



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MERU

ELC NO. 163 OF 2014

MOHAMUD ILTARAKWA KOCHALE.....1ST PLAINTIFF

KOCHALE SOMO JALE2ND PLAINTIFF

ISAA JITEWE GAMBARE.....3RD PLAINTIFF

DAVID TAMASOR ARAKHOLE4TH PLAINTIFF

SEKOTEY SEYE5TH PLAINTIFF

(suing on behalf of the residents of Laismais constituency and Karare Ward Marsabit County)

-VERSUS-

LAKE TURKANA WIND POWER LTD.....1ST DEFENDANT/APPLICANT

MARSABIT COUNTY GOVERNMENT.....2ND DEFENDANT

THE ATTORNEY GENERAL3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION5TH DEFENDANT

-AND-

AARAON ILETELE LESIANTAM1ST INTERESTED PARTY

HENRY PAARASSIAN SAKALPO.....2ND INTERESTED PARTY

STEPHEN NAKENO3RD INTERESTED PARTY

JOB LMALASIAN LENGOYA.4TH INTERESTED PARTY

DAIR LENTIPAN5TH INTERESTED PARTY

(As representatives of the residents of Loiyangalani District, Marsabit County)

RULING

1. The application is dated 4th April, 2022.

2. The application seeks the following orders;

1. This application be certified urgent and be heard ex-parte in the first instance for purposes of prayer 2 below.

2. Pending the hearing and determination of this Application inter-partes, this Honourable court be pleased to suspend the running of the 1- year period in the judgment/Decree of this Honourable Court delivered on 19/10/2021 in relation to compliance with existing laws on setting apart of the suit properties known as LR 28031/1 measuring approximately 40,000 acres and L/R 28031/2 measuring approximately 110,000 acres both situated in Loyangalani, South Horr, Marsabit County.

3. This Honourable court be pleased to review its judgment/decree delivered on 19/10/2022 and /or any consequential orders therein as to extend the period of 1 year granted to the 2nd , 3rd , 4th and 5th Defendants in the judgment to a period in line with the expert testimony to be adduced before Court and based on the Court's opinion as to the appropriate timeline to comply with existing laws on setting apart of the suit properties known as LR 28031/1 measuring approximately 40,000 acres and LR 28031/2 measuring approximately 110,000 acres both situated in Loyangalani, South Horr, Marsabit County.

4. This Honourable court be pleased to review its judgment/decree delivered on 19/10/2022 and /or any consequential orders therein as to issue directions/orders in the form of a structural interdict for any of the Defendants after every 12 months cycle or such other period as the court may deem appropriate in order to report to the court on the progress of compliance with the existing laws relating to the setting apart of the suit properties known as LR 28031/1 measuring approximately 40,000 acres and LR 28031/2 measuring approximately 110,000 acres both situated in Loyangalani, South Horr, Marsabit County.

5. This Honourable court be pleased to order that further and/or additional evidence be adduced in the form of expert testimony on the process setting apart the suit properties known LR 28031/1 measuring approximately 40,000 acres and LR 28031/2 measuring approximately 110,000 acres both situated in Loyangalani, South Horr, Marsabit County.

6. The Honourable Court be pleased to issue such further orders, as it may deem fit, appropriate, and expedient to grant in the circumstances of this matter for purposes of compliance with its judgment/decree or other just consideration.

7. The costs to this application be awarded to the 1st Defendant.

3. The application is supported by the supporting affidavit of Philippus Leferink sworn on 4th April, 2022 and has the following grounds:-

1. The 1st Defendant stands to suffer billions of shillings in irreparable losses and damage should this applicant not be allowed and the orders sought herein not be granted. In addition, the nation at large stands to suffer the loss and waste of invaluable investments as Lake Turkana Wind Power Project is a critical source of Kenya' low-cost renewable energy. The cancellation of the titles to the Suit Properties which will cause enormous and irreparable losses to the 1st Defendant, the Government of Kenya and the public at large since the Power Project is a critical source of Kenya' low-cost renewable energy that contributes to national energy security and the County would experience blackouts and power load shedding should the Wind Project cease operations.

2. On 19/10/2021, this Honourable Court delivered its judgment ("judgment") in the matter and held, inter alia, that:

a. The setting apart of the parcel of land known as LR 28031/1 measuring approximately 40,000 acres and LR 28031/2 measuring

approximately 110,000 acres both situated in Loiyangalani, South Horr, Marsabit County(together the suit properties/suit land) was irregular, unlawful, and unconstitutional; and

b. The titles issued to the 1st defendant were irregular and unlawful the court declared that they should be cancelled. However, the 2nd, 3rd, 4th and 5th Defendant were granted one year to strictly comply with the existing law on setting apart failing which the impugned titles would stand cancelled and the suit land would revert to the community.

3. This Honourable Court's judgment and orders aforesaid were inter alia premised on this Honourable Court's finding that:

a. The suit properties were at time of their acquisition, Trust Land;

b. That, as such, the Suit properties could only have been set apart in strict compliance with the mandatory provisions of Article 117 of repealed Constitution and Section 13 of the Trust Land Act (Cap 288) (now repealed) ; and

c. That the aforementioned provisions of the repealed Constitution and the Trust Land Act were purportedly not materially adhered to and thus the setting apart process was held to have been conducted in contravention of the law as it is then was.

4. The 1st Defendant is the promoter of the Wind Power Project and the registered owner of the Suit Properties. As such, it is the party that primarily stands to suffer immense loss and damage as a consequence of any failure in implementation of the terms of the judgment.

5. The 1st Defendant has developed, financed, build and is currently operating a 310 MW wind farm at a cost of EUR 623 million or KES 80.99 billion. The wind farm is a Government of Kenya Vision 2030 Project generating and selling clean renewable wind energy to Kenya Power Lighting Company (KPLC) thereby contributing about 17% of Kenya's energy need (the Wind Project).

6. Associated to the 1st Defendant Wind Project is 430 Km overhead high voltage 220/400k Kv double circuit power transmission line (the Transimission Line) built by Kenya Electricity Transmission Company Limited. (KETRACO) for purpose of evacuating power from the Wind Project to the national grid.

7. Since the delivery of the judgment over 5 months ago asat the date hereof, there has been no visible or tangible action in complying with the existing laws on the setting apart thus leaving the 1st Defendant under the very real threat that the titles to the Suit property will stand cancelled and the suit land reverting to the community.

8. The Court's good and wise intention will not have been actualized within the time period set forth by the Court, leaving the 1st Defendant highly exposed to a loss of billions of shillings.

9. The 1st Defendant is extremely apprehensive that the inaction of the relevant parties in copying with the judgment threatens the very existence of the Wind Project should the titles to the Suit Properties be cancelled. This would cause enormous and irreparable losses to the 1st Defendant, the Government of Kenya which has invested billions of shillings in the Transmission Line, and to the public at large who are likely to suffer load shedding and an increase in electricity consumer tarrifs should the Wind Project cease operations.

10. The avert such a catastrophic outcome, the 1st Defendant prays that this Houourble Court stays or suspends the 1-year timeline for the 2nd, 3rd, 4th and 5th Defendants to comply with the existing laws until this application is heard and determined.

11. It is the 1st Defendant's firm conviction that it was the good and wise intention of the 3 Judge Bench to have the 2nd, 3rd, 4th and the 5th Defendants to comply with the existing law on setting apart the Suit Property.

12. The existing law on setting apart of community land formerly referred to as trust land is primarily the Community Land Act, 2016 and the Constitution of Kenya, 2010 wherein in the conversion process must be initiated by members of the community (as defined in the Community Land Act) and not by any of the parties in this suit.

13. The practical effect of the judgment is that should the process of setting apart not conclude within the period of 1-year as stipulated by the Court, the 1st Defendant shall stand to immediately and automatically thereafter have its titles to the Suit Properties cancelled leading to the permanent and irreparable loss of billions of shillings invested in a critical project of strategic national importance.

14. The potential cancellation of the 1st Defendant's titles as aforesaid would amount to drastic and catastrophic loss for both the 1st defendant and the wider Kenyan public who currently benefit from the wind energy generated by the 1st Defendant on the Suit Properties.

15. Immediately following the delivery by the Honourable court of its judgments on 19/10/2021, the 1st Defendant proceeded to obtain advice and opinion from experts to ascertain the feasibility of the compliance with the Orders of this Honourable Court arising from the judgments within the stipulated period of 1 year. The expert opinion received by the 1st Defendants had concluded that pursuant to the Community Land Act (No. 7 of 2016):

a. The conversion process can only be initiated by a community claiming an interest in the land who must first organize themselves into a Community Assembly and a Community Land management Committee who will then requires to be registered by the Lands Registrar as a corporate Entity (the Community Entity)

b. The Cabinet Sectary in charge of Ministry of Lands and Physical Planning would, in consultation with the County Government, then develop and publish in the Kenya Gazette a comprehensive Land Adjudication Programme.

c. Notices are then to be published notifying the public of the intention to survey, demarcate and register the relevant properties and invitations made for comment and public participation.

d. The County Government would then undertake a survey and prepare a cadastral plan that would require approval from the County Assembly, the National Land Commission, the Ministry of Management Authority. Notices would again be issued for comment and public participation; and

e. If no objection are received, the National Land Commission would then issue a title to the community Corporate entity who would then issue a title to the Community Corporate Entity who would then be able to transfer the land to the 1st defendant

16. Pursuant to the judgment and orders of this honorable court, the 2nd 3rd, 4th and 5th Defendants have been accorded leave to undertake the process of regularization of the Suit Properties a power that none of these Defendants have under the existing law.

17. The Provisions governing the process of setting apart of trust land as contemplated in the proceedings leading to the judgment, being Section 117 of the Constitution and Section 13 of the Trust Land Act, have long since been repealed and the concept of trust land, the setting apart thereof and the practices, procedures and relevant institutions of the state pertaining thereto have been replaced and/or superseded by operations of the provisions of Article 63 of the Constitution of Kenya, the Community Land Act and the regulations made thereunder.

18. This Honourable Court did not, during the proceedings herein, have the benefit of receiving evidence and submissions from the parties regarding the application of, and practices of and procedures under the community Land Act and the regulations made thereunder in relation to any process similar to setting apart as was provided Under Section 17 of the repealed Constitution and Section 13 of the Trust Land Act (repealed).

19. Because of the foregoing, this honorable court in the issuance of the judgment did not have occasion to consider the availability or efficacy of the legal procedure required to undertake and complete a process of conversion of community land under the existing legislative framework or the practical exigencies that this process would entail.

20. The process of conversion of Community Land to private land in accordance with the provisions of the Community Land Act and the regulations made thereunder is a complex, intricate and lengthy procedure conducted within and across various community, County and National levels of government and their respective organs.

21. By the provisions of the Community Land Act, the initiative to comply with existing law must be instituted and driven by the relevant registered community or communities and not the 2nd defendant or indeed any of the other Defendants and/or the 1st defendant.

22. The 2nd, 3rd, 4th and 5th defendants in fact have no role in initiating the compliance with the existing law or the process of conversion as set out in the Community Land Act and the regulations made thereunder.

23. As such and in any case, the 1st Defendant is deeply apprehensive that any purported initiation or implementation by the 2nd to 5th defendants of a process of conversion in purported compliance with the directions of this honorable court would stand impugned in future as being contrary to statute, thereby leading to further litigation.

24. There have been no steps taken by any person as at 18/3/2022 (five months into the 12-month timeline provided by the Honourable Court) towards the implementation of the judgment in relation to the regularization of the titles to the Suit Properties the 1st Defendant's knowledge.

25. The roles and obligations (if any) of the 2nd, 3rd, the and 5th Defendants/Respondents in the conduct of setting apart, the conversion or rectification of the 1st Defendant's titles have not been set out with any specificity or clarity in the law or in the judgment, thereby creating scope for confusion and non-compliance as it is now. This ambiguity is to ultimate prejudice of the 1st Defendant.

26. It is critical to note that the judgment and orders of the honorable Court do not provide the 1st Defendant with any agency with respect to the conduct of the proposed process of setting apart and/or conversion that is the sole means of safeguarding its rights in the suit properties and the entirety of its investments and benefits to the nation.

27. The judgment of this Court did not provide for a reasonable process of oversight of the implementation of its orders which the 1st defendant believes that this honorable court has the discretion, authority, and justification to do. This honorable court can be guided by the structural interdicts issued by the Supreme Court in the cases of *Mitu-Bell Welfare Society –v- Kenya Airports & 2 others; initiative for Strategic Litigation in Africa (Amicus Curiae) (2021) eKLR* and the case of *Francis Karioko Muratet & another –V- Republic: Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR*.

28. The 1st Defendant is apprehensive that the foregoing combined with the lack of an imposed positive obligation upon the relevant communities as contemplated by the Community Land Act (and not the 2nd, 3rd, 4th and 5th Defendants) to undertake and complete the process of conversion or rectification of the 1st Defendant's titles within the specified timeframe would best lead to confusion regarding the respective obligations of the 2nd to 5th defendants, and at worst create opportunities for unwarranted obstruction to the relevant processes to the permanent and irreparable detriment of the 1st defendant.

29. The 1st defendant is also apprehensive that the judgment and orders of this honorable court cannot be deemed in the circumstances aforesaid to be specific, appropriate, clear and effective, and in is insufficiently directed at the parties to the suit or relevant state entities vested with the statutory mandate to enforce and implement the orders of this honorable court.

30. The foregoing circumstances have given rise to a reasonable apprehension on part of the 1st defendant that the period of 1 year prescribed by this Honourable court for the setting part and/or conversion and regularization of the 1st Defendant's titles is manifestly inadequate and particularly so in absence of a process of judicial oversight.

31. In view of the entirety of the foregoing, the 1st defendant/applicant stands to suffer billion of shillings in irreparable losses and damages should the orders sought herein not be granted in the titles to the Suit Properties being cancelled and the nation at large stands to suffer the loss and waste to invaluable investments as the Lake Turkana Wind Power Project is a critical source of Kenya's affordable renewable energy.

32. There is accordingly not only a risk of very considerable loss of the 1st defendant should the orders sought not be granted, but also a clear risk to the wider public should the 1st defendant's project, the current operations of which are well underway, be permitted to be lost and wasted by the cancellation of the titles to the Suit Properties.

33. On the other hand, the Plaintiffs and the 2nd, 3rd, 4th and 5th Defendants not only stand to suffer no prejudice whatsoever should the honorable court grant the orders sought herein but would indeed stand to benefit from the clarity and judicial oversight sought together with a reasonable timeframe for the implementation to the orders of this court.

34. According to the Civil Procedure Rules, 2010, a party including the 1st Defendant may apply for the review/set aside of a judgement to the court which passed the decree on account of any sufficient reason. The 1st Defendant herein applies for review/set aside of certain orders that emanated from the judgment of this honorable Court delivered on 19/10/2021 in order to ensure that judgment is complied with and that the intentions of the 3-judge bench are fulfilled. The 1st defendant is ready and willing to comply such conditions as this Honourable Court may impose for the issuance of the orders sought herein.

35. This application has been brought before the Honourable Court with reasonable dispatch considering the full circumstances of this matter.

36. It is therefore in the manifest interests of justice, fairness and the public interest that the orders sought herein granted as prayed.

4. I have considered the application and its annexures, I do note that the impugned judgment was made by 3 judges as one bench. I have consulted the other 2 judges.

5. The following orders are issued;

a. The applicant to serve the application upon the other parties within 14 days of today.

b. All parties to come to ELC Court at Isiolo for directions on the 9th May, 2022.

c. Costs be in the cause.

DELIVERED IN NAIROBI THE 11TH DAY OF APRIL, 2022 IN THE ABSENCE OF THE PARTIES.

HON. JUSTICE P. M. NJOROGE

ELC JUDGE

ISIOLO LAW COURTS



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