



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC MISC APPLICATION NO. 11 OF 2017

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF SECTION 4, 5 & 6 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTION 24 OF THE PHYSICAL PLANNING ACT

AND

IN THE MATTER OF ARTICLES 47 & 62(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

SECTION 13 OF THE ENVIRONMENT & LAND COURT ACT 2011

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN NATIONAL LAND COMMISSION...1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

DIRECTOR OF PHYSICAL PLANNING, MINISTRY OF

LAND & PHYSICAL PLANNING.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

CORDISON INTERNATIONAL (K) LIMITED.....EX PARTE

KENWIND (K) LIMITED.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF LAMU.....2ND INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated and filed herein on 22nd May 2017, Cordison's International (K) Limited (the Ex-Parte Applicant) prays for Judicial Review Orders to issue against the Respondents as follows:-

1. Certiorari to remove into this Court and quash the decision contained in the Letter of Allotment issued by the 2nd Respondent to the 1st Interested Party dated 7th February 2017, of refence number CF 4154/34 and executed by one Kariuki J.K. for the 1st Respondent;

2. Certiorari to remove into this Court and quash the direction of the 3rd Respondent on 6th January 2017 through letter Reference Number PDD/206/XII/(26) to Ms Amina R. Masoud, County Executive Committee member, Land and Physical Planning, County Government Lamu recommending that the 1st Respondent do issue a letter of allotment to the 1st Interested Party's power generation project;

3. Mandamus compelling the 2nd Respondent to forthwith issue land lease instruments to the Applicant as directed by the 2nd Interested Party in its letter Reference LCG/PA/Vol. 2/2014/77 dated 5th December 2014 for the area over the approximately 11,100 acres or thereabouts situate in Kiongwe within Lamu County and covered under the Coordinates as outlined in the Award of 2nd September 2013 by the 2nd Interested Party in the Letter of Award for Land Lease Reference No. LCG/ADM/3/3/77/203/18 and captured in the Valuation Report of 21st March 2014;

4. Prohibition to be directed at the 1st Respondent whether by himself or through his agents and/or servants, from denying and/or compromising the validity of the Ex-Parte Applicant's approval with regard to the allocation and implementation of the Ex Parte Applicant's Project over the approximately 11,100 acres or thereabout situated in Kiongwe within Lamu County and covered under the coordinates as outlined in the Award of 2nd September 2013 by the County Government of Lamu; and

5. That the costs of and incidental to this application be provided for.

2. The application is supported by an Affidavit sworn on 16th May 2017 by the Ex-Parte Applicant's Chairman and Chief Executive Officer Crispin B.O. Kodi and is premised inter alia on the grounds that:-

i) The 1st Respondent has caused a letter of allotment to be issued to the 1st Interested Party despite being expressly told by the County Government of Lamu (the 2nd Interested Party) through a letter dated 18th April 2016, that the same parcel of land had been earlier approved, allocated, awarded and surveyed for the Ex-parte Applicant's Wind Power Project;

ii) The 1st Respondent has been actively, unlawfully and unprocedurally agitating for the inclusion, hijack, and/or takeover by the 1st Interested Party of the ex-parte Applicant's valid interest and allocation over the approximately 11,100 acres or thereabouts situate in Kiongwe within Lamu County and covered under the coordinates as outlined in the Award of 2nd September 2013 by the County Government of Lamu;

iii) The 1st Respondent has been sending conflicting and inconsistent correspondence, to the lessor, the County Government of Lamu purporting to exercise powers and authorize functions and actions while refusing to address objections or queries which leaves the ex-parte Applicant with no other option but to presume a bias for the 1st Interested Party;

iv) The Letter of Allotment issued by the 2nd Respondent to the 1st Interested Party and dated 7th February 2017, was prepared and purportedly delivered to the 1st Interested Party but was neither discussed, mooted or brought to the notice of the Ex-parte Applicant for whom the PDP No. LMU/1281/01/16 was prepared pursuant to the relevant approvals nor with the 2nd Interested Party which is the legal landlord of the subject land. This is in direct contravention of Section 4(4) of the Fair Administrative Action Act No. 4 of 2015;

v) Both the Ex-parte Applicant and the 2nd Interested Party have written severally and vehemently on the impropriety of the 1st and 2nd Respondent's blind attempts to ignore the Ex-parte Applicant's approval and allocation and their non-consultative and illegal attempts to force the 1st Interested Party's interest against procedure and fairness;

vi) That Part Development Plans and correspondences from or caused by the Respondents are subject to other Court proceedings and the Respondents, in bad faith, have moved to defeat such challenge and perpetuate a fraud before due process can catch up with their activity by causing and/or issuing the subject letter of allotment;

vii) Article 62(2) (a) of the Constitution vests un-alienated public land in County Governments. This vestment was acknowledged by the County Government of Lamu which approved and allocated the subject land to the Ex Parte Applicant to implement a Wind Power Project. The 1st, 2nd and 3rd Respondents are incapable by law of causing the subject Letter of Allotment and the aforementioned PDPs without the County Government of Lamu's involvement let alone in disregard to the County Government's opposition;

viii) The 1st and 2nd Respondents have for 25 whole months, failed/refused and/or ignored issuing Land Lease Instruments directed by the County Government of Lamu in its letter Reference LCG/PA/Vol. 2/2014/17 dated 5th December 2014 to the Ex Parte Applicant and have now unprocedurally purported to issue a Letter of Allotment to the 1st Interested Party;

ix) The 1st, 2nd and 3rd Respondent's actions amount to an abuse of power having acted in bad faith, for an improper purpose and has failed to exercise discretion judiciously.

3. On behalf of the 1st and 2nd Respondents, the Chief Land Administration Officer at the National Land Commission (2nd Respondent) Zachariah Ndege has sworn a Replying Affidavit filed herein on 21st August 2017 in which he refutes the allegations made by the Ex Parte Applicants.

4. The 1st and 2nd Respondent aver that Section 12 of the Land Act empowers the 2nd Respondent to allocate public land on behalf of the National and County Governments whenever it becomes necessary. Pursuant to this, both the Ex-Parte Applicant and the 1st Interested Party, decisions of desirous of commencing various wind energy projects within Lamu County have submitted applications for allocation of public land within the said County for implementation of these projects.

5. According to the 1st and 2nd Respondents, they are aware that vide a letter dated 4th November 2009, the Ex-Parte Applicant submitted to the Ministry of Energy an expression of interest to develop a 350 MW of Wind Power energy at four sites being, Lambwe Valley, Offshore Lamu, Offshore Malindi and Marsabit. The Ministry of Energy responded in a letter dated 25th November 2009 informing the Ex-Parte Applicant that of the four areas applied for, the Ministry only granted first refusal rights to develop two sites being Offshore Lamu and Lambwe Valley. The Ex-Parte Applicant was also informed in the said letter that the other areas had already been allocated to other developers.

6. The 1st and 2nd Respondents further state that despite not getting explicit approvals from the Ministry, the Ex-Parte Applicant jumped the gun by seeking from the 2nd Interested Party allocation of land in Kiongwe and engaging the community members over the same in a bid to secure public participation and legitimacy.

7. That as a result by a letter dated 5th December 2014, the 2nd Interested Party requested the 2nd Respondent to process lease documents in favour of the Ex-Parte Applicant over land in Kiongwe measuring approximately 4,654ha for purpose of renewable energy generation. Thereafter the Ex-Parte Applicant and the 2nd Interested Party purported to draw a lease agreement on behalf of the 2nd Respondent in respect of public land situate in Kongwe within Lamu County and forwarded the same to the 2nd Respondent for execution.

8. In respect of the 1st Interested Party, the 1st and 2nd Respondents aver that they are aware they applied to the 2nd Respondent for allocation of roughly 1,660 hectares of land within Mpeketoni in Lamu County for development of what was termed as "Mpeketoni Wind Energy Project". On 24th August 2015, the Ministry of Energy wrote to the 2nd Respondents seeking the expedited allocation of land to the 1st Interested Party for implementation of a 90 MW wind energy project within Mpeketoni in Lamu County. This was after the relevant proposals by the 1st Interested Party for the project had received all requisite approvals as required by law and the Ministry of Energy.

9. The 1st and 2nd Respondent aver that the area of land applied for by the 1st Interested Party is public land duly vested in the County Government of Lamu to hold in trust for the benefit of the residents of the County and that in line with Article 62(2) of the Constitution, it is the role of the 2nd Respondent to administer this land on behalf of the County Government.

10. Accordingly upon receipt of the Application by the 1st Interested Party, the 2nd Respondent wrote to the 1st Interested Party on 27th May 2015 advising them inter alia, to have the application referred to the County Assembly of Lamu for deliberation and subsequent approval. Subsequently on 22nd July 2015, the County Assembly of Lamu approved for allocation to the 1st Interested Party approximately 1,282.42 Ha of land for implementation of a Wind Energy Project within Bahari Ward.

11. The decision of the Lamu County Assembly was ultimately communicated to the 1st Respondent who thereafter placed the matter before the 2nd Respondent's committee on Land Administration for deliberation. The committee approved the allocation on 23rd September 2015. Thereafter the 2nd Respondent caused to be published notice of action pursuant to Section 14(1) of the Land Act. The said notice sought comments from the public regarding the intended allocation.

12. Thereafter, the 1st and 2nd Respondents aver that they received two objections raising different issues. The first objection was from the Ex-Parte Applicant while the second one came from the 2nd Interested Party. Having considered the same, the 2nd Respondent resolved to stand by the allocation to the 1st Interested Party and they were therefore on 7th February 2017 issued with a Letter of Allotment. It is the 1st and 2nd Respondents position that the Ex-Parte Applicant's application has so far not met all the requirements to warrant allocation of the land for the purpose they require and the purported allocation of over 4.654 ha of land by the 2nd Interested Party is without any basis.

13. On their part, the 3rd and 4th Respondents have filed Grounds of Opposition dated 27th September 2017 in which they state inter alia:-

i) That the actions of the Director of Physical Planning (the 2nd Respondent) were proper and within his powers and mandate and the orders sought are untenable and a nullity;

ii) That the 3rd Respondent is empowered by virtue of Section 4,5,16, 24 and 25 of the Physical Planning Act (to carry out the actions that were undertaken);

iii) That no rules or rights have been demonstrated to have been breached especially by the 3rd Respondent and it is patently clear that the Applicant has not fulfilled the conditions required before the grant of public land;

iv) That public interest militates against private interests hence the reliefs sought should not issue.

v) That this Court lacks jurisdiction to entertain this Application as there is an alternative remedy in law which is more appropriate, efficient and effective; and

vi) That the Application lacks merit, is frivolous, vexatious and ought to be dismissed as against the 3rd Respondent.

14. In an Affidavit sworn by one of its directors Allan Ngari, on 10th July 2017, Messrs Kenwind Limited(1st Interested Party) aver that there is no material evidence that relevant Constitutional and Statutory Provisions on setting apart/allotment of the subject land for investments have been flouted and the orders sought herein are calculated to frustrate steps taken by the Respondents in compliance with the law which included the following:-

(a) Approval by the Ministry of Energy.

(b) Approval by members of the public in the area after being sensitized of the project through public participation.

(c) Approval by the County Assembly of Lamu.

(d) Approval by the 2nd Interested Party's Executive.

(e) Approval by the National Government; and

(f) Approval by the National Land Commission (2nd Respondent).

15. It is further the 1st Interested Party's position that there has been no unfair administrative action and no material has been availed in support of the allegations contained in the verifying affidavit. The 1st Interested Party further avers that the Ex-Parte Applicant's interest on part of the subject land is not through due process but is based on a State of the County address to the County Assembly by the Governor of Lamu on 1st April 2014. According to the 1st Interested Party, it is indisputable that the Applicant's feasibility Study on the intended wind energy project has neither been submitted nor approved to warrant entitlement for consideration to be allocated land.

16. In a Replying Affidavit sworn by its Director of Lands and Physical Planning Erick Randu on 7th July 2017, the County Government of Lamu (2nd Interested Party) avers that its predecessor, the defunct County Council of Lamu had on 15th November 2012 approved for implementation an application by the Ex-Parte Applicant for construction of a 350 MW Wind Power Project in Lamu.

17. Upon taking over, the 2nd Interested Party proceeded to assure the Ex-Parte Applicant vide their letter dated 31st January 2014 that it has no objection to the project as earlier approved and that it was looking forward to its successful implementation. Accordingly, on 5th December 2014, the 2nd Interested Party wrote to the 1st Respondent requesting for the preparation of a Physical Development Plan(PDP), a definite survey of the Plot for deed Plan purposes and the lease documents. The said letter did not however elicit any response from the 1st Respondent.

18. Subsequently the 1st Interested Party applied to the 2nd Interested Party for allocation of land in Mpeketoni for wind power project on 24th February 2014. The application for 1660 Hectares of land was forwarded to the Lamu County Assembly which subsequently on 22nd July 2015 passed a resolution approving the application. That it was only after the said approval that it transpired that the land the 1st Interested Party wanted to be allocated was the same one which had been approved for allocation to the Ex-Parte Applicant.

19. The 2nd Interested Party avers that when thereafter they received a letter from the 1st Respondent requesting for a PDP to be prepared in favour of the 1st Interested Party they voiced their reservations in preparing the PDP in view of prevailing situation of the land. Indeed on 18th April 2016, they wrote to the 1st Respondent asking him to immediately halt the process of allocation to the 1st Interested Party but their request was ignored. Instead the 1st Respondent requested the 3rd Respondent herein to prepare the PDP.

20. It is the 2nd Interested Party's case that the 3rd Respondent does not have the power to prepare the Part Development Plan and the instructions were therefore illegal as the mandate to do so falls within the purview of the County Government.

21. The 3rd to 44th Interested Parties are on their part opposed to the Application on the grounds inter alia:-

a) That the Ex-Parte Applicant is guilty of serious material non-disclosure firstly at the time of obtaining the leave to initiate the Judicial Review proceedings and after the filing of the Motion in that:-

i) There was pending before the Court for determination Malindi JR Case No. 2 of 2017; Cordison's International Ltd –vs- The Chairman, National Land Commission & Others which was struck out by this Court preliminarily after leave had been obtained in this cause and which essentially raised the same issues;

ii) There is pending for determination before this Court ELC No. 18 of 2016; Omar Abdalla Mohamed & 20 Others –vs- The County Government of Lamu & Others where the Ex-Parte Applicant is the 5th Respondent and where the Ex-Parte Applicant ought to have raised a Cross Suit or Petition on the matters being raised herein;

iii) There is pending for determination in this Court ELC Constitutional Petition No. 10 of 2015; James Gachichio Gitau & 6 Others –vs- The Honourable Attorney General & Others where all the parties herein are participating and where no Cross-Petition has been filed by the Ex-Parte Applicant.

b) That the application touches on complex and disputed facts regarding land ownership rights and interests which cannot be resolved by way of an application for prerogative orders;

c) That the environment and land Court has no jurisdiction to grant the orders sought by dint of the provisions of Section 8 and 9 of the Law Reform Act read together with the provisions of Order 53 of the Civil Procedure Rules.

22. I have considered the Application and the various responses in support and in opposition thereto. I have equally taken into account the detailed submissions and authorities filed in support of and in opposition to the Application.

23. The origin of the dispute herein may be traced to the desire of the Government of Kenya to boost investment in power generation and transmission to support the transformation of the Country into a newly industrialising “middle income Country by the year 2030 (popularly known as Vision 2030 Project). As a means towards this goal, the Ministry of Energy in March 2008 introduced what were referred to as a feed-in Tariffs (Fits) Policy aimed at promoting generation of electricity from renewable energy sources.

24. It is apparent that in response to this initiative, on or about 4th November 2009, the Ex-Parte Applicant a Limited Liability Company incorporated in Kenya submitted an Expression of Interest with the help of some international sponsors to the Ministry of Energy seeking to develop 350 MW of wind energy at identified sites. Subsequently by a letter dated 25th November 2009, the Ministry wrote to the Company informing them among others that their Expression of Interest had been approved for development under the feed-in Tariffs Policy, for two of the sites they had identified namely Lambwe Valley and Offshore Lamu.

25. In the said letter signed by the then Permanent Secretary in the Ministry of Energy Mr. Patrick Nyoike, the Ex-Parte Applicants were also advised as follows:-

“Lastly, we would like to point out that we have no control of the ownership of the land at the proposed site. It is therefore upto you to ensure that you secure land rights for the proposed power stations. In the event that you are unable to do so, the Committee will be at liberty to consider other proposals for the development of the same site. You will however be informed about any such development before the final decisions are made.”

26. It is apparent that from the point of view of the Ex-Parte Applicant, that approval gave them authority and exclusivity to study and implement Wind Power Projects in Lambwe Valley and Lamu. Accordingly, over the proceeding years they provided the Ministry of Energy with extensive reports and feasibility studies which they state were at great expense with regard to research, labour and cost including a Lamu Transmission Screening Analysis by an entity known as Electric Power Engineers Inc of the United States of America.

27. On 5th July 2013, the National Environment Management Authority (NEMA) issued the Ex-Parte Applicant with a Licence for the implementation of its Wind Project with an expected output of 300 MW over the sites of Moa-Witu, Kiongwe-Mpeketoni, Pate-Faza and Kiongwe-Kiunga divisions in Lamu County. Satisfied with the encouragement and support they were receiving, the Ex-Parte Applicant set out to secure the land for the implementation of the project by actively engaging the Ministry of Lands, the County Government of Lamu and the Communities in the concerned areas.

28. Subsequently by a Letter of Award for Land Lease dated 2nd September 2013 (annexture CBOK 23 (a) of the Ex-Parte Applicant’s Supporting Affidavit), the County Government of Lamu acting as the “Lessor” of the concerned sites granted the Ex-Parte Applicant a renewable Lease for a period of 40 years in Moa, Witu Division, and Kiongwe, Mpeketoni Division.

29. Thereafter by a letter dated 5th December 2014, the County Government of Lamu (the 2nd Interested Party herein) wrote to the 1st Respondent indicating that having received all the necessary approvals it wished to allocate its land for lease to the Ex-Parte Applicant. Apparently neither the 1st nor the 2nd Respondent responded to the said letter.

30. Instead on or about 22nd July 2015, the Ex-parte Applicant became aware of a resolution emanating from the Office of the Clerk of the County Assembly of Lamu which appeared to approve for Lamu an Electra wind Project by Kenwind Ltd (the 1st Interested Party). The 1st Respondent thereafter proceeded to instruct the 3rd Respondent herein to prepare a Part Development Plan (PDP) for the 1st Interested Party. This was done and was gazetted on 12th August 2016.

31. It is the Ex-Parte Applicant’s contention that the said PDP and another gazetted subsequent amendment thereto was an attempt to unprocedurally, unfairly and defectively hijack its allocation by parties unknown. In this regard the Ex-Parte Applicant avers that the only valid PDP is PDP No. LMU/1281/01/16 of 22nd July 2016 prepared by the 2nd Interested Party.

32. The 2nd Respondent has however gone ahead to issue the 1st Interested Party with a Letter of Allotment dated 7th February 2017 something the Ex-Parte Applicant considers to be in abuse of its powers, in bad faith, and amounting to a wrong exercise of discretion by the 2nd Defendant.

33. In my mind the entire dispute herein boils down to the powers of the County Government vs-a-vis those of the National Land Commission in the administration and management of public land. Interestingly all the parties herein cite Articles 61 and 62 of the Constitution in support of the various antagonistic positions taken herein. Article 61 provides as follows in regard to classification of land in Kenya:-

“61 Classification of land

(1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.

(2) Land in Kenya is classified as public, community or private.

34. In defining what constitutes public land, Article 62 of the Constitution stipulates:-

“62 Public Land

(1) Public Land is-

(a) Land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) Land lawfully held, used or occupied by any State Organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) Land transferred to the State by way of sale, reversion or surrender;

(d) Land in respect of which no individual or community ownership can be established by any legal process;

(e) Land in respect of which no heir can be identified by any legal process;

(f) All minerals and minerals oils as defined by law;

(g) Government forests other than forests to which Article 63(2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and especially protected areas.

(h) All roads and thoroughfares provided for by an Act of Parliament;

(i) The territorial sea, the exclusive economic zone and the sea bed;

(j) The continental shelf;

(k) All land between the high and low water marks;

(l) Any land not classified as private or community land under this Constitution; and

(m) Any other land declared to be public by an Act of Parliament-

a) In force at the effective date or

b) Enacted after the effective date.

2) Public Land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their behalf by the National Land Commission, if it is classified under-

a) Clause (1) (a), (c), (d), or (e);

b) Clause (1) (b), other than land held, used or occupied by a National State Organ.

3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

35. It is not in dispute that the land in dispute is public land as defined herein under Article 62(2) (a) of the Constitution. Relying on these provisions, the 2nd Respondent weighs in that it is an independent Commission established under Article 67(1) of the Constitution that it has as its fundamental functions the management of public land on behalf of the National and County Governments in accordance with the principles of Land Management as set out in the Constitution.

36. In this regard, the 2nd Respondent accused the Ex-Parte Applicant of “jumping the gun” by seeking from the County Government of

Lamu (the 2nd Interested Party) allocation of public land in Kiongwe and engaging community members on the same. The 2nd Respondent further faults both the Ex-Parte Applicant and the 2nd Interested Party of purporting to draw a lease agreement on behalf of the 2nd Respondent in respect of public land situate in Kiongwe within Lamu County and thereafter forwarding the same to the 2nd Respondent for execution.

37. In a rejoinder to this accusation by the 2nd Respondent, the Ex-Parte Applicant in a Further Affidavit also sworn by its Chairman and Chief Executive Officer Crispin B.O. Kodi and filed herein on 20th September 2017 avers at paragraph 4 thereof as follows:-

“4. That in response to paragraph 3 and 5 of the 1st and 2nd Respondents” Replying Affidavit (hereinafter “the Affidavit”) I am advised and believe that the 2nd Respondent manages public land on behalf (emphasis mine) of the National and County Government as stated in Article 67(2) (a) of the Constitution of Kenya and not in opposition, contrary to or against the interests and intentions of National and County Governments with regard to public land under their jurisdiction. I contend that because of partiality in favour of the 1st Interested Party, the 1st and 2nd Respondents have been unlawfully doing so.”

38. Evidently, from the Ex-Parte Applicants perspective the process of allocating the land for the wind power project was one which was supposed to be driven by the 2nd Interested Party and the 2nd Respondent’s role was merely to facilitate the decisions of the County Government. This position which is supported by the 2nd Interested Party is clearly brought out at paragraph 9, 19 and 20 of the Ex-Parte Applicant’s Further Affidavit aforesaid in which they aver as follows:-

“9. That as noted in paragraph 10 and 11, indeed the County Government of Lamu wrote to Cordison’s on 31st January 2014 to affirm its approval of Cordison’s implementation of the Project and on 5th December 2014 the County Government wrote to the Chairman of the National Land Commission citing that having received all the necessary approvals it wished to allocate its land for lease to Cordison’s taking into account that community interests were protected. It reaffirmed that the land was public and that the identification of boundaries had been done by the Government Surveyors. The details of the Lease Terms were provided and the National Land Commission (NLC) was directed to prepare a Part Development Plan, a definitive Survey for deed plan purposes and execute the lease document. I attach hereto and mark (BOK 2a JR 11 and CBOK 2b JR 11 respectively true copies of the said letters of 31st January 2014 and 5th December 2014.

19. That in response to paragraph 16 and particularly the letter of 27th May 2015 annexed and referred to therein, I note that the 2nd Respondent accepts that the lessor and approving entity with regard to the subject land was the County Government of Lamu and only the County Government could allocate and “confirm that the targeted site earmarked is for your project”. As such, the 1st and 2nd Respondent could not act unilaterally let alone in contravention of (the) County Government direction.

20. That in response to paragraph 17 of the Affidavit, I concur that any conversion or substantial transaction of public land within the County demanded the attention and approval of the County Assembly. It is my vehement belief that the 1st and 2nd Respondents, as I shall endeavour to demonstrate, violated the provisions in unilaterally and unlawfully defying resolutions, directions, objections and reminders of both the County Government and County Assembly to favour the 1st Interested Party.”

39. As we have seen above, public land is defined under Article 62 of the Constitution and is either vested in the National or County Governments. Under Article 67 of the Constitution the 2nd Respondent is charged with the responsibility of management of public land. Article 62(3) on the other hand stipulates that public land vested in County Governments shall be administered on their behalf by the 2nd Respondent. What then does the administration entail?

40. In the **Supreme Court Advisory Opinion Reference No. 2 of 2014; in the matter of the National Land Commission(2015)eKLR**, the apex Court referring to the definition of Commissions and Independent Offices at Article 260 of the Constitution observed as follows at paragraph 177 thereof:-

“The real purpose of the “independence clause” with regard to Commissions and Independent Offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other Institutions of Government. Such a provision was incorporated in the Constitution as an antidote, in the light of the regrettable memories of an all powerful Presidency that, since independence in 1963, had emasculated other arms of Government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions alongside the Judicial Branch, entrusting to them special governance mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as “people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this indeed, is the purpose of the “Independence Clause.”

While bearing in mind that the various Commissions and Independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and Independent Offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit.....For due operation in the matrix, “Independence” does not mean detachment”, “Isolation” or “disengagement” from other players in public governance. Indeed for practical purposes, an independent Commission will often find it necessary to coordinate and harmonise its activities with those of other institutions of Government, or other Commissions, so as to maximize results, in the public interest. Constant consultation of Government, and with Civil Society as may be necessary, will ensure a seamless and an efficient and effective rendering of services to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that the Commissions and Independent offices are not to plead “Independence” as an end in itself; for public –governance tasks are apt to be severely

strained by possible “Clashes of independence.”

41. The Supreme Court went on to observe at paragraphs 274 to 299 of the Advisory Opinion that in interpreting the terms “manage” and “administer” as used in the Constitution one has to take into account the historical background of land issues in Kenya that necessitated the establishment of the 2nd Respondent, and the mischief that the 2nd Respondent was intended to cure in the allocation of public land. In this regard, the Court determined that the National Land Commission is not subject to direction or control by any person or authority, and it cannot, thus be considered an agent of the National or County Government.

42. The Supreme Court went on to conclude that the meaning of those two terms can only be inferred by looking at the context in which they are used in the National Land Commission Act, the Land Act and Land Registration Act, which Acts are the primary statutes dealing with land management and administration in Kenya.

43. In this regard, Section 8 of the Land Act is prescriptive of the management role of the 2nd Respondent. This section falls under Part II of the Act entitled “Management of Public Land”. It is instructive to note that the role prescribed under this Part include *identifying public land; keeping a data base of all public land; sharing of data; and land mapping among others.*

44. Under the National Land Commission Act, it is further clear that the 2nd Respondent was established to, inter alia, provide for the management and administration of public land. The role of the 2nd Respondent in its Constitution Act, are in tandem with its roles in the Land Act. These include *allocation of land; disposing of public land; leasing and effecting change of user.*

45. As it were, Section 12 of the Land Act equally gives the 2nd Respondent power to allocate public land on behalf of both the National and County Government. Section 14 of the Act provides the procedure to be followed by the 2nd Respondent prior to such allocation.

46. Arising from the foregoing, it is evident to me that the Ex-Parte Applicant and the 2nd Interested Party herein were clearly mistaken in the assumption that the 2nd Interested Party could allocate the public land in issue and thereafter direct the 2nd Respondent to prepare the relevant Part Development Plan (PDP) as happened herein. The 2nd Interested Party had no power to alienate and/or allocate public land in the manner it did and the PDP No. LMU/1281/01/16 as published in Gazette Notice No. 6128 of 5th August 2016 was therefore in my view unprocedural illegal and of no consequences in law.

47. While it is obvious to me that the Ex-Parte Applicant has indeed expended considerable amounts of time, research and money in its desire to establish the Wind Power Project in Offshore Lamu all the way from the year 2009, it is apparent that certain requirements, especially those that came with the advent of the Constitution of Kenya, 2010 were not adhered to.

48. In contrast, it is apparent that the 1st Interested Party rightfully applied to the 2nd Respondent for land within Mpeketoni in Lamu County for development of what was termed as Mpeketoni Wind Energy Project. On 24th August 2015, the Ministry of Energy wrote to the 2nd Respondents seeking expedited allocation of the land for implementation of the project. The 1st Interested Party’s application was placed before the County Assembly of Lamu for deliberation and was approved on 22nd July 2015.

49. The contention by the Ex Parte Applicant that the subsequent allocation was irregular and unlawful for encroaching on land already issued and allocated to the Ex-Parte Applicant does not lie as in law, the 2nd Interested Party had no power to allocate the public land to the Ex-Parte Applicant in the manner it did or at all.

50. zAs it were, I did not find any ground to suggest that the Respondents herein acted ultra vires-their authority and/or in abuse of the powers bestowed upon them. Neither did I find any evidence of breach of rules of natural justice to warrant the grant of Judicial Review orders sought herein.

51. Accordingly, the Motion dated 22nd May 2017 must fail. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE