted or not. The Court's discretion has to be exercised while taking into account the circumstances of each case. The **Apotex Inc case (Supra)** as quoted in the case of **Middle East Consultancy Services Limited case (Supra)** set out the parameters to be considered by the Court. These include, a prior demand to the concerned officer must have been made. That is, the applicants must have called upon the concerned officer or institution to undertake its legal duty to act. A reasonable time to comply with the demand for performance must have been given. The order sought must also be of some practical value or effect.

An order of mandamus is part of the Judicial Review jurisdiction exercised by Courts. Judicial Review is concerned with the process making and not the decision itself. The complaint in the petition is that the process is taking long. The Court is being called upon to hasten the process and compel issuance of the licence to the 1st respondent. Granting to such a request may lead to the court usurping the jurisdictions of the Authority mandated to grant licences and permits for power generation established under the Energy Act.

In my view, granting the orders being sought will be tantamount to processing the 1st respondent's applications for licence as well as deciding on the objection lodged with the Authority by the interested party. The Court cannot decide as to whether the 1st respondent's application meets the technical requirement or not. Granting the order of mandamus will amount to usurping the role of the Authority established under the Energy Act. The interested party has a legitimate expectation that its objections shall be heard and determined on merit. The delay in processing the application for licence by the 2nd respondent cannot be concluded as an implied refusal by the 2nd respondent. There is good will on the part of the 2nd respondent as it informed the Court that the evaluation process has reached the tail end.

Granting the order of mandamus would assist the 1st respondent in getting a licence at the detriment of the interested party. Further, such an order would mean that the Court is satisfied that the 1st respondent's application meets all the technical requirements.

It is true that the timelines for processing the application for licence lodged by the 1st respondent have lapsed. However, that in itself cannot be the basis for granting an order of mandamus. It could be possible that once the evaluation of the application is done, it may be found not to meet the required specifications or requirements. Compelling the 2nd respondent to accept the application and issue a licence is not the most effective way of solving the problem. Compelling the 2nd and 3rd respondents to conduct public participation for the Korr site as prayed in the petition will run contrary to the provisions of the Energy Act as there is an objection pending before the Authority. I do equally find that the two prayers for declaratory orders cannot be granted as I am satisfied that there is no violation of the petitioners' constitutional rights. It is not the petitioners' communities which lack electrical energy in Kenya. Granting the orders being sought might open the flood gate of memorandums of understanding between communities and private companies which generate electricity and thereafter call upon the 2nd and 3rd respondents to grant the private companies licences and permits to connect power to the communities. Although each case is determined on its own merit, I do find that the petition herein lacks merit. This is not a case where Declaratory Orders of mandamus can be granted.

The upshot is that the petition lacks merit and is hereby dismissed. The petitioners were driven by the urge to pursue their right to be connected to electric power. I do not wish to condemn them to pay costs. Parties shall meet their own respective costs.

Dated, Signed and Delivered at Marsabit this 20th February, 2020

S. CHITEMBWE

JUDGE