



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 18 OF 2016

OMAR ABDALLA MOHAMED & 20 OTHERS.....PETITIONERS

VERSUS

- 1. THE COUNTY GOVERNMENT OF LAMU**
- 2. THE MINISTRY OF LAND AND PHYSICAL PLANNING**
- 3. THE NATIONAL LAND COMMISSION**
- 4. THE ATTORNEY GENERAL**
- 5. CORDISONS WIND POWER PROJECT**
- 6. KENWIND COMPANY OF KENYA.....RESPONDENTS**

AND

- 1. PETER MUNENE WAMBUGU**
- 2. RAHMA OMAR**
- 3. ZACHARIA NJORGE.....INTERESTED PARTIES**

RULING

BACKGROUND

1. By a Notice of Motion application dated 20th September 2016, the 21 Petitioners herein pray for orders framed as follows:-

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3.

4. That upon inter-partes hearing, this Honourable Court be pleased to issue an interim order of injunction against the 1st, 2nd, 3rd and 4th Respondents restraining them, their servants, agents, representatives, assigns or any other persons claiming under them from intruding, trespassing into and from surveying and demarcating excessive and/or more land above the agreed acreage of 1282.42 Hectares of land for the proposed site for construction and/or putting up of the Wind Power Generation Project or Plant at Kiongwe Area in Bahari Ward of Lamu West within Mpeketoni Township in Lamu County and from implementing the Part Development Plan being PDP No. LMU/1281/01/16 whose Notification of Completion to the public was made on the 22nd July 2016 for a period of 60 days and lapses on 22nd September 2016 pending the hearing and determination of the Petition.

5. That upon inter-partes hearing this Honourable Court do further issue interim Orders restraining the 5th and 6th Respondents from entering into the proposed site for Wind Power Generation situated at Kiongwe Area Bahari Ward of Lamu West within

Mpeketoni Township in Lamu County and from ferrying or transporting any construction material or equipments of any nature to the said proposed site and from carrying out or commencing any preparation or construction of any structures or plant thereon pending the hearing and determination of the petition.

6. That in order to prevent the ends of justice from being defeated, this Honourable Court be pleased to make such other interlocutory orders as may appear to be just and convenient.

7. That the costs of this Application be provided for.

THE PETITIONERS' CASE

2. The Application is supported by the annexed affidavit of Omar Abdalla Mohamed, the 1st Petitioner herein and is premised inter alia on the grounds:-

i) That the Petitioners are residents of the said Kiongwe area and among the rightful beneficiaries entitled to ownership of all that land situated at Kiongwe Mjini Bahari Ward in Lamu West Constituency.

ii) That after the Respondents came up with a plan to put up a Wind Power Generation Project, several consultations, negotiations and public meetings were held with the residents and after assuring and confirming to the Petitioners that the project would cover an approximate area of 1282.43 Hectares, the 2nd and 6th Respondents were contracted to carry out a survey, assessment and identification of suitable land within the area.

iii) That after the site, named Kenwind Power Site was identified, the 1st, 2nd and 3rd Respondents secretly, maliciously and wrongfully contracted the 5th Respondent who proceeded to prepare a new PDP No. LMU/1281/01/16 on the same site which plan now indicates the approximate area to be covered by the project as 4057.350 Hectares which land is more than what was agreed upon.

iv) That subsequently the Director of Physical Planning advertised the completion of the PDP. The land comprised of the new PDP had been surveyed and adjudicated and the Petitioners were awaiting the issuance of Title Deeds therefor. If the PDP is implemented, the Petitioners fundamental rights are likely to be infringed as the proper acreage land has not been done and the residents may not get just compensation for their land.

v) That the Petitioners and other residents of the area have occupied the same since time immemorial and have developed the land for farming and their residences; and

vi) That unless the orders sought are granted, the Constitutional rights of the residents of the said Kiongwe area stand to be violated and the Petitioners shall suffer irreparable loss and damage.

THE 1ST RESPONDENT'S CASE

3. By a Replying Affidavit filed herein on 19th October 2016 and sworn by its Director of Lands, Physical Planning and Urban Developments, Erick Randu, the County Government of Lamu (1st Respondent) avers that the land which is proposed as a site for wind power generation in the PDP prepared by itself is situated at Kiongwe Mashambani in Bahari Ward and not Kiongwe Mjini or Kiongwe Village as alleged by the Petitioners.

4. The 1st Respondent further avers that contrary to the Petitioners assertions, the land in Kiongwe Mjini or Kiongwe Village has already been surveyed and certificates of titles issued and it is therefore private as opposed to public land. They state further that the land in respect of which it has prepared a PDP is for all intents and purposes public land as per the provisions of Article 62(1) of the Constitution and it is therefore not true that the Petitioners are the rightful beneficiaries of the land proposed by the 1st Respondent for wind power generation.

5. The 1st Respondent denies that the 5th Respondent is a new power generation agent and asserts that the project in issue was approved by the now defunct Lamu County Council whereas the 6th Respondent's project was approved by the Lamu County Assembly.

6. The 1st Respondent avers that subsequent to the publication of its notice of the PDP on 23rd July 2016, the 3rd Respondent wrote to it vide a letter dated 29th July 2016 recommending the sharing of the land proposed for wind power project between the 5th and 6th Respondent investors hence necessitating a revision of the initial PDP Ref. No. LMU/1281/1/16 and publication of the Notice of 20th September 2016.

7. In addition, the 1st Respondent contends that this Petition is premature and in bad faith as the Petitioners ought to have sent an objection to the Director of Land and Physical Planning within 60 days as per the provisions of Section 19 of the Physical Planning Act.

THE 2ND AND 4TH RESPONDENT'S CASE

8. On their part, the Ministry of Lands and Physical Planning (2nd Respondent) as well as the Attorney General (4th Respondent) filed Grounds of Opposition herein on 27th October 2016 opposing the application on the grounds:-

i. That the Motion filed herein is misconceived, frivolous, vexatious and an abuse of the process of the Court;

ii. That the actions by the 2nd Respondent were proper and within its power and fully within its mandate;

iii. That the application lacks merit as it does not demonstrate infringement or imminent threat of infringement of any right and freedom as contemplated under Article 22, 23 and 258 of the Constitution nor breach of any law to warrant grant of the reliefs sought; and

iv. That the balance of convenience and the public interest tilts against the grant of the orders sought.

THE 5TH RESPONDENT'S CASE

9. Responding to the same application, Cordisons International (K) Ltd sued herein as Cordisons Wind Power Project (5th Respondent) has through a Replying Affidavit sworn by its Chairman and Chief Executive Officer Crispin B.O. Kodi also vehemently opposed it. It is their case that they are unaware that the 1st Respondent had at any time contracted the 6th Respondent to carry out any survey, assessment and identification of a suitable site for a Wind Power Project. On the contrary, they state that the 1st Respondent as the Trustee and Lessor of all public land over Lamu County did lawfully engage with them for the establishment of a Wind Power Project which engagement began way back in the year 2009.

10. The 5th Respondent avers that in their said engagement, they involved all stakeholders, including the community, all relevant hierarchies and civil leadership, civil society groups and any other entity that felt the project would affect them directly or peripherally. The said consultation included all occupiers of the project sites and it is they who acquiesced and supported the development of the project.

11. The 5th Respondent identifies the 2nd, 5th, 6th, 12th, 15th and 20th Petitioners herein as some of the people who participated in their stakeholders engagements and who issued their approval for the project in writing.

12. In regard to the expanded PDP, the 5th Respondent avers that it became aware of an advertisement in the Kenya Gazette of 12th August 2016 for a completion of development for PDP No. NRB/1281/2016/01 which apparently related to the land situated within Lamu West County. Already the 1st Respondent had by then advertised PDP No. LMU/1281/01/16 on 5th August 2016. The 5th Respondent wrote to the 1st Respondent objecting to the same. The 5th Respondent was therefore shocked to learn that on 30th September 2016, a Gazette Notice No. 7851 purported to amend PDP No. LMU/1281/01/16.

13. The 5th Respondent again wrote a letter to the 1st, 3rd and 6th Respondents objecting to the gazettement. It is therefore the 5th Respondent's position that the only valid PDP is the one dated 22nd July 2016 whose completion was gazetted on 5th August 2016. According to them the rest are defective, fraudulent, ultra vires and spurious documents meant to defeat the 5th Respondents interest.

14. I was unable to find any response to the application filed by the 3rd and 6th Respondent. Indeed from the record, I noted that Mr. Kiarie Kariuki, Learned Counsel for the 6th Respondent protested throughout the proceedings in regard to fact that his client had not been served with anything in regard to the Petition. While Mr. Wahome Advocate had appeared at some point in these proceedings for the 3rd Respondent, I did not find any response filed on their behalf.

THE INTERESTED PARTIES' CASE

15. In the course of the proceedings, by an application dated 20th May 2017, three individuals sought to be enjoined as Interested Parties in the proceedings. There being no objection to their being enjoined, their application was allowed on 29th May 2017. Subsequently by Grounds of Opposition filed herein on 16th June 2017, the three Interested Parties sought to oppose the Petitioners application on grounds inter alia that:-

1. The Petitioners have not established the parameters for the grant of the orders sought and therefore the application lacks basis and is bad in law.

2. The Petitioners have come to Court with dirty hands and that the substance of their Petition and application is the same or similar to the substance and gist of the Interested Party's Petition in Malindi ELC NO. 10 of 2015; James Gachichio Gichu & Others -vs- The A-G and where the same reliefs sought were reflected by the Court in its Ruling of 2nd October 2016.

3. The Motion dated 20th September 2016 is res judicata the ruling of the Court given in the said Malindi ELC No. 10 of 2015.

4. The Petitioners have no proprietary interest and rights over the suit property and hence have no locus standi seeking conservatory orders herein.

5. The substance of the Motion is hollow and the Petition does not raise any Constitutional issues for adjudication by this Court.

6. The Petitioners have not challenged the preparation of the alleged Part Development Plan in relation to the Wind Power Project as required by law; and

7. The 2nd to the 21st Petitioners have not lawfully authorized the 1st Petitioner to file the Petition on their behalf and leave of the Court to institute the Petition in representative capacity has not been sought or granted by this Court hence the Motion is incompetent and null and void ab initio.

ANALYSIS AND DETERMINATION

16. I have considered the substance of the Motion and the various responses thereto. I have equally considered the various written submissions filed herein by the respective Learned Advocates appearing for the parties.

17. The Petitioners herein have moved the Court on the basis that they are residents of Kiongwe Mjini in Bahari Ward in Lamu West Constituency within Lamu County. As such residents, it is their position that they are among the rightful beneficiaries entitled to ownership of all that land situated in the said area, and more particularly within Mpeketoni Township, which land has been surveyed and adjudicated and the residents thereof are now only waiting to be issued with title deeds.

18. It is the Petitioners contention that after the 1st, 2nd and 3rd Respondents came up with a plan to put up a Wind Power Generation Project, several consultations, negotiations and public meetings were held between the residents of the concerned area and the 1st, 2nd, 3rd and 6th Respondents pursuant to which the Petitioners and other area residents were assured that the proposed project to be put up by the 6th Respondent was likely to cover an area measuring approximately 1282.42 hectares. Consequently a Part Development Plan (PDP) was prepared and completed and the same identified a site named Kenwind Wind Power Site which was in tandem with the size of the project as agreed in the consultations.

19. The Petitioners aver that to their shock and dismay, they later on came to learn that the 1st, 2nd and 3rd Respondents have secretly, maliciously and wrongfully contracted the 5th Respondent to put up a similar project as that of the 6th Respondent and the said Respondents have now prepared a parallel Part Development Plan, being PDP No. LMU/1281/01/16.

20. The initial Motion filed herein sought several conservatory orders in the interim but the same were not granted at the time. As it is, what remains before me for consideration at this stage is whether the Petitioners have satisfied the conditions for grant of the injunctive orders as sought in Prayers 4, 5, and 6 of their Application.

21. In granting injunctive relief such as that sought herein, the Court will be guided by the principles laid down in the celebrated case of *Giella –vs- Cassman Brown Company Ltd(1973) EA 358*. These principles provide that:-

i) The applicant must demonstrate a prima facie case with a probability of success;

ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage which cannot be adequately compensated in any way or by an award of damages;

iii) If the Court is in doubt, it will decide the application on a balance of convenience.

22. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially(see Kenya *Commercial Finance Company Ltd –vs- Afraha Education Society (2001) 1EA 86*).

23. That being the case, the first question that this Court has to grapple with is whether on the facts placed before me, the Petitioners have established a prima facie case with a probability of success. The definition of a prima facie case was fashioned by the Court of Appeal in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, as follows:-

“In civil cases, a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

24. Expounding on the definition of prima facie case in *Mrao Ltd(Supra)* in the case of *Nguruman Ltd –vs- Jan Bonde Nelsen & 2 Others (2014)eKLR*, the Appellate Court further held as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent irreparable damage that may result from the invasion.”

25. In the matter before me, the Petitioners aver that they are among the beneficiaries entitled to ownership of all that land situated at Kiongwe Mjini Bahari Ward in Lamu West Constituency within Lamu County. In support of their contention, they have annexed to the Supporting Affidavit of Omar Abdalla Mohamed copies of their identify cards (annexture OAM-1) as well as a Sketch Map of Lamu Adjudication Section (Annexture OAM-2).

26. On its part, the 1st Respondent disputes this position and avers that the land in Kiongwe Mjini or Kiongwe Village has already been surveyed and Certificate of titles were issued to the beneficiaries. It is accordingly the 1st Respondent’s position that the land the Petitioners

refer to is private land and not public land. According to the 1st Respondent, the land in respect of which it has prepared the impugned PDP is for all intents and purposes public land as per the provisions of Article 62 (1) of the Constitution and it is therefore not true that the Petitioners are the rightful beneficiaries of the land that it has proposed for Wind Power Generation.

27. The Petitioners have not denied the contention by the 1st Respondent that the land in question is public land. It is however their contention that they have lived on the land for many years after their forefathers moved into the land and that they are entitled to be issued with title deeds since the land has been surveyed and adjudicated upon as per the sketch map annexed to their application.

28. It is evident from the material placed before me as at the time of filing the Petition that the Petitioners had no title to the land they claim and that the same is trust land vested upon the 1st Respondent. Under Article 62(2), the Constitution vests public land in the County Government to be held in trust for the people resident in that County. Public land is not, as it were capable of being owned by individuals unless and until the same is duly converted into private land.

29. As Angote J. held in Malindi ELC Petition No. 10 of 2015: ***James Gachichio Gichu & Others –vs- The Attorney General & 4 Others (unreported):-***

“If as claimed by the Petitioners they have been living on the public land since 1984, then they can be considered alongside other people to be allocated the land by the National Land Commission. However, until that happens, the Petitioners cannot claim to have any legal or beneficial interest in the land.”

30. Arising from the foregoing, I am persuaded that the Petitioners have no proprietary interest and/or rights over the suitland to warrant the grant of the orders sought. As Mutungi J. stated in ***Kitui Ole Yiamboi & Another –vs- Agricultural Finance Corporation & 102 Others(2016) eKLR:-***

“To establish a breach to the right to property, one has to demonstrate entitlement to the property. Halsbury’s Laws of England, 4th Edition Vol 8(2) provides:-

“The protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned and that an applicant must establish the nature of his property right to enjoy it as a matter of domestic law.”

31. In the matter before me the Petitioners have not shown that they are entitled to the property or that they have any legitimate claim to it to enable them invoke the Court’s intervention. In the circumstances herein, I find no merit in the Application dated 20th September 2016.

32. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 28th day of September, 2018.

J.O. OLOLA

JUDGE