



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.179 OF 2013

GREEN POWER GENERATION COMPANY.....PLAINTIFF/APPLICANT

=VERSUS=

1. KENYA POWER AND LIGHTING COMPANY

2. HON. ATTONEY GENERAL.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. The Application before me is the one dated 20th March 2015 filed by the 2nd Defendant. In the Application, the 2nd Defendant is seeking for the following orders:

(a) That this Honourable Court be pleased to strike out the 2nd Defendant from this suit.

(b) The costs of this application be borne by the Plaintiff

2. The Application is premised on the ground that the Plaint does not disclose a cause of action against the 2nd Defendant and that the 2nd Defendant's role is oversight and policy formulation and not electricity generation or distribution.

The 2nd Defendant's/Applicant's case:

3. According to the 2nd Defendant's counsel, there was no privity as regards the subject matter between the Plaintiff and the 2nd Defendant; that all the correspondence by the 2nd Defendant, were authored prior to the Plaintiff's incorporation on 9th April 2010 and subsequent registration as the proprietor of the suit property and that as a consequence the Plaint does not disclose a cause of action against the Applicant.

4. It is the deposition of the 2nd Defendant that the 2nd Defendant's liability to the Plaintiff could not have crystallised prior to the Plaintiff's incorporation and that in any event the suit against the 2nd Defendant is time barred by virtue of Section 3(1) of the Public Authorities Limitation Act.

The Plaintiff's/Respondent's

5. The Plaintiff/Respondent filed its Grounds of Opposition in which it averred that the Ministry of

Energy had a diminished interest in the generation plant which it placed on Lamu/Lake Kenyatta 1/3690; that the Ministry of Energy on whose behalf the Hon. Attorney General is sued has made material admission of facts in the Defence and that the Defence is hollow and a mere denial.

Submissions:

6. The 2nd Defendant's counsel submitted that there is no privity between the Plaintiff and the 2nd Defendant in respect to the subject matter.
7. Counsel submitted that the Plaintiff's suit is so weak and beyond redemption and cannot be cured by amendments.
8. The Plaintiff's/Respondent's counsel submitted that there are sufficient facts disclosed in the Plaintiff's statement of Defence and Reply to the 2nd Defendant's Defence.
9. Counsel submitted that striking out the suit will mean that the court will not hear the government's story.
10. Counsel submitted that the 2nd Defendant must lead evidence in support of the averments by the Ministry; that evidence must be led to show that the ministry donated generators to Mpeketoni Electricity Project (MEP) and that the ministry must also show that it implicitly gave its concurrence for the sale of MEP land.
11. The Plaintiff's counsel submitted that if KPLC is able to demonstrate that the suit was forest land, then the 2nd Defendant must demonstrate that there was strict compliance with the legal regime governing forest land.
12. Counsel submitted that the issues raised in the suit are of great public interest

Analysis and findings:

13. In the Plaintiff's statement dated 4th September 2013, the Plaintiff averred that the 2nd Defendant is sued on behalf of the Ministry of Energy, which directly or indirectly encouraged the development of a power plant on the suit property and later sanctioned the sale of Lamu/Lake/Kenyatta II/3690 to minimise loss to itself and the erstwhile owners of the land, after making provision for purchase of two generators which were ultimately placed on the land.
14. According to the Plaintiff's statement, the Plaintiff purchased the suit property in July 2010 whereafter it informed the 1st Defendant to remove from the suit property any electric power generating plant that they may have put on the land with the leave of the erstwhile owners.
15. According to the Plaintiff's statement, the Ministry of Energy is the one that encouraged the erstwhile owners to sell the land to minimise losses by way of a letter dated 5th July, 2007.
16. In its Defence, the 1st Defendant averred that in the year 2005, the officials of Mpeketoni Electricity Project (MEP) met the Permanent Secretary, Ministry of Energy where it was agreed that the government, through the 1st Defendant, agree to own and manage a proposed mini grid at Mpeketoni.
17. It is the 1st Defendant's Defence that unknown to it, the original plot was clandestinely subdivided thus creating the suit property and that MEP sold the suit property to the Plaintiff.
18. According to the 1st Defendant, the existence of its assets as set out in the Plaintiff's statement creates overriding interests and could not be sold or acquired by the Plaintiff because on the suit land stands the 1st Defendant's sub-station.
19. The 1st Defendant's case is principally that the Plaintiff fraudulently acquired the title to the suit property.
20. The 2nd Defendant filed a Defence in which he denied the Plaintiff's averment.
21. The 2nd Defendant has not answered the allegations by the Plaintiff that it is the Ministry of Energy which encouraged MEP to sell to the Plaintiff the suit property to mitigate losses.
22. The 2nd Defendant has also not averred on the process that actually led to the issuance of the title to the Plaintiff.
23. In the circumstances, and considering that evidence will have to be led by the Plaintiff to show the role that it played viz-aviz the acquisition of the suit land by MEP and the 1st Defendant, the 2nd

Defendant is a necessary party in these proceedings.

24. Whether the suit property was acquired by the Plaintiff fraudulently as alleged by the 1st Defendant is true or not, the 2nd Defendant will have, on behalf of the Government officials involved in the issuance of the title deed in respect to the title deed, explain the circumstances under which it was issued.
25. Consequently, the allegations raised both by the Plaintiff and the 1st Defendant against the Ministry of Lands and the Ministry of Energy are not frivolous. Those allegations can only be effectually dealt with by the court after the officials from the two ministries, who are represented by the 2nd Defendant, testify.
26. For those reasons, I disallow the Application by the 2nd Defendant dated 20th March, 2015 with costs.

Dated and delivered in Malindi this **18th** day of **September** 2015.

O. A. Angote

Judge