



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 163 OF 2014 (FORMELY NAIROBI ELC 1330 OF 2014)

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

*(Suing on behalf of the residents of Laisamis constituency
and Karare ward of Marsabit County)*

=VERSUS=

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

RULING

On 23rd July 2019 this court delivered a ruling directing that this suit, which is about to come to an end with only two witnesses remaining, be heard in the absence of **all the parties**.

This was following a complaint raised both by Mr. Kiprop counsel for the interested parties and also MS. CECILIA EKENO a court assistant attached to this court for purposes of this trial. The gist of that directive is contained in the said ruling.

Soon after we delivered that ruling, Mr. Sagana counsel for the plaintiffs addressed us complaining that excluding the parties from these proceedings, in this public interest litigation is drastic and exceptional. He added that the court has not watched the said video recording in question yet it has already taken the case of the interested parties as the gospel truth. He added that he had not responded to the exparte submissions by Mr. Kiprop. Mr. Sagana also added that while the court had retired in chambers, the court assistant had raised another issue to which counsel had not responded to. He submitted that as counsel for the plaintiffs, they were not willing to proceed without the involvement of their clients and that the court has now taken the role of both investigator and prosecutor.

Counsel therefore sought an adjournment in order to seek a review of the ruling. He concluded by saying that this is a court of law and not for the interested parties or their counsel.

In response, Mr. Wairoto counsel for the 1st defendant opposed the application for adjournment reminding the court that the plaintiffs have repeatedly accused the other parties of delaying the case which is about to end with only two or three witnesses remaining.

Counsel added further that this court has been generous in expediting this case and there is no appeal and therefore this court should not down its tools.

Mr. Minishi for the 2nd defendant supported the application for adjournment so that he could also seek instructions on the ruling.

Ms. Kungu for the 3rd and 4th defendants and also holding brief for Ms. Njuguna for the 5th defendant similarly opposed the application for adjournment and associated herself with the sentiments of Mr. Wairoto.

Mr. Kiprop supported the sentiments of Mr. Wairoto and Ms. Kungu adding that any adjournment will only delay this case which had been prioritized at the request of the plaintiffs. He also referred this court to the remarks by counsel for the plaintiffs that this court is a court of law and not the interested parties, as being unfortunate.

In response Mr. Sagana told the court that justice should not be done at the behest of one party and concluded by reminding the court that the right to a public hearing is a constitutional right protected by **Article 50 of the constitution** which cannot be taken away in such a casual manner. He therefore sought an adjournment for purposes of seeking instructions to file an application for review and also put in a notice of appeal.

We have considered the application by the plaintiffs seeking an adjournment for purposes of filing an application for review and/or to appeal against our ruling dated 23rd July 2019. We have also considered the submissions raised by the other counsel.

It is common ground that all along, the plaintiffs have wanted this suit expedited. That is clear from the record herein. Indeed by their letter dated 29th October 2018, plaintiff's counsel implored the chief Justice to empanel another bench to hear this case following the untimely demise of Justice Samuel Mukunya who was then presiding.

On 23rd November 2017, counsel for the plaintiffs informed the court that his clients were fatigued and wanted the trial to proceed with seriousness as they had never applied for any adjournment.

Similarly, on 21st September 2017, counsel for the plaintiffs urged this court to bring this litigation to an end by giving very strict time limits.

With the above background in mind, this court has always endeavored to expedite this case by giving it priority. That is why when Mr. Kiprop counsel for the interested parties invited us to intervene by punishing the persons(s) who may have been circulating the video recording that was meant to intimidate the witnesses, we took the view that to do so would derail the expeditious disposal of this case. It was also in the same vein that notwithstanding the serious complaint made by the court assistant Ms. CECILIA EKENO to the effect that she had been accosted by persons asking her to step aside from interpreting in this case, this court nonetheless directed that this case continues but in the **absence of all the parties**. That decision was informed by the fact that the overriding interest in this case is to expedite the trial taking into account the concerns raised in the aforementioned letter addressed to the Chief Justice that parties have had to travel over 600 Kilometers to attend court and have been doing so diligently since October 2014. This court had the option of adjourning this case while the police investigate this serious allegation because witnesses and court officers cannot be expected to continue participating in a case when their security is at risk. In view of the serious allegations, the court took the view that in order for the remaining witnesses to be able to testify freely, and since we did not know who was circulating the offending video recording or intimidating the court assistant, the better option would be to exclude **all the parties** from the court room. The court did not exclude only the plaintiffs in this case. The order was for the exclusion of **all the parties**. The decision to exclude **all the parties** from the court appears not to have been received well by counsel for the plaintiffs who then sought an adjournment in order to seek instructions on filing an application for review of that order or to file an appeal.

In his application for adjournment, Mr. Sagana for the plaintiffs has made remarks which even Mr. Kiprop for the interested parties has described as '**unfortunate**'. We share that view.

In his submissions Mr. Sagana accused the court of having taken the word of counsel for the interested parties as the gospel truth. This court did not make any such finding to that effect. That is why it made the order to **exclude all the parties**.

Mr. Sagana further accused this court of taking upon itself the role of an investigator and prosecutor in respect to the complaint raised by the

court assistant Ms. CECILIA EKENO. The complaint by Ms. CECILIA EKENO was made in chambers when the court had retired to write its ruling. Ms. CECILIA EKENO was already shaken and distraught when she narrated the incident to us and even requested to be relieved of her duties. It is not always that court assistants follow judicial officers to chambers to complain about being harassed by litigants. We therefore had no reasons to doubt the veracity of her complaint.

Nevertheless, we did not go further to investigate the complaint or direct for any prosecution. We looked at the bigger picture of expediting this trial and requested Ms. CECILIA EKENO to continue serving the court and, to her credit, she agreed to continue serving this court as an interpreter. Had she declined to continue serving, this court would have had to adjourn to enable the Registrar appoint another Samburu interpreter. It is instructive to note that Ms. CECILIA EKENO was sourced from Isiolo court specifically to do interpretation in this case.

In the circumstances, it is difficult to understand the complaint that this court has acted both as an investigator and prosecutor. All that we did was to hear the complaint and make orders which in our view would expedite this trial. At no time did we direct that any persons be summoned, investigated or prosecuted.

Further, Mr. Sagana submitted that justice should not be done at the behest of one party and that this is a court of law and not a court for the interested parties.

All these remarks and innuendos taken together, have made it clear that although Mr. Sagana was addressing this court on an application for adjournment, it has become obvious to us that both he and the clients he represents have no faith in this court dispensing justice to the plaintiffs. This court considers it to be scandalous when counsel refers to it as a court for the **“interested parties”**, a court acting both as **“investigator and prosecutor”** a court that acts at the **behest of one party** and a court that acts in a **casual manner**. Mr. Sagana also cited **Article 50 of the constitution** which provides for a fair public hearing.

In view of the serious allegations raised above by both Mr. Kiprop and Ms. CECILIA EKENO, there would be no fair hearing if some of the parties are intimidated while in court. That is why the order to exclude the parties did not refer to the plaintiffs only. It referred to **all the parties**. In any event, the court has the jurisdiction to eject any party whose conduct may impede the fair hearing of the case.

Article 50 (8) of the constitution provides that:

“This article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary in a free and democratic society to protect witnesses or vulnerable persons, morality, public order or national security”. Emphasis added.

We repeat that this court’s order excluding **all the parties** was made in the interest of not only securing the security of the witnesses but also ensuring that they testified in a free atmosphere without fearing that their testimony was being recorded to be used against them adversely outside this court.

We remind ourselves that no application has been made by any party for our recusal in this case. If such application had been made before us, we would have been guided by the principles laid down by the court of appeal in **R.V DAVID MAKALI & OTHERS C.A CRIMINAL APPLICATION NO. 4 AND 5 OF 1995 NBI (unreported)**. In our case, we find that the very strong language employed by Mr. Sagana in describing this court, casts aspersions on our impartiality to dispense justice to the plaintiffs. When counsel describes this court as a court for the interested parties, a court that acts as an investigator and a prosecutor, a court that acts at the behest of one party and a court that conducts serious business in a casual manner, the perception created in the minds of his clients is that they are unlikely to get justice in the court which they will now view, inter alia, as a court favouring the interested parties. It is a cardinal principle that justice must not only be done, but also be seen to have been done. We would not want any of the parties to leave this court with a feeling that justice was only done to one party.

The submissions by Mr. Sagana, taken in their natural meaning, suggest that this court is already biased against his clients. Under the **Bangalore Principles of Judicial Conduct**, a judge is required to perform his or her judicial duties without favour, bias or prejudice.

As we have already noted above, this case has almost run its full course. This court was determined to complete the hearing of the remaining witnesses by this Friday (26th July 2019) taking into account that this case was filed in 2014.

We are not oblivious to the interests of the parties to have an expeditious determination of this suit. Nonetheless, it is no longer tenable for us to continue hearing this case in view of the very unfortunate remarks that counsel for the plaintiffs Mr. Sagana has used in describing this court.

It has not been an easy decision to make and we have agonized over it. In the case of **GLADYS BOSS SHOLLEI VS JUDICIAL SERVICE COMMISSION & ANOTHER 2018 eKLR, the SUPREME COURT OF KENYA** cited with approval the following passage from the treatise **JUDICIAL CONTINUING EDUCATION WORKSHOP; RECUSAL, CONTEMPT OF COURT AND JUDICIAL ETHICS, MAY 4, 2012:**

“A Judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartialities and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason”.

In our view, any objective person, including Mr. Sagana’s clients, listening to those very unfortunate remarks, would take the view that this court is unlikely to be impartial in this case. We find that to be an extremely good reason to warrant our recusal.

Having considered the above, we hereby recuse ourselves from further handling this case.

However as a court, we must express our strong disapproval at the intemperate language and disparaging remarks that Mr. Sagana employed in addressing us. Whereas a counsel owes a duty to his client, he also has an overriding duty to the court. That duty demands of him to conduct himself with decorum and to maintain the dignity required of his professional standards.

We take the view that Mr. Sagana has fallen far short of those standards.

HON. JUSTICE B. N. OLAO

HON. JUSTICE L. N. MBUGUA

HON. JUSTICE E. C. CHERONO

RULING DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF JULY, 2019

Mr. Sagana and Ms. Hashi for the plaintiffs – present

Mr. Wairoto for the 1st defendant – present

Mr. Minishi and Ms. Barako for the 2nd defendant – present

Ms. Kungu for the 3rd and 4th defendants and also holding brief for Ms. Njuguna for the 5th defendant – present

Mr. Kiprop for the interested parties – present

Court assistants – Mr. Dennis Ndonye

Court interpreters: Ms. Cecilia Ekeno (Samburu/Turkana interpreter)

Mr. James Lomurut (Rendille interpreter)

HON. JUSTICE B. N. OLAO

Sign: Date:

HON. JUSTICE L. N. MBUGUA

Sign:..... Date:

HON. JUSTICE E. C. CHERONO

Sign: Date: