



REPUBLIC OF KENYA



**KENYA LAW**

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**Lake Turkana Wind Power Limited v Kochale & 13 others (Civil Application  
E064 of 2023) [2023] KECA 1596 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1596 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E064 OF 2023  
W KARANJA, J MOHAMMED & LG KIMANI, JJA  
SEPTEMBER 22, 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**

**DAVID TAMASOT ARAKHOLE ..... 4<sup>TH</sup> RESPONDENT**

**SEKOTEY SEYE (SUING ON BEHALF OF THE RESIDENTS OF  
LAISAMIS CONSTIYUENCY AND KARARE WARD, MARSABIT  
COUNTY) ..... 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**



*(An application for stay of execution and an order of injunction pending the hearing and determination of an intended appeal against the Judgment/Decree of the Environment and Land Court (Njoroge, Kemei & Angima, JJ.) dated 19th October, 2021 in E.L.C. Case No. 163 of 2014)*

**RULING**

1. The applicant, Lake Turkana Wind Power Limited filed a notice of motion, inter alia, under Rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#) seeking orders from this Court to stay the execution of the judgment and decree of the Environment and Land Court (ELC) issued on 19<sup>th</sup> October, 2021 as regards the cancellation or implementation of the cancellation of the applicant's titles in respect of the parcels of land known as LR Nos. 28031/1 and 28031/2 (I.R.N. 6395 and 6396) situate at South Horr, Marsabit County (the suit parcels of land) pending the hearing and determination of the appeal. The applicant further sought an order of injunction to restrain the respondents by themselves or through their agents or representatives from interfering with their possession, occupation and ownership of the suit parcels of land pending the hearing and determination of the appeal. The application is supported by the grounds stated on its face and the annexed affidavit of Phillipus Leferink, the Chief Executive Officer of the applicant.
2. In the grounds in support of the application, the applicant states that it was aggrieved by the said decision of the ELC which held that the process of setting apart the suit parcels of land for the purpose of the wind power project that is operated by the applicant was irregular, unlawful and unconstitutional.

The applicant further faults the decision of the ELC which held that unless the setting apart of the suit parcels of land was regularized within a year from the date of the delivery of the judgment, the titles issued to the applicant would stand cancelled and the suit properties would revert back to the community. The applicant states that the decision of the ELC was made in error, both in fact and in law, hence its decision to appeal against the same to this Court. Among the grounds of appeal the applicant intends to argue before this Court are that; the ELC had ignored weighty and elaborate evidence which had established that due process was duly followed before the suit parcels of land were set aside for the wind power project; that the ELC had misconstrued the provisions of the repealed Constitution and the repealed Trust [Land Act](#) in applying a restrictive rather than a purposive interpretation guided by established precedent; that the ELC failed to take into account the public interest involved when it rendered the decision. In particular, the applicant stated that the cancellation of the said titles and the order of reversion of the suit parcels of land to the community, if executed, "could fatally impede the applicant's ability to continue generating and supplying electricity to Kenya Power and Lighting Company (KPLC) which will cause enormous and irreparable losses to the appellant, KPLC, the Government of Kenya, the public at large because the appellants wind project is a critical source of Kenya's clean, renewable, and low cost and energy that generate and contributes upto 310 MW of electricity to KPLC and the nation at large".

3. The applicant urged that if stay of execution of the judgment and decree of the ELC is not granted, there is a risk that the investment made in the wind power project would be put in jeopardy, a project to which the Government of Kenya had given a letter of support to the applicant's financiers to guarantee the tenure of the project, including a 20-year Power Purchase Agreement (PPA) with KPLC. The applicant stated that it had established that it had an arguable appeal and it would suffer irreparable and substantial harm and loss if the orders that it has sought from the Court are not granted.



4. The application is opposed by the 1<sup>st</sup> to 5<sup>th</sup> respondents.

Kochale Somo Jale, the 2<sup>nd</sup> respondent, swore a replying affidavit on behalf of his co-respondents. He stated that the applicant had not demonstrated that it had an arguable appeal. The 2<sup>nd</sup> respondent reiterated that the ELC correctly interpreted the then existing laws to hold that the decision and the process to set apart the suit parcels of land was tainted with illegality and irregularity and was, therefore, unconstitutional. He deponed that there was no public participation nor were the members of the community who reside on the land ever consulted before the alienation of the suit parcels of land was made to the applicant. The 2<sup>nd</sup> respondent doubted that the intended appeal would be rendered nugatory. He pointed out that the ELC had allowed the wind power project to continue and secondly that the titles issued to the applicants had already been cancelled after the expiry of the one year grace period to regularize the setting apart had lapsed. There was, therefore, nothing to stay in respect of the revoked and cancelled titles. In the premises therefore, the 1<sup>st</sup> to 5<sup>th</sup> respondents urged the Court to dismiss the application with costs.

5. Although the 7<sup>th</sup> and 9<sup>th</sup> respondents did not file any response to the application, in their oral submissions before Court, they supported the applicant's application.
6. We have considered the notice of motion, the supporting affidavit, the replying affidavit, the written and oral submissions made by the parties and the authorities cited by the respective parties. It was clear from the submissions made that the parties to this application understood this Court's jurisdiction when determining an application under Rule 5 (2) (b) of the Rules of the Court. Both the applicant and the 7<sup>th</sup> and 9<sup>th</sup> respondents cited the seminal decision of *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR where this Court held, inter alia, that the jurisdiction of the Court under Rule 5(2) (b) was both original and discretionary; that the applicant must establish that he has an arguable appeal; that it is sufficient if a single bona fide ground of appeal is raised; that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed (or injuncted) if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
7. In *Priscilla Wambui Mathenge v Mary Wairimu Mathenge & Another* [2020] eKLR this court held that:

“For the applicant to succeed, she has an obligation to prove that she has an arguable appeal, that is, the appeal is not frivolous. Upon satisfying that principle, the applicant also has the additional duty to demonstrate that the appeal, if successful, would be rendered nugatory should the order sought not be granted. In *Trust Bank Limited & Another v Investech Bank Limited & 3 Others*, Civil Application Nai. 258 of 1999 (unreported) this Court stated that:

‘The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly, that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case.’”

8. In the present application, it was the applicant's case that its appeal would be defeated if this Court does not grant the twin orders of stay of execution and injunction that the applicant has craved for in the notice of motion. The 1<sup>st</sup> to 5<sup>th</sup> respondents are of a contrary view. They are of the considered opinion



- that that which the applicant wishes to stay has already been overtaken by events given that the one year grace period decreed by the ELC had already expired. There is nothing therefore to stay or injunct.
9. We have considered the rival arguments made by the parties to this application. The thrust of the applicant's intended appeal is a challenge to the decision of the ELC impeaching the setting apart process that led to the issuance of the titles to the suit parcels of land to the applicant. The applicant contends that due process according to the then existing laws was followed before the said titles to the suit parcels of land was issued to them. In this regard, the 7<sup>th</sup> and 9<sup>th</sup> respondents support the applicant's application. On the other hand, the 1<sup>st</sup> to 5<sup>th</sup> respondents have argued that the ELC was right in reaching the decision that it did because, among other reasons, the members of the community who reside on the suit land were not consulted before the decision to set apart their community land was made. This Court is aware that at this stage of the appeal process, it is not being called upon to render an opinion on the strength or otherwise of the applicant's intended appeal. However, we are required to consider whether the applicant's appeal is arguable. As has been stated time and time again by this Court, an arguable appeal is not one which must succeed on appeal but one which raises triable issues and is not frivolous.
  10. In the present application, it was clear to this Court that the grounds that the applicant intends to raise in its appeal to this Court are arguable. The fact that they are likely to lose title to the parcels of land upon which they have invested an enormous and colossal sum of money in setting up the wind power project is an arguable ground. Further, the fact that the wind power project is already commissioned and is supplying electricity to the national electricity grid and which will impact the supply of electricity to the county if it is disrupted is another arguable ground of appeal. It is clear that there is public interest involved in this appeal.
  11. As was held by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR public interest, where applicable, is one of the principles that should be considered when an application for stay of execution or injunction pending the hearing of an intended appeal is in issue. In the instant application, it is clear to us that public interest tilts in favour of granting the applicant's application. At the very least, status quo as it exists today must be maintained pending the hearing and determination of the appeal so as to guarantee that the electricity supplied by the applicant to the national grid is not disrupted or interfered with. We therefore hold that the applicant has established that it has an arguable appeal.
  12. On the nugatory aspect, the 1<sup>st</sup> to 5<sup>th</sup> respondent argued that since the one year grace period that the ELC granted the applicant, the 7<sup>th</sup> and the 9<sup>th</sup> respondents to regularize the setting apart the suit parcels of land had expired, there was nothing for this Court to stay. They therefore contend that the appeal would not be rendered nugatory as what is sought to be stayed had already taken place. On the other hand, the applicant submitted that the titles to the suit parcels of land are being held as security by the financiers of the wind power project. The 7<sup>th</sup> and 9<sup>th</sup> respondents have neither confirmed nor denied the assertion by the 1<sup>st</sup> to 5<sup>th</sup> respondents that the titles to the suit parcels of land have indeed been cancelled. It appears that there is contention as to whether the titles to the suit parcels of land have indeed been cancelled. That dispute will be resolved during the hearing of the appeal. Suffice for this Court to state that, on a balance, the applicant has established that its appeal would be rendered nugatory if the orders that it craves in its application is not granted.
  13. In the premises, the applicant's notice of motion dated 19<sup>th</sup> July, 2023 is allowed in terms of prayer 3 and 5 of the application, that is, a stay of execution of the judgment and decree of the ELC delivered on 19<sup>th</sup> October 2021 is hereby issued pending the hearing of the appeal, and further, an order of injunction is hereby issued restraining the respondents by themselves or through their agents or representatives



from interfering with the applicant's possession, occupation and ownership of the suit parcels of land pending the hearing of the appeal. The costs of the application shall abide the outcome of the appeal. It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

