



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

Introduction

1. The 1st defendant, Lake Turkana Wind Power Ltd has put up a wind power project in the heart of Marsabit County. The land affected by the project measures about 150 000 acres (the Suit land) in Laisamis constituency, and it is apparently the size of Nairobi County (or there about). Plaintiffs are claiming that they are nomadic pastoralists who have since time immemorial been the legitimate occupants of the Suit land, and that they have held this land as ancestral, cultural and grazing land for themselves and in trust for their future generation. Plaintiffs further claim that the suit land was illegally set apart and given to a private entity, the Lake Turkana Wind Power Limited and therefore, the ancestral ownership of community land was extinguished through an illegal process. It is against this background that plaintiffs filed the suit

seeking orders of cancellation of the titles to the suit land (L.R No. 6395/1, L.R 28031/1, L.R No. 6396/1, L.R No. 28031/2). Plaintiffs are also seeking orders of nullification of the wind power project.

2. The suit was filed contemporaneously with an application for injunction to restrain the defendants from dealing with the land in any manner until the suit is determined. After a tumultuous process which involved a scene visit in Marsabit County, a ruling was delivered on 9.11.2016 whereby, the application for injunction was denied.

3. In the aforementioned ruling, the court referred the matter to the Alternative Dispute Resolution mechanism pursuant to provisions of section 59 (c) of the civil procedure Act.

4. Neither the scene visit, nor the Alternative Dispute Resolution mechanism have borne any fruits. Meanwhile, the project is now complete.

The Application

5. Counsel for 1st defendant has applied orally for this court to certify the case as raising substantial questions of law as to warrant the constitution of a three Judge bench to hear and determine this matter. The grounds in support of this application are that the wind power project is a vision 2030 project costing 71 billion Kenyan shillings and that it is the largest privately funded project to have been undertaken in Kenya. The project is situated on the 150 000 acres of land, which land was sold by Marsabit county council to 1st defendant for purposes of construction of the wind power project.

6. 1st defendant contends that there is a power purchase agreement between **Kenya Power and Lighting Company and Lake Turkana Wind power Ltd** to purchase the power, 310 megawatts, which power will in turn supply power to the national grid.

7. 1st defendant further states that since it is the government which will purchase the power, then the entire country is affected as it is tax payer's money which is purchasing the power.

8. 1st defendant also states that there are International donors who have funded the facility and will also be affected by the decision herein.

9. 1st defendant states that the project is now complete with 365 wind turbines which will generate 310 megawatts. The completion of the project came to be because the court allowed the 1st defendant to continue with the construction and implementation of the project way back on 9.11.2014.

10. 1st defendant also informed the court that a number of expert witnesses including anthropologists will be called as witnesses.

11. Against this back ground, 1st defendant has submitted that the suit does raise weighty issues of law and fact and therefore, the case ought to be heard by a bench of Judges.

12. This application is supported by the Marsabit County Government (2nd defendant, the Attorney General and Chief Land Registrar (3rd and 4th defendants), the National Land commission (5th defendant) and the interested parties. The interested parties (who state that they are residents of the affected area) have added that they have begun to enjoy the fruits of the project which they consider to be very positive. They aver that this matter is of National importance and ought to be determined in a way that promotes the interests of the Nation.

13. The plaintiffs' side is opposing this application averring that there is nothing novel about the case and that the application is a delay tactic. The plaintiffs wonder why the application is being made at this stage, yet applicant had failed to comply with order 11 for one and a half years.

14. Plaintiffs contend that this court is being told to define weighty issues due to the level of investment, yet this is not an issue in the pleadings. They aver that this court has no jurisdiction to value what is being termed as a private project and that parties should not be allowed to form a case within a case.

15. Plaintiffs argue that the issue of having a bench is against the fidelity to the constitution, against proper practice candor and that the decision of a single Judge is as good as a three Judge bench. The plaintiffs therefore urge the court to proceed with the matter.

Determination

16. The constitutional provisions which permits the constitution of a bench of more than one Judge is article 165 (4), where it is provided that; ***“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three assigned by the Chief Justice”.***

17. As rightly submitted by the plaintiff's advocate, the decision of a bench of Judges is as good as that one of a single Judge. see-**Harrison Kinyanjui vs. Attorney General & Another (2012) Eklr.** In this case, the court added that ***“the meaning of substantial question must take into account the provisions of the constitution as a whole and the need to dispense justice without delay given specific fact situation.... Each case must be considered on its merits by the Judge certifying the matter”.***

18. What then is a substantial question of law requiring the empaneling of an uneven number of Judges to hear this matter?. In **Chunilal V. Mehta versus Century Spinning and Manufacturing Co. AIR 1962 SC 1314 (The Supreme Court of India)** it was held that; ***“A substantial question of law is one which is of general public importance or which directly substantially affects the rights of the parties***

and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views”.

19. In **National Super Alliance (NASA) versus The Independent Electoral and Boundaries Commission H.C Pet No. 328/2017** the court considered that the **Chunillah case (Supra)** offered proper guidelines and an insight in determining whether or not a matter raises a substantial question of law for the purposes of article 165 (4) of the constitution. The guidelines considered are as follows;

(i) Whether, directly or indirectly, it affects substantial rights of the parties or

(ii) Whether the question is of general public importance, or

(iii) Whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest court of the land, or

(iv) The issue is not free from difficulty, or

(v) It calls for a discussion for alternative view.

20. Still in the **NASA** case, the court stated that; **“The court may also consider whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires substantial amount of time to be disposed off, the effect of the prayers sought in the petition and the level of public interest generated by the petition. These are mere examples since the article employs the word *“includes”*. Accordingly the list cannot be exhaustive and courts are at liberty to expand the grounds as occasions demand”.**

21. Similarly in **Martin Nyaga and others versus speaker of the County Assembly of Embu & 4 others and Amicus (2014) eKLR**, the court considered **“Whether the matter is Complex, whether the matter raises a novel point, whether the matter by itself requires a substantial amount of time to be disposed off, the effects of the prayers sought in the petition and the level of public interest generated by the petition”.**

22. In the present case, I have considered the issue of competing rights of the indigenous communities, private entities, rights of the general public as well as rights of the future generation. The effects of the prayers sought in this suit will have a ripple effect for now and in the far future. I find that the rights of the parties herein, the general public and generations to come stand to be substantially affected by the final decision in this matter.

23. I have also taken into account the averment made by the plaintiff’s side that alienation of such expansive piece of community land to a private entity amounts to a contemporary land injustice. A question arises as to whether the alienation and annihilation of the community’s ancestral land to the tune of 150,000 acres amounts to an irreparable loss and an unquantifiable inter-generational loss.

24. I have also taken into account the component of finance. 1st defendant has averred that the project is the single largest private investment in Kenya’s history, and that through the power purchase agreement, public funds have been and continue to be utilized. Plaintiffs on the other hand state that the commercial aspect of this matter should not be considered by the court. The fact that the project is massive appears not to be in dispute. Way back on 9.11.2015, Judge Njoroge in a certain ruling had also noted that **“this matter involves a massive project. It also involves weighty issues”.**

25. **Article 201 (d)** of the constitution stipulates that **“public money shall be used in a prudent and responsible way**”. I am inclined to find that the manner in which public funds (which is the tax payers money) have been used and continue to be used in a project of such great magnitude is an issue of general public importance and of great public interest.

26. On this point, I must add that I have seen a notice of indemnity filed by the 1st defendant against a co-defendant (Marsabit County Government) claiming a total sum of Kshs.224.2 billion plus legal fees pursuant to their lease agreement. This amount has been tabulated as Kshs.77 billion as costs of construction of the wind power. Shillings 136.4 billion being shareholder returns/profits from the wind power and Shillings10.3 billion being deferred Government of Kenya transmission inter connector delay deemed Generated Energy (DGE) payments. This again gives credence on the contention that the project is massive and affects not just the parties here in but even the general public.

27. I have also considered that this is a case which requires substantial amount of time to be disposed off. Although the matter was filed in 2014, the actual trial has never taken off primarily because every step taken in this matter appear to be lengthy. Thus even if the present application has never been raised before, nevertheless, it is not late in the day to do so. Further, I find that the materials to be considered during the trial are voluminous whereby some parties have presented a thousand plus page bundle of documents. This again is an indication that the trial will require substantial amount of time.

28. I have also taken into account that the matter is presenting itself as complex case. The court has been informed that a total of **24 expert witnesses** are lined up to testify (3 for plaintiff, 6 for 1st defendant, 3 for 2nd defendant, 2 for 3rd defendant and 10 for Interested Parties). Some of the expert witness are set to produce books, others reports and still, others will produce maps. This technical arena may elicit or create room for difference of opinion.

29. I have also considered that this is a case where mediation by an autonomous mediation panel consisting of area leaders, representatives from KNCHR, CI Arb, LSK and CAJ has failed.

30. Having expressed myself as above, I am satisfied that the issues raised herein are **of great public importance and of great public**

interest, are weighty, complex and will require substantial amount of time to conduct the trial. The matter deserves the constitution of a Bench of Judges for hearing and determination.

31. I therefore certify that this matter be referred to the Chief Justice forthwith for the constitution of a bench in terms of Article 165 (4) of the constitution.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 25th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Hashi for plaintiffs

Wainato for 1st defendant and holding brief for Kiprop for 1st – 5th Interested Parties

Minishi for 2nd defendant

Miss Kungu for 3rd and 4th defendants

Miss Njuguna for 5th defendant

HON. LUCY. N. MBUGUA

ELC JUDGE