



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lake Turkana Wind Power Limited v Kochale & 13 others (Civil Application  
E041 of 2023) [2023] KECA 1602 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 1602 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E041 OF 2023  
W KARANJA, JA  
JULY 28, 2023**

**BETWEEN**

**LAKE TURKANA WIND POWER LIMITED ..... APPLICANT**

**AND**

**MOHAMUD ILTARAKWA KOCHALE ..... 1<sup>ST</sup> RESPONDENT**

**KOCHALE SOMO JALE ..... 2<sup>ND</sup> RESPONDENT**

**ISSA JITEWE GAMBARE ..... 3<sup>RD</sup> RESPONDENT**

**SEKOTEY SEYE (SUING ON BEHALF OF THE RESIDENTS OF  
LAISAMIS CONSTITUENCY AND KARARE WARD, MARSABIT  
COUNTY) ..... 4<sup>TH</sup> RESPONDENT**

**DAVID TAMASOT ARAKHOLE ..... 5<sup>TH</sup> RESPONDENT**

**MARSABIT COUNTY GOVERNMENT ..... 6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 8<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 9<sup>TH</sup> RESPONDENT**

**AARON ILETELE LESIANTAM ..... 10<sup>TH</sup> RESPONDENT**

**HENERY PARASSIAN SAKALPO ..... 11<sup>TH</sup> RESPONDENT**

**STEPHEN NAKENO ..... 12<sup>TH</sup> RESPONDENT**

**JOB LMALASIAN LENGOYS ..... 13<sup>TH</sup> RESPONDENT**

**DAIR LENTIPAN (AS REPRESENTATIVES OF THE RESIDENTS OF  
LOIYANGALANI DISTRICT, MARSABIT COOUNTY) ..... 14<sup>TH</sup> RESPONDENT**



*(Being an application preservation/conservatory order of injunction and stay of execution pending the hearing and determination of an intended appeal against the ruling/order of the Environment and Land Court at Meru (P. M. Njoroge, Kemei & Y. Angima, JJ.) delivered on 22nd May, 2023 in MERU ELC No. 163 of 2014)*

## RULING

### DISSENTING RULING OF W. KARANJA. JA

1. The applicant, Lake Turkana Wind Power Limited, has moved this Court by way of a Notice of Motion pursuant to Section 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and Rule 5 (2) (b) of the [Court of Appeal Rules 2022](#) seeking, inter alia, orders that;
  - a. Pending hearing and determination of the intended appeal, this honourable court be pleased to issue a temporary injunction order restraining the respondent and or persons claiming through them including the communities, their employees, agents, officers, assigns, representatives of anybody whosoever claiming under them from entering, trespassing upon, transferring, leasing, charging, excising, advertising, licensing, or in any other way howsoever interfering with the applicant's ownership, possession and occupation of all that property known as title number I.R.N 6395 and reference number 28031/1 measuring approximately 16,600 hectares issued on 1st March 2009 situated in South Horr, Marsabit and the title number I.R.N 6396 Land reference number 28031/2 measuring approximately 44,104 hectares issued on 1st March 2009 situated in South Horr, Marsabit.
  - b. Pending the hearing and determination of the intended appeal, this honorable court be pleased to issue a Conservatory and or preservatory order restoring the applicant's Land titles relating to parcels of land known as title number IRN 6395 land reference number 2803/1 Measuring approximately 16,600 hectares issued on 1st March 2009 situated in South Horr, Marsabit and title number I.R.N 6395 land reference number 28031/2 Measuring 44,104 hectares issued on 1st March 2009 situated in South Horr, Marsabit.
  - c. Pending the hearing and determination of the intended appeal, this honorable court be pleased to issue an interim stay of execution of the ruling and or order of the Environment and Land court issued on 22nd may 2023 and in particular of application of the cancellation of Title number IRN 6395 land reference number 28031/1 measuring approximately 16,600 hectares issued on 1st March 2009 situated in South Horr, Marsabit and title number I.R.N 6396 land reference number 28031/2 measuring approximately 44,104 hectares issued on 1st March 2009 situated in South Horr, Marsabit.
2. The application is predicated on the grounds stated on its face and is supported by the affidavit of Philippus Leferink, the Chief Executive Officer of the applicant sworn on 26<sup>th</sup> May, 2013. In summary, the applicant states that it was aggrieved by the ruling of the Environment and Land Court (ELC) delivered on 22<sup>nd</sup> May, 2023 dismissing the applicant's application for review dated 4<sup>th</sup> April, 2023 which sought the review of the judgment/decree of the said court delivered on 19<sup>th</sup> October, 2021.
3. The application is opposed through the replying affidavit of Kochale Somo Jale, the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent deposes that the order sought to be stayed was a negative order which is not capable of being stayed. Summaries of the depositions contained in both affidavits are well summarized in the Ruling of Kimaru JA and I need not repeat them for purposes of this ruling.



4. It is nonetheless necessary to give a brief summary of the circumstances leading to the application for review in order to place this application in proper perspective. The applicant herein applied for land from the Government of Kenya and the County Council of Marsabit for purpose of putting up a Wind power generation project. It was allocated the land, which is now the subject of this litigation on a 33 years leasehold. It put up the power project and started generating power and supplying the same to boost the National grid. 7 years later, the respondents who are communities living in the area challenged the allocation of the said land, on grounds that the same was community land and the laid down procedures had not been followed.
5. They filed suit before the ELC seeking several declarations and cancellation of the applicant's Title Deeds. A 3 Judge bench was empaneled to hear the matter and after hearing the parties, it rendered a judgment dated 19<sup>th</sup> October, 2021, which is the subject of another appeal filed before this Court. I will not, therefore, delve into the findings of the Court in that judgment. The Court nonetheless declined to nullify the Wind Power project, but found that the land had been irregularly allocated to the applicant and cancelled the Title Deeds. The Court, nonetheless, granted the Marsabit County Government, the Attorney General the Chief Land Registrar and the National Land Commission 12 months to comply with the existing law on setting aside land failing which, those title deeds would be cancelled, and the suit land would be reverted to the community.
6. It is evident from these orders the parties who were supposed to initiate the process. Six months down the line, the said parties had not done anything to comply with the court's judgment and fearing that the 6 months would elapse before the allocation was regularized as directed by the court, the applicant moved the court vide a Notice of Motion dated 4<sup>th</sup> April, 2022, principally urging the Court to extend the 12 months. For reasons that are not necessary to repeat here, the motion was dismissed.
7. The applicant has now moved this Court urging us to grant the orders listed earlier in this ruling. As correctly stated by my brother Kimaru, JA. in his ruling this Court has pronounced itself severally on staying of negative orders.
8. On the other hand, however, as indicated at the beginning of this ruling, the applicant has prayed for orders of injunction and also conservatory, or preservative orders. Those orders are awardable where the same are necessary for purposes of preserving the subject matter of the appeal.
9. For instant, in *Equity Bank Limited v West Link MBO Limited*, Civil Application No Nai 78 of 2011 Githinji, JA. stated that.

“It is trite law in dealing with 5(2) (b) applications the court exercises discretion as a Court of first instance. It is clear that rule 5(2)(b) is a procedural innovation to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

In addition, in *Daniel Lomagul Kandeji & 2 others v Kamanga Holdings Limited & 40 others* (2017) eKLR this Court expressed itself as follows:-

“In the motion before us the applicants sought a stay of the striking out of the O.S. This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed.”



Having said that, it is not lost to us that the applicants in their prayers sought an order of injunction. In *Nairobi Metropolitan PSV Saccos Union and 25 others v County of Nairobi Government & 3 others* (supra) this court stated as follows:

“In granting orders sought in application for stay or grant of an injunction as the case may be this court exercises original jurisdiction....” and proceeded to cite the case of *Equity Bank Limited v West Link MBO Limited* CA No NAI 78 of 2011.

10. The purpose of an injunction pending appeal is to preserve the *status quo*. See [Lake Tanners Limited & 2 others v Oriental Commercial Bank Limited](#) [2010] eKLR (CA No 64 of 2010)
11. As the applicant seeks an order of injunction as well as stay of execution, then the law enjoins me to consider the other prayers on merit. Has the application met the threshold expected of in applications predicated on Rule 5(2) b of the [Court of Appeal rules](#)?
12. The law on the grant of orders under Rule 5(2)(b) of the [Court of Appeal Rules](#) (including injunction) is well settled as restated by this Court in [Chris Mungga N. Bichage v Richard Nyagaka Tongi & 2 others](#) [2013] eKLR where the court succinctly set out the law as follows:-

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

13. In this case, as acknowledged by the learned Judge in his judgment, this matter involves public interest, and in my considered view, the issue of allocation of community land, and also the fact that the power generated from the power plant in question forms part of the national grid, removes the matter from the narrow, constricted ambit of personal or contractual arrangements between the applicant and his financiers, who according to the applicant stand to suffer if the orders sought are not granted. The third limb set out by the Supreme Court in [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR, therefore, inevitably comes into play.
14. On the question of arguability of the appeal, I appreciate the fact that the gravamen of the appeal is whether the learned Judge exercised his discretion judiciously in disallowing the application for review. The test on this is clearly enunciated in the locus classicus case of *Mbogo v Shah* (1968) EA at page 93 in which De Lestang ( P ) (as he then was) observed at page 94.

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”.

15. From the motion on review, it was clear that the applicant had subsequently engaged an expert and obtained a report on the conversion of the titles and the length of time that would be required to comply with the orders of the Court. That report was not available when the said directions were given. It would appear to me therefore, that the question as to whether the learned Judge failed to consider some relevant material that was before him is an arguable point. The appellant only needs to



demonstrate one arguable point to be canvassed on appeal. I am persuaded that the intended appeal is arguable.

16. On the nugatory aspect, if the injunctive orders are not granted, the title deeds will stand cancelled and there is risk of the power project being invaded and damaged and that would render the intended appeal moot.
17. On the third principle, the matter is in my considered view a public interest matter and the injunction sought should, therefore be granted. Preserving the subject matter of the appeal will not also prejudice the respondents in any way.
18. For the foregoing reasons, I would allow this application and grant the orders of injunction as prayed, with costs in the substantive appeal. As my brothers Kimaru and Muchelule, JJ.A are of a different opinion, the orders as proposed in Kimaru JA's ruling will be the orders of the Court.

Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**W. KARANJA**

.....

**JUDGE OF APPEAL.**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

