

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA AT MALINDI
PETITION NO. 14 OF 2017
FORMERLY PETITION NO. 334 OF 2017 (MILIMANI)

- IN THE MATTER OF: ARTICLES 22(1) & (2)(c), 50(1), AND 258(1) & (2)(c) OF THE CONSTITUTION OF KENYA 2010
- IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1(1); 2(1), (2) & (3); 3(1); 4(2); 10(2); 69; 70; 71;73(1)(b); 232(1)(d), (e) & (f), AND 259(1) & (3) OF THE CONSTITUTION
- IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 35(1) & (3), 40, 42, 46, & 47 OF THE CONSTITUTION.
- IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT; AND SECTION 6 OF THE STATUTORY INSTRUMENTS ACT.
- IN THE MATTER OF: THE OBLIGATION ON THE PRIVATE SECTOR TO REALIZE RIGHTS AND FUNDAMENTAL FREEDOMS, AND THE NEED FOR A HUMAN RIGHTS IMPACT ASSESSMENT REPORT ON THE PROPOSED LAMU COAL FIRED POWER PROJECT.
- IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF ENVIRONMENTAL IMPACT ASSESSMENT REPORTS ISSUED UNDER THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT (CAP 387) AND THE JURISDICTION OF THE NATIONAL ENVIRONMENT TRIBUNAL TO ENTERTAIN PROCEEDINGS FILED IN DEFENCE OF ARTICLES 42, 69, 70, AND 71 OF THE CONSTITUTION.

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

VERSUS

KENYA POWER AND LIGHTING COMPANY 1ST RESPONDENT
AMU POWER COMPANY LIMITED 2ND RESPONDENT
ENERGY REGULATORY COMMISSION 3RD RESPONDENT
PRINCIPAL SECRETARY, THE NATIONAL TREASURY 4TH RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF ENERGY & PETROLEUM 5TH RESPONDENT
HON. ATTORNEY GENERAL 6TH RESPONDENT
THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 7TH RESPONDENT

AND

SAVE LAMU 1ST INTERESTED PARTY
THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS 2ND INTERESTED PARTY
THE KENYA HUMAN RIGHTS COMMISSION 3RD INTERESTED PARTY
THE NATIONAL ENVIRONMENT TRIBUNAL 4TH INTERESTED PARTY

PRESS AND PUBLIC SUMMARY

(The following summary is provided to assist the public and the media in reporting this case.)

1. Relying on deliberately falsified data that contradicts official records which clearly show that currently there is a glut in electricity generation, the Government of Kenya has allowed a consortium of local and international firms, under the investment vehicle Amu Power Company Limited, to build the proposed 1,050 MW coal fired electric generating unit (colloquially, power plant) in Lamu County. The plant is supposed to fill an imaginary acute shortage of electricity generation in Kenya.
2. Government records, including current data for daily supply and demand from Kenya Power; the National Energy and Petroleum Policy 2016; the Mid-Term Power Generation and Transmission Master Plan 2015 - 2020; and the Long-Term Power Generation and Transmission Master Plan 2015 - 2035 show a glut in electricity supply and the abundance of renewable sources of energy such as geothermal, hydro, solar, wind, and biomass, that have hardly been tapped. Hence, there is absolutely no justification today or in the distant future for setting up the highly polluting coal fired power plant in Lamu or anywhere else in Kenya.
3. The Government has also refused to disclose whether or not the Energy Regulatory Commission has granted an Electricity Generation Licence to Amu Power Company Limited to build the Coal Fired Power Plant in Lamu County.
4. The Government has also refused to make full disclosure of the Power Purchase Agreement (PPA) entered into between the Kenyan State (through Kenya Power) and Amu Power Company.
5. The secretive PPA is said to bind Kenyan taxpayers to pay about US\$ 368 million (approximately, Kshs 36.8 billion) per year as capacity charges for the privately owned Lamu Coal-Fired Power Plant whether we use the electricity or not.
6. The Environmental Impact Assessment report upon which NEMA licensed the project is a scientifically meritless apology for the project. It was prepared by a conflicted expert who was literally an agent of Amu Power Limited. Kurrent Technologies Ltd. was appointed by Amu Power Limited to dispense with the formality of preparing the EIA study report for the necessary environmental authorisation required in law.
7. The Environmental Management and Co-Ordination Act requires aggrieved parties to seek relief before the National Environment Tribunal, yet tribunals have no

jurisdiction under the Constitution to entertain matters concerning the violation of constitutional provisions, including of rights and fundamental freedoms in the Bill of Rights.

8. In response to the above, I filed Malindi Environment and Land Court Constitutional Petition No. 14 of 2017 (formerly, Nairobi High Court Constitutional Petition No. 334 of 2017), asking the Court:

a. To determine whether or not the Energy Regulatory Commission has granted an Electricity Generation Licence to Amu Power Company Limited to build the proposed 1,050 MW coal fired electric generating unit (colloquially, power plant) in Lamu County. Further, I want the Court:

i. To determine whether or not the Energy Regulatory Commission's Acting Director General Pavel Robert Oimeke, who is not a registered engineer, is competent to issue the Electricity Generation Licence for the Lamu Coal Power Plant.

ii. To determine under what circumstances the Electricity Generation Licence was issued (if it was issued) given it is in the public domain that Engineer Joseph Ng'ang'a, the former substantive Director General of the Energy Regulatory Commission, declined to issue the said licence.

iii. To order the production of the report by the Energy Regulatory Commission's Electricity Generation Licensing Committee approving the issuance of a licence to the Lamu Coal Fired Power Plant.

iv. To order the production of the Energy Regulatory Commission's minutes approving the issuance of the license to Lamu Coal Fired Power Plant.

b. To order the Kenya Power and Lighting Company, the Amu Power Company Limited, the Energy Regulatory Commission, the National Treasury, the Ministry of Energy & Petroleum, and the Hon. Attorney General to make full disclosure of the secretive Power Purchase Agreement (PPA) entered into between the Kenya State (Kenya Power) and Amu Power Company.

- c. To further compel the Government to release the following information and documents on the Lamu Coal Fired Power Plant:
 - i. Details of any loans the PPA has been used to secure or guarantee.
 - ii. Details of any loan guarantees by the GOK or any of its agencies for the Lamu Coal Power Plant.
- d. To declare that, given the inherent conflicts of interest, it is constitutionally invalid for proponents of projects to hire and pay experts who prepare the mandatory environmental impact assessment (EIA) reports, upon which the State regulator (the National Environment Management Authority - NEMA) then relies to issue licenses for development projects.
- e. To declare that given the current glut in electricity generation, and the abundance of renewable sources of energy such as geothermal, hydro, solar, wind, and biomass, that have hardly been tapped, there is no justification for setting up the highly polluting coal fired power plant in Lamu or anywhere in Kenya.
- f. To issue a permanent injunction against the establishment of the Lamu Coal Fired Power Plant.
- g. To declare that, the National Environment Tribunal lacks the jurisdiction under the Constitution to entertain proceedings filed in defence of the Constitution and the Bill of Rights. The Tribunal continues to act as it did under the repealed Constitution as the court of first instance for challenging decisions of NEMA to licence projects which impact on the enjoyment of rights and fundamental freedoms protected by Article 42 of the Constitution.

Okiya Omtatah Okiiti - 0722-684-777
Nairobi, July 4, 2017