REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 825 OF 2012

FORMERLY PETITION NUMBER 214 OF 2010

IN THE MATTER OF SECTION 84(1) OF THE REPEALED CONSTITUTION & ARTICLES 22, 23 AND 165(3)(b) AND 70 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70(a) AND 71(1) OF THE REPEALED CONSTITUTION AND ARTICLES 26, 27(1), 28, 35, 42 & 44 OF THE CONSTITUTION

BETWEEN

FRIENDS OF LAKE TURKANA TRUST.....................................PETITIONER/RESPONDENT

VERSUS

THE HON. ATTORNEY GENERAL (Being sued on behalf of the

Government of the Republic of Kenya)……………...…......1ST RESPONDENT/RESPONDENT

THE KENYA POWER & LIGHTING COMPANY LIMITED....2ND RESPONDENT/APPLICANT

KENYA ELECTRICITY TRANSMISSION CO. LTD..................................INTERESTED PARTY

RULING

Coming up for determination is the 2nd Respondent’s application dated **18th June 2014** seeking an order of stay of execution of the Judgment delivered on **19th May 2014** pending the hearing and determination of its intended appeal to the Court of Appeal. The application is premised on grounds that, first, the order of mandamus and the direction for sustainable management of Lake Turkana contained in the Judgment are beyond what was requested in the amended petition, and secondly, that the burden of complying with the order would be extremely onerous and beyond the control and knowledge of the 2nd Respondent.

The application is supported by an affidavit sworn by **Beatrice Meso**, the Acting Company Secretary of the 2nd Respondent. The deponent states that the Amended Petition sought an order of mandamus against the Government of Kenya and the 2nd Respondent to make full and complete disclosure of each and every agreement or arrangement entered into or made with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of 500MW from Gibe III including (but not limited to) the MOU signed in **2006**. However, that the Judgment is not limited to disclosure related to the "500MW from Gibe III" but is extended to "each and every agreement or arrangement entered into or made with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of electricity from Ethiopia and/or Gibe III project". Further, that the Judgment also contains an order which was not sought in the petition that the 2nd Respondent "to forthwith take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed, utilized and conserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia (including its parastatals) relating to the purchase of electricity.

It is deposed that the 2nd Respondent is concerned at the enlargement of the order of mandamus beyond the scope of the prayers in the Amended Petition and the order requiring sustainable management of Lake Turkana. The deponent contends that the 2nd Respondent did not get an opportunity of addressing the Court on the extended orders and also the burden placed on the 2nd Respondent relates to matters which are beyond the knowledge and control of the 2nd Respondent. In addition, the 2nd Respondent has sought to consult with the Government of Kenya regarding the Judgment, but is yet to receive guidance.

It was further deposed that the 2nd Respondent is a public Limited Liability Company and although the Government of Kenya has a substantial shareholding in the 2nd Respondent, it does not have control over relations with the Government of Ethiopia or the management of Lake Turkana which are matters of policy entirely within the authority and control of the Government of Kenya. The deponent also stated that the burden and costs of the direction on sustainable management is extremely onerous since the order and direction by the Court is not limited to the contracts and operations of the 2nd Respondent.

Joshua Angelei, the Director of the Petitioner swore a Replying Affidavit on **29th May 2015** in response to the application. He deposed that the Court was perfectly within its jurisdiction and mandate, pursuant to **Articles 70 and 159(2) (a) and (d) of the Constitution; Section 3, 13(7) and 18 of the Environment and Land Court Act; and Sections 3 and 3A of the Civil Procedure Rules,** in granting an order of mandamus and specific performance directed at the Respondents and the Interested Party, even if the Petitioner had not specifically prayed for the said orders. Further, that in any event, the Petitioner under prayer (c) of the Amended Petition prayed for such other and/or further orders/directions as the Court may deem just and equitable, which would justify the orders issued by the Court.

The deponent contended that the 2nd Respondent had not demonstrated any attempts made in compliance with the orders by the Court, either by providing the Petitioner with any information it has, or has knowledge of with regard to the purchase of electricity from Ethiopia, or furnish any evidence of its attempts to consult with the Government of Kenya regarding the Judgment particularly how to comply with the direction on sustainable management. It was further deposed that the 2nd Respondent cannot be absolved from the obligations and responsibilities that flow from the Judgment because it solely carries on the business of transmission and distribution of electric power within the Republic of Kenya and would therefore be an intimate participant in any agreements with regards to the purchase of electricity from Ethiopia and by extension under an obligation to ensure sustainable management of the environment and natural resources of and around Lake Turkana.

The deponent deposed that the 2nd Respondent has not demonstrated what prejudice it will suffer in the event the orders are executed. Further, that there is unreasonable delay in filing the application with the intention of defeating the execution of the orders of **19th May 2014**, as the application was filed on **18th June 2014**, on the **30th day** after delivery of the Judgment on the background that the Respondents and Interested Party were directed to comply with the said orders within **30 days**. Additionally, despite

seeking stay of execution, the 2nd Respondent is yet to file its record and Memorandum of Appeal, over one year later, *to the date of this affidavit*. Besides, no reasons had been afforded as to the delay in filing the application.

The 2nd Respondent filed submissions dated **10th October 2015** in further support of the application. Counsel submitted that the Notice of Appeal was filed on **3rd June 2014**, within the stipulated time, and on the same date requested for copy of proceedings. However, that the proceedings are yet to be provided. Counsel submitted that the delay is not unreasonable and the Petitioner has suffered no prejudice based on the following. On the first *inter-partes* hearing of the stay application on **16th July 2014, Mr. Amoko of Oraro & Company**, the previous advocates of the Petitioner stated that he was conflicted and wished to withdraw to allow the Petitioner to appoint a new advocate. On **25th September 2014**, the matter could not proceed because the Court (Nyamweya J.) was not sitting. When the matter came up on **2nd December 2014**, the Petitioner's newly appointed advocate did not attend and thus the Petitioner was unrepresented. On the said date, the Judge made an order that the Petitioner does file a Replying Affidavit within 30 days. However, that the Petitioner filed its affidavit on 9th June 2015, 6 months of the direction of the Court and almost one year after the application was filed. Consequently, that the Petitioner who is guilty of so much delay cannot complain about fifteen days of delay by the 2nd Respondent or claim that it is prejudiced by the delay. It was also submitted for the 2nd Respondent that the Petitioner cannot complain about prejudice or delay when it has done nothing to pursue its remedies against the other parties – especially the Government of Kenya, being the primary mover in all the matters complained of by the Petitioner.

It was submitted that stay would be granted, where an intended appeal would be rendered nugatory. Counsel submitted that the orders granted were beyond the case presented in the petition and that to comply with the orders would be extremely onerous, as it would require the 2nd Respondent to control the Governments of Kenya and Ethiopia. Thus, that the orders are beyond the capabilities of the 2nd Respondent and incapable of performance.

This application is governed by **Order 42 Rule 6 of the Civil Procedure Rules**, which sets out three requirements for the grant of stay of execution, as follows:

> **a) The application is brought without undue delay;**
>
> **b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and**
>
> **c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant**

The first condition is that the application must be brought without delay. Judgment herein was delivered on **19th May 2014**. The Court record reveals that upon request of counsel for the Respondents, leave of **30 days** was granted to the Respondents to comply with the orders emanating from the Judgment. The instant application is dated **18th June 2014** at the lapse of the **30 days** as ordered by the Court. The Petitioner contends that there has been unreasonable delay in bringing the application and that the timing of filing is suspect as it filed on the 30th day of the Judgment hence the intention is to scuttle the execution of the orders. The 2nd Respondent on its part states that efforts to reach the Government of Kenya to seek guidance on compliance with the orders have borne no fruit. It is noteworthy that the 2nd Respondent did not avail any letters to the Government in support of this claim. However, there was a letter addressed to the Petitioner's advocate dated 9th June 2014 seeking whether they were amenable to varying the Judgment by consent so as to correspond with the Petitioner's prayers.

Courts have held that unreasonable delay depends on the circumstances of each case. Munyao J. in the case of ***Jaber Mohsen Ali & another v Priscillah Boit & another E&L No. 200 of 2012[2014] eKLR***

held ***that*** unreasonable delay depends on the circumstances of the case. The court stated:

> **"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of** Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 **the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."**

It is no doubt that the application was filed at the lapse of the 30 days as directed by the Court. I hold the view that the 2nd Respondent was within time to file this application. On perusal of the Court record, I find that the delay is not filing the application, but prosecution of the same. The delay was occasioned by the Petitioner herein in changing advocates and the unavailability of the Court in one occasion. I therefore find that there has not been undue delay in filing the application.

This being a non-monetary decree, the condition of security for due performance of the order does not arise. Refer to the case of **Praxades Okutoyi v Medical Practitioners and Dentists Board Nairobi Civil Appeal 1048 of 2007 [2008] eKLR** where Visram J. (now JA.) elaborated that:

> **As this is not a money decree, and no financial obligations are involved on either side, the issue of security does not arise...**

The last condition is whether the 2nd Respondent stands to suffer substantial loss in the event the order of stay is not granted. Under this heading, the Court ought to take into account the two competing interests, that is, the Petitioner's right to enjoy the fruits of its Judgment and the 2nd Respondent's right of appeal which must be safeguarded from being rendered nugatory. What entails substantial loss was described by Gikonyo J. in the case of **James Wangalwa & Another v. Agnes Naliaka Cheseto Bungoma HC Misc Application No 42 of 2011,** that:

> **''The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...''**

It is the 2nd Respondent's case that complying with the order would be extremely onerous and beyond its control as the orders of mandamus and the direction on sustainable management is not limited to its contracts and operations. It contends that the orders are incapable of performance as the 2nd Respondent has no control over the relations of the Governments of Kenya and Ethiopia or the management of Lake Turkana.

From the foregoing, the Court is satisfied that the 2nd Respondent has demonstrated that it stands to suffer substantial loss. Consequently, the Court exercises its discretion and grants stay of execution of the Judgment delivered on **19th May, 2014** pending the hearing and determination of 2nd Respondent/Applicant's appeal. I make no order as to costs.

Dated, Signed and delivered this 10th day of June, 2016

L. GACHERU

JUDGE

In the Presence of:-

Mr. Ambale: For the Petitioner

No appearance: .For the 1st Respondent/Respondent

Mr. Fraser: For the 2nd Respondent/Applicant

Muthoni for Interested Party

James Court Clerk

L. GACHERU

JUDGE