



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

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 LENGOMIAP.....5TH PLAINTIFF
SEKOTEY SEYE.....6TH PLAINTIFF

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

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

(As representatives of the residents of Loiyangalani District, Marsabit County)

RULING

1. This Ruling contains directions concerning an application filed by the 2nd defendant and dated 17th April, 2020.
2. The application seeks the following orders:-

1. **This** application be certified as urgent, be heard on priority basis and service be dispensed in the first instance.

2. **There** be a review of the ruling delivered on the 21st January 2020 and this Honourable Court be pleased to set aside all consequential Orders emanating from the said ruling.

3. **The 2nd** Respondent's replying Affidavit in response to the Plaintiffs Application dated 26th April 2018 and filed on the 27th April 2018 be readmitted on record.

4. **That** there be a stay of proceedings in this matter pending the hearing and determination of this Notice of Motion inter partes.

5. **Costs** of the application be in the cause.

3. The application has the following grounds:

a) That the Plaintiffs are aggrieved by the prejudicial Ruling of the court delivered on the 21st January 2020 expunging the 2nd Respondent's Replying Affidavit in response to the Plaintiffs' Application dated 26th April 2018 and filed on the 27th April 2018.

b) That the said ruling and order of the Court is highly prejudicial to the 2nd Defendant as it infringes on its constitutional right to a fair trial as is guaranteed by the Constitution.

c) That it would be against Article 50 of the constitution if this matter proceeds in the absence of the 2nd Defendants response to the Plaintiffs Application as this infringes on the right to a fair hearing.

d) That the said ruling offends the rules of natural justice and fairness to all parties.

e) That on the 31st July 2018, the Court directed that all parties if necessary, to file their response within 30 days inclusive of their written submissions. It only became necessary for the 2nd Defendant to file its Response upon being served with the 1st Defendant's Response and submissions on the 14th December 2018 four (4) months later, when its response raised matters adverse to the 2nd Defendant.

f) That before service of the said 1st Defendant's Response, the 2nd Defendant would not have wished to respond and that the said 1st defendant did not seek an extension of time to serve its response when it filed its documents on the 23rd August 2018 and failed to serve until the 14th December 2018 when the 2nd defendant had presumed that the Application was undefended. No explanation whatsoever was tendered by the 1st Defendant as to why it choose to file their responses in August and serve in December four months later raising all manners of claims against the 2nd Defendants.

g) That even though a consent was recorded by the parties regarding the manner in which the said Application was to be canvassed there is established procedure at, Order 51 (2) of the Civil Procedure Rules that gave the 2nd Defendant a lifeline to file and serve its response not less than 3 clear days before the date of hearing. The substantive date for hearing of the said Application was on the 20th January 2020 when parties highlighted their submissions and as such the 2nd Defendant was clearly within time in view of the fact that statutory provisions override a consent that was made by parties on the said date.

h) The 1st Defendant's Counsel on the 20th January 2020 misrepresented to the Bench that the matter was canvassed before the previous bench when in fact an Application for striking out was not made as is provided for under Order 2 Rule 15 of the Civil Procedure Rules and only an Objection was raised by the 1st Defendant who is a codefendant when the Previous Bench directed that it would consider the matter and deliver a ruling. There was no reservation of a ruling but a reserved date in this regard.

i) The 1st Defendant upon being served with the said Affidavit took no step to either make applications for reopening the case, recalling a witness for purposes of testing the veracity of the evidence in cross examination or making an application for striking out of the said Affidavit. As has been the Case the 1st Defendants Applications have all through the proceedings been orally presented before this court, even when matters as serious as striking out a co-defendants response as it affects them without laying a basis in law for such a claim,

j) No ground for prejudice against the 1st Defendant was ever demonstrated which ought to have been the case because prejudice ought to be specifically pleaded. In the said objection by the 1st Defendant, and in consideration of Order 2 rule 15, grounds for prejudice ought to have enumerated and evidence adduced by way of an Affidavit, which was not done.

k) On the 20th January 2020, Counsel for the 1st Defendant informed the Court that parties had agreed that the Contempt Application be highlighted at 10.00 am including the admissibility of the 2nd Defendants Affidavit filed on 10.4.2019. The 2 and Defendant therefore prepared to argue the question of admissibility when the Court on the 21st January 2020 delivered the said ruling leaving the 2nd defendant not having canvassed the issue of admissibility of the said Affidavit.

l) The previous bench did not at all material times reserve a ruling as was misrepresented to the new Bench by Counsel for the 1st Defendant's in fact the Court only said that it would consider the objection and deliver a ruling in respect of the same for the 24th of July 2020 on the proposed last day of hearing. Reservation of a ruling in law would mean that all parties have completed arguments and written submissions have been filed which was not the case in this matter.

m) The previous Bench having recused itself from this proceedings, the Court ought to have heard the matter denovo and deliver a ruling in light of the circumstances.

n) **This** Application is made in order to correct an error apparent on the face of the record on the following grounds:-

i. **Article** 50 of the Constitution guarantees for the right to a fair hearing which was not accorded to the Applicant in this case.

ii. **The** Applicant had a right to be shown any evidence in regards to prejudice if any and how it would have affected the 1st Defendant when both the 1st defendant and 2nd defendant had closed their respective cases and when the reply was in regards to the Plaintiffs Application and not the 1st Defendant's Application and in view of the notice of indemnity by the 1st Defendant against the 2nd defendant which notice is on record.

iii. **The** 1st Defendant was not accorded the right to canvass and respond to any Application on points of law regarding admissibility both substantive and procedural.

o) **That** the Applicants shall be prejudiced if the orders of review are not granted.

p) **That** this application is intended to facilitate the just and proportionate resolution of the dispute between the parties.

q) **That** unless the application is heard and determined the matter will proceed to conclusion in the absence of a response by the 2nd Defendant to an Application so adverse in nature to it.

r) **Unless** the Notice of Motion dated 4 the February 2020 is heard urgently and Orders therein granted, the 2nd Defendant's right to a fair trial hearing will continue to be infringed upon.

s) **That** this application has been instituted without unreasonable delay.

4. The application is supported by the affidavit of Joseph Guyo sworn on **17th April, 2020** and which states as follows:

I, JOSEPH GUYO, a resident of C/O of Post Office Box Number 50569-00200 Nairobi in the Republic of Kenya do hereby make oath and state as follows: -

1. **THAT** I am the County Secretary for 2nd Defendant /Applicant and hence competent to swear this affidavit and state as follows:-
2. **THAT** I swear this affidavit in support of my application to stay the proceedings in this matter and have a review of the ruling delivered on the 21st January 2020 and all consequential orders set aside.
3. **THAT** I am informed by the Applicant's Advocates on record which information I verily believe to be true that a ruling was delivered by the Honorable Court on the 21st of January, 2020 expunging from the record a Replying Affidavit sworn by myself Predecessor in response to the Plaintiffs Application dated 26th April 2018 and filed on the 27th April 2018. Annexed hereto and marked "JG 1A" is a copy of the Order in respect of the said ruling.
4. **THAT** the said ruling and order of the Court is highly prejudicial to the 2nd Defendant as it infringes on its constitutional right to a fair trial.
5. **THAT** I am further informed by the Applicant's Advocates on record which information I verily believe to be true that on the 31st July 2018, the Court directed that all parties if necessary, to file their response within 30 days inclusive of their written submissions. It only became necessary for the 2nd Defendant to file its Response upon being served with the 1st Defendant's Response and submissions on the 14th December 2018 when it response raised matters adverse to the 2nd Defendant. Annexed hereto and marked "JG 1B" and "JG 2" respectively is an excerpt of the certified copy of proceedings at page 99 in respect of directions and a received copy of the face of the 1st Defendant's documents.
6. **THAT** I am further informed by the Applicant's Advocates on record that before service of the said 1st Defendant's Response, the 2nd Defendant would not have wished to respond and that the said 1st defendant did not seek an extension of time to serve its response having filed its documents on the 23rd August 2018 and failed to serve until the 14th December 2018 when the 2nd defendant had long presumed that the Application was undefended.
7. **THAT** I am further informed by the Applicant's Advocates on record which information I verily believe to be true that even though a consent was recorded by the parties regarding the manner in which the said Application was to be canvassed there is established procedure at, Order 51 (2) of the Civil Procedure Rules gave the 2nd Defendant a lifeline to file and serve its response not less than 3 clear days before the date of hearing. The substantive date for hearing of the said Application was on the 20th January 2020 when parties highlighted their submissions and as such the 2nd Defendant was clearly within time in view of the fact that statutory provisions override a consent that was made by parties on the said date.
8. **THAT** I am further informed by the Applicant's Advocates on record which information I verily believe to be true that the 1st Defendant's Counsel on the 20th January 2020 misrepresented to the Bench that the matter was canvassed before the previous bench when in fact an Application for striking out was not made as is provided for under Order 2 Rule 15 of the Civil Procedure Rules and only an Objection was raised by the 1st Defendant who is a co-defendant and the said Bench directed that it would consider the matter and deliver a ruling. There was no reservation of a ruling at all but a reserved date in this regard. Annexed hereto and marked "JG 3" are copies of excerpts of the proceedings of the 22nd July 2019 at pages 232,233 and 234 demonstrating what transpired on the material.

9. THAT I am further informed by the Applicant's Advocates on record which information I verily believe to be true that the 1st Defendant upon being served with the said Affidavit took no step to either make applications for reopening the case, recalling a witness for purposes of testing the veracity of the evidence in cross examination or making an application for striking out of the said Affidavit clearly setting out the grounds for such striking out.

10. THAT I am further informed by the Applicant's Advocates on record which information I verily believe to be true that no ground for prejudice against the 1st Defendant was ever demonstrated which ought to have been the case because prejudice ought to be specifically pleaded. In the said objection by the 1st Defendant, and in consideration of Order 2 rule 15, grounds for prejudice ought to have enumerated and evidence adduced by way of an Affidavit, which was not the case.

11. THAT I am further informed by the Applicant's Advocates on record which information I verily believe to be true that on the 20th January 2020, Counsel for the 1st Defendant informed the Court that parties had agreed that the Contempt Application be highlighted at 10.00 am including the admissibility of the 2nd Defendants Affidavit filed on 10.4.2019. The 2nd Defendant therefore prepared to canvass the question of admissibility when the Court on the 21st January 2020 delivered the said ruling despite the fact that the 2nd defendant had not canvassed the issue of admissibility of the said Affidavit. Annexed hereto and marked "JG 4" is an excerpt of the copy of proceedings of the 20th January 2020 at page 18 in regards to the 1st Defendant's Counsel's submissions.

12. THAT I am advised by the Applicant's Advocates on Record advise me which advise I verily believe to be true that the proceedings of the 20th of January 2020 show that our Counsel made no submission on the issue before Court at all and only the 1st Defendant and the Interested parties made submission. When my advocate rose to address court he was informed he would be accorded an opportunity to canvass admissibility of the replying affidavit the next day. Notably on 20th of January 2020 the Plaintiff being the Applicants were not invited to make any submission on the said matter considering my response is a reply to their Application.

13. THAT I am further advised by the Applicant's Advocates on record which advice I verily believe to be true that unless the application is heard and determined the matter will proceed to conclusion in the absence of a response by the 2nd Defendant to the Application and to a response by the 1st Defendant so adverse in nature to it and the need to protect its interest regarding a notice of indemnity filed against it by the said 1st Defendant. Annexed hereto and marked "JG 5".

14. THAT I am further informed by the Applicant's Advocates on record which information I verily believe to be true that when the Court on the 20th January 2019 gave directions regarding highlighting of submissions of the said Application on the 22nd January 2020, the Court intimated to the 2nd Defendant's Counsel that he would have time to submit on admissibility at the scheduled time of highlighting of submission, only for the Court to proceed and deliver the said ruling without granting that opportunity.

15. THAT I am further informed by the Applicant's Advocates on record which information I verily believe to be true that this position referenced at paragraph 15 above, was well understood among the parties as referenced by the excerpt of the proceedings where the Counsel for the defendant stated parties had agreed that the Contempt Application be highlighted at 10.00 am including the admissibility of the 2nd Defendants Affidavit filed on 10.4.2019.

16. THAT when the Court on the 20th January 2019 gave directions regarding highlighting of submissions of the said Application on the 22nd January 2020, the Court intimated to the 2nd Defendant's Counsel that he would have time to submit on admissibility at the scheduled time of highlighting of submission, only for the Court to proceed and deliver the said ruling without granting that opportunity.

17. THAT unless the Notice of Motion dated 19th February 2020 is heard urgently and Orders therein granted, the Plaintiffs right to a fair trial hearing will continue to be infringed upon.

18. THAT the 2nd Defendant is aggrieved by this ruling and seek a review against it on the following grounds; (a) That the ruling infringes Article 25, Article 50 of the Constitution of Kenya 2010 and their right to a fair trial. (b) That the ruling is a breach of the rules of natural justice and justice for all parties.

19. THAT the Applicants will be highly prejudiced if the orders prayed are not granted.

20. THAT what is deponed to hereinabove is true to the best of my knowledge, information and belief save wherein sources of information have been disclosed.

5. At this interlocutory stage, the following directions are issued:

- (i) The application dated **17th April, 2020** is certified urgent.
- (ii) Application to be canvassed by way of written submissions.
- (iii) Applicant to file and serve written submissions within 14 days of today.
- (iv) Other parties to file their submissions within 14 days after service on them by the applicant.
- (v) Further directions to be given after submissions have been filed by all parties.

Delivered in chambers at Chuka this 18th day of May, 2020 in the presence of:

CA - Ndegwa

Hon. N. Kahara – Deputy Registrar

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P. M. NJOROGI [PJ]

J.G. KEMEI, J,

Y. M. ANGIMA, J,