REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MERU ELC CASE NO. 163 OF 2014

FORMERLY NAIROBI ELC NO. 1330 OF 2014

MOHAMUD ILTARAKWA KOCHALE	-	1ST PLAINTIFF
KOCHALE SOMO CHALE	-	2ND PLAINTIFF
ISSA JITEWE GAMBARE	-	3RD PLAINTIFF
DAVID TOMASOT ARAKHOLE	-	4TH PLAINTIFF
WILLIAM LENGOYIAP	-	5TH PLAINTIFF
SEKOTEY SEYE	-	6TH PLAINTIFF
(suing on behalf of the residents of Laisamis Constituency and Karare Ward Marsabit County)		

VS

LAKE TURKANA WIND POWER LTD	-	1ST DEFENDANT
MARSABIT COUNTY GOVERNMENT	-	2ND DEFENDANT
THE ATTORNEY GENERAL	-	3RD DEFENDANT
CHIEF LAND REGISTRAR	-	4TH DEFENDANT
THE NATIONAL LAND COMMISSION	-	5TH DEFENDANT
AARON ILTELE LESIANNTAM	-	1ST INTERESTED PARTY
HENRY PARASIAN SAKALPO	-	2ND INTERESTED PARTY
STEPHEN NAKENO	-	3RD INTERESTED PARTY
JOB LMALSIAN LENGOYA	-	4TH INTERESTED PARTY
DAIR LENTIPAN	-	5TH INTERESTED PARTY

JUDGEMENT

A. THE PLEADINGS

1. The Plaintiffs filed a representative suit claiming ancestral land rights within Laisamis Constituency and Karare Ward in Marsabit. They aver that they are members and residents of pastoralists communities' resident in Marsabit County which include the Rendille, Samburu, El Molo and Turkana peoples.

2. Their claim revolves around land parcel numbers LR 28031/1 and 28031/2 cumulatively measuring 150,000 acres (herein after referred to as the suit land). In order to assert their said rights they sued the 1st to 5th defendants vide a plaint dated 14th October 2014 and filed on even date seeking the following reliefs;

    a. **Cancellation/revocation of the title comprising of the suit property and in particular IR No. 6395/1(LR 28031) and I.R No.6396/1(LR No. 28031/2) hereinafter referred to as the suit land.**
    b. **Nullification of the Wind Power Project.**
    c. **Costs of this suit herein.**
    d. **Any such other or further relief as this Honourable court may deem fit to grant.**

3. The plaintiffs case is that the suit land is central to their survival and livelihood as it is their cultural, ancestral and grazing land held under an intergenerational trust for future generations. In addition, that cultural rites such as Galgulame ceremonies are performed in Serima

Village, an area that is now alienated to the 1st Defendant. Further that the suit land is used as a livestock and camel access to the Lake Turkana waters.

4. It is their plea that their land rights predating 1920s are anchored under the Provisions of Art 40, 63, 69 and 71 of the Constitution of Kenya.

5. Citing the Banjul Charter, ICCPR, ICESCR, ILO Convention 169 on indigenous and tribal peoples and the IFC Performance standards, the Plaintiffs aver that they are entitled to protection as indigenous inhabitants of Marsabit.

6. It is their case that the suit land was illegally and unprocedurally set apart in favour of the 1st Defendant contrary to the Trust Land Act and the Constitution. Interalia, that they were not compensated for their loss of their communal land. That their free, informed and prior consent was not sought contrary to the IFC performance standards with respect to indigenous peoples and cultural heritage.

7. To buttress their case, the Plaintiffs enumerated the particulars of breach of statutory provisions in para 32 of the Plaint.

8. In addition, the Plaintiffs averred that the setting apart of the suit land has occasioned economic and social hardships as set out in para 34 of the plaint.

9. While denying the claim of the Plaintiffs, the 1st Defendant contended that the suit land is situate in Laisamis constituency while the plaintiffs hail from Karare ward in far away Saku constituency. It averred that all the Plaintiffs are current and or former members of the County Assembly of Marsabit and of Rendille descent hailing from Korr, 90 kilometres from the suit land and cannot purport to represent the Samburu, El Molo and Turkana communities.

10. Explaining the background of the project, the 1st Defendant admitted that it developed a 300 MW wind power farm near Loyangalani, 10 kilometres east of Lake Turkana at the cost of Kshs 75 Billion which is expected to supply 17% of the national power needs into the national grid.

11. Maintaining that the project catchment area comprises of mixed tribes, it averred that the host communities are the samburus El Molo and the Turkana tribes while the Rendille live in Korr and Kargi , 90 kilometrres away from the project site. With respect to the Galgulame ceremonies, the 1st Defendant enumerated the location in which the ceremony was held from 1938 – 2008, none of which was at Serima Village as averred by the Plaintiffs.

12. In detailing the process of acquisition of the suit land and whilst asserting its rights to the suit land, the 1st Defendant averred that it holds a 33 year lease over the property which it acquired through a lawful and legal process. That none other than the then County Council of Marsabit, the 5th Defendant, the Ministry of Energy, The

National Treasury were involved in the approval process. That as such its property rights as a private investor/owner is entitled to protection under Art 40 of the Constitution.

13. Alleging bad faith, the 1st Defendant faulted the Plaintiffs for delay in filing the suit while they were aware of the same since inception of the project – 7 years.

14. The 1st Defendant denies the allegations of statutory breaches levelled against it by the Plaintiffs and called for proof. It also denied that their acquisition of the land has caused any economic and social hardship to the Plaintiffs. That in any event the property is not fenced off and so is accessible for use by the communities. Further that no claim of compensation was made to the Council by the communities because they recognized that their usage of the land would not be interfered with.

15. The 2nd Defendant posits that the process of alienation of the suit land was lawful and complied with the Trust Land Act and the Constitution (now repealed). Interalia, it was of the firm view that the host communities were involved in the public participation and approved the process and the project.

16. It contended that the suit land predominantly and culturally belonged to the Rendille community. That the other communities enjoyed user and access rights. It affirmed that though the Plaintiffs are members of the Rendille community that reside in the Laisamis constituency, being

nomadic in nature, they were not present in Serima and Loiyangalani at the time the land was set apart.

17. With respect to the approval process the 2nd Defendant contended that its Town Planning committee in approving the setting apart of the suit land adopted the public participation carried out by the 1st Defendant on the 26/5/2007.

18. Finally, that as the custodian of the land on behalf of the people of Marsabit, it had the responsibility to hold the land in trust and undertake activities beneficial to the communities including alienating land to any private entity.

19. Echoing the defence of the 1st Defendant, the 3rd and 4th Defendants denied that the Plaintiffs are residents of the Laisamis Constituency, where the suit land is situate.

20. It reiterated that the suit land was set apart in compliance of the law. That the subdivision and change of user also complied with the law and denied any impropriety on their part. It insisted that the 1st Defendant's title is lawful in all respects and remains unimpeachable.

21. Like the 1st, 3rd & 4th Defendants, the 5th Defendants denied the claims of the Plaintiffs entirely and was emphatic that the suit land was alienated, subdivided and changed user according to the Trust Land Act and the constitution. That Proper public participation was carried out.

22. That on prompting by the 1st Defendant, it reviewed the title of the suit land under its legal mandate and gave it a stamp of approval and avers that the 1st Defendant is in lawful possession and occupation of the land and denied any alleged illegality and or impropriety.

23. It was the 5th Defendant's case that the project is a key Vision 2030 Government project aimed at sustainable development with immense socio economic benefits to the locals as well as the country at large. Further that in view of the astronomical amounts of public money that have been committed to the project, nullification of the project would amount to undermining the constitutional provisions which advocate for responsible and prudent use of public resources.

24. It urged the court to accept that in the absence of the Divisional Board, the setting aside of the suit land through the Town Planning Committee was lawful. That this was Government policy and custom that had been employed in other parts of the Country that had no divisional boards.

25. The Interested parties case can be summarised as follows; that they are host communities and have supported the Project wholeheartedly because of the benefits that have accrued to their communities; That they were consulted on the setting apart of the land and had no objections; that the Plaintiffs have no locus to oppose the 1st Defendants project; That the suit land is not a cultural

site as claimed by the Plaintiffs and if the project is nullified they and their communities stand to suffer irreparable harm.

B. THE EVIDENCE OF THE PARTIES

The Plaintiffs

26. The Plaintiffs called 4 witnesses in support of their case. PW1 – David Tamasot Arakhole adopted his witness statement dated 15/2/2019 in evidence in chief.

27. He stated that he was the Member of County Assembly representing Korr ward within Laisamis constituency. That he was born in Laisamis and he and his parents being pastoralists migrated to other areas of the county in search of pasture and water for their livestock. That the suit land is in the centre of Rendille ancestral land though the Samburu, Turkana and the El Molo have access and grazing rights. That he is a Rendille and has capacity to file the suit on behalf of the communities who reside in Marsabit.

28. That he discovered that the land had been alienated unprocedurally in favour of the 1st Defendant when he joined the county Assembly in 2013. That this led to fact finding meetings through public meetings (barazas) in early 2014 to ascertain whether the communities were aware that 150,000 acres of their land had been privatised. The answer being negative, they filed suit in 2014.

29. He took the court through the procedure of setting apart of land as set out in section 117 of the then Constitution and TLA and

informed the court that the procedure adopted by the 2nd Defendant fell short of the provisions of the law in the following areas; no divisional land board was set up; no public participation was carried out as contemplated by the law; compensation was not paid to the communities.

30. The witness testified that the act of appropriating 150,000 acres of their ancestral land is not without consequences; community land is now private land attracting the law and consequences of trespass upon the community; privatisation of community indigenous resources such as plants shrubs wells and areas of cultural significance; the camel corridor enroute to the Lake will be blocked forcing the Rendille to pass through Gabra and Samburu lands with the risk of fuelling conflicts along the way; enclosure of about 28 kilometres of the shores of the lake in the private property; loss of 150,000 acres of land without compensation; risk of loss of nomadism which is their way of life and livelihood and loss of cultural sites.

31. In cross examination, the witness informed the court that there is no agreement or condition in the titles of the 1st Defendant allowing the community to use the land and any use or access may be liable to trespass. That nothing stops the 1st defendant from asserting its full rights as a private land owner against the communities who are principally the owners of the suit land.

32. In addition, the witness stated that the meeting held by the 1st defendant on the 26/5/2007 did not meet the requirements of public

participation. That setting apart of the suit land was not discussed in the said meeting.

33. Faulting the setting apart process, he informed the court that the county did not adhere to the procedures set out in the TLA; no divisional land board was held; no notice was issued; no public participation; no recommendations by the people; no recommendations were tabled before the council; no approval was given. That the Town planning committee had no mandate in law to step into the shoes of the divisional land board.

34. PW2- Sarai Fecha adopted his witness statement dated the 15/1/2009 and stated that he was a resident of Loiyangalani ward Laisamis Constituency. That he is the Chief of Loiyangalani location having been the Assistant Chief from 1991 – 2017. It was his evidence that the predominant communities in Loiyangalani were the Rendille alongside the Turkana, El Molo and the Samburu. That the Turkana moved in later around 1981. That Serima area plays a key role to the communities as it is a grazing area, settlement, source of water and a place for cultural rites. That communities moved around depending on the cyclic grazing and rainfall pattern.

35. The witness stated that he was not notified of the meeting that was held on the 26/5/2007 and that he walked in to the meeting and that neither the setting apart of the land nor compensation was discussed.

36. PW3 – Professor Gunther Schlee stated that he was a Professor in Anthropology and Director of Research of Max Planck Institute in Germany. That he had conducted research on Northern Kenya and Ethiopia for over 45 years and he produced a report dated the 16/5/2017 as well as part of his books in support of his testimony. That his wife lives in Kenya and he too has lived in Kenya for a good part of his adult life.

37. With respect to the Galgulame ceremony he explained that it is a Rendille rite of passage performed on the eastern shores of Lake Turkana, a water body ideal for nourishing livestock and people attending the ceremony. That it is carried out after every 14 years and he detailed the places that the ceremony had been carried out before. In his testimony the ceremony was held in other places due to insecurity. He gave an example of the 1970s during the Ngoroko wars when the ceremony was held at Buri and water was sourced from Sokorte (Lake Paradise). It was his evidence that the Rendille, Samburu and Turkana and other smaller tribes reside in the county and being majorly pastoralists they move around in search of pasture and water without any boundaries. That the setting apart of the land may pose a challenge to the livelihood and nomadic nature of the communities as part of their land is now part of the 1st Defendants land.

38. PW4 – Odenda Lumumba Richard informed the court that he is a land and agrarian expert and relied on his report on page 303 of the Plaintiffs bundle. In addition, the witness stated that he previously worked at the Kenya Human Rights Commission as a Commissioner.

That he was consulted for other communities with customary land disputes in Kajiado , Laikipia as well as the Ogiek of Mau Forest. That he has authored a book in customary land rights in Kenya and therefore knowledgeable on customary land rights.

39. It was his evidence that the suit land belongs to the People of Marsabit who practice rangeland use. He cautioned that the fact that the land is vast, abundant and underutilised should not be mistaken for idle land because the land is customarily owned by the communities who reside in the area and in case of alienation, they must be consulted and their consent obtained.

40. The witness was emphatic that the communities in these areas are already marginalised in terms of resource access and tenure and that their rights were violated in the manner in which the setting apart was done contrary to the law. That the wind power project has led to loss of rangeland and the commons, water sources and access. That the meeting held on the 26/5/2007 fell short of a public participation contemplated by the TLA. That the County Council held the land in trust for its residents and had no mandate to dispossess the land without the consent of the local communities and contrary to the law.

The evidence of the 1st Defendant

41. In total the 1st Defendants called seven witnesses in support of its defence.

42. DW1- Nicholas Jendersen Taylor stated that he was employed as the Chief Operations Officer of the 1st Defendant from 2009 to 2014. That the suit land measuring 150,000 acres belongs to the 1st Defendant and is situate near Serima village Loiyangalani District in South Horr Sublocation Marsabit County. That it holds a leasehold title of 33 years from 1/3/2009.

43. That on it sits the 310MW wind power farm constructed on a foot print of 87.5 acres of the suit land comprising of among others, 365 wind power turbines and a power station, staff houses, offices and other ancillary amenities. That the rest of the acreage acts as a buffer zone for wind generation. He stated that the suit land is not fenced and therefore local communities have access to the land except the area designated for offices and the power station.

44. It was his testimony that the communities that reside in the area are Rendille, Samburu, Turkana and the Elmolo. He stated that though the Plaintiffs are residents of Marsabit county, they live between Laisamis and Logologo a distance of about 200 kilometres from the project area/suit land. That consequently they are not directly affected by the project. He was of the opinion that the Plaintiffs do not represent the interests of the local communities who have given their support to the project.

45. The witness informed the court that several meetings were held with the local communities with respect to the project between 2009 to 2015. He cited the minutes of the meeting held on the 26/5/2007

as one of those engagements where the locals approved the project. That he took part in sensitizing the communities about the project.

46. It was his evidence that the 1st Defendant carried out environmental impact assessment of the Project and obtained approvals and licences from the National Environment Management Authority (NEMA).

47. That he led the resettlement program of about 2000 Turkana who occupied a section of the Serima village to pave way for the construction of the road to the project. Enumerating the benefits of the project to the communities, the witness stated that the 1st Defendant has constructed schools, health centres, provided employment and as result there is reduced insecurity in the area.

48. The witness informed the court that he was not aware of how the land was acquired by the 1st Defendant. Whilst being shown the title of the suit land , the witness confirmed that the conditions in the title stated that the land was to be used for wind power generation and there was nothing that permitted grazing or other community activities thereon.

49. The witness informed the court that nullifying the project would lead to dire consequences such as ; loss of investor confidence in the country, loss of massive investments (approx. Kshs 72 billion) already ploughed into the project; loss of 17% power supply to the national

grid and loss of employment and other CSR activities for the benefit of the local residents. He urged the court to deny the prayer.

50. DW2 – William Lengoyiap testified and informed the court that he is a Samburu living in Nanyuki and a teacher by profession. His ancestral home is Mt Kulal in Gatab area. That the Rendilles live in Mt Kulal too. That though he was one of the Plaintiffs he withdrew his case on personal conviction that the project was beneficial to the people. Though he stated that he did not know the conditions on the title, he confirmed that the 1st Defendant has not fenced off the land or prevented the communities from accessing it. That he did not attend any meeting where the setting apart of the land was discussed.

51. DW3 – Heri Felix Oskar Rottman informed the court that he was employed by the 1st Defendant in 2015 as a Senior Social Specialist and the manager in charge of resettlement of the Serima Village, the only permanent settlement in the project area. That the resettlement was voluntary and was undertaken in compliance with the law and international standards. That the resettled communities are the only communities that were affected by the project. That the 1st Defendant provided social amenities to the village such as water, paid disturbance allowanced sanitation systems and training on business and financial management.

52. That he was also the Director of Winds of change, a corporate social responsibility outfit created by the 1st Defendant to undertake CSR activities in the area focusing on schools, health centres, water.

That the projects have a funding life of 20 years provided by the 1st Defendant.

53. He stated that he was unaware how the 1st Defendant acquired the land as he joined the employment of the 1st Defendant in 2015, long after the 1st defendant acquired title to the suit land in 2009. When showed the title , he confirmed that the user of the land is wind power generation and that there was nothing in law to stop the 1st Defendant from evicting the communities from its land.

54. Next to testify was Lamarck Oyath as DW4. He stated that he is an Engineer by profession, a social needs expert and a lead environmental officer with the National Environmental Management Authority. That he is the Managing Director of Lartech Africa Limited, a consultancy firm engaged by the 1st Defendant to develop a full resettlement action plan for the relocation of Serima Village. He confirmed that there was no compensation paid for the loss of land and that the payments were purely for the resettlement of the affected persons.

55. DW5 – Prof Francis Muthuri Mbijiwe informed the court that he is a practising environmental consultant. That he was engaged by the 1st Defendant in 2008 to carry out an EIA for the project. That he carried out public participation and finally prepared his report which contained both the negative and positive impact as well as mitigating measures. He informed the court that the project was approved by NEMA and a licence was granted.

56. DW6 – Emmanuel Ndiema testified and informed the court that he is a senior research scientist and the head of Archaeology at the National Museums of Kenya. That according to the report on page 887 of the 1st Defendants bundle, he found an assortment of archaeological material on the project site including burial sites, artefacts and evidence of rituals that were performed by the inhabitants. He confirmed to the court that none of the turbines were erected on the area with archaeological significance. That it is outside the protected areas.

57. DW7 – Rizwan Fazal informed the court that he is the Finance Advisor to the Project. That the total project costs is Kshs 73 billion sourced from 13 international lenders most of which are foreign Government related. That the project is one of the largest single private sector funded investment in the history of the country and one of a kind in renewable energy in Africa. That the project was completed in 2017. That it supplies 15% and 30% power to the national grid during the day and night respectively.

58. He stated that the project is on a foot print of 87.5 acres of the suit land. That there are immense benefits of the project some of which are listed in page 1125 of the 1st Defendants bundle. He stated that he does not know how the suit land was acquired. That if the project is nullified the results would be negative to the country.

59. In addition, he stated that the communities that resided on the land before the project commenced were the Rendille , Samburu and Turkana and that the only settlement was at Serima as the communities are pastoralists in nature and keep shifting in search of water and pasture. When referred to the minutes of the meeting of 26/5/2007 he informed the court that he was not involved in the land acquisition and would not be able to know the legalities involved.

The Evidence of the 2nd Defendant

60. DW8 – Malicha Boru Wario stated that he is the County Secretary and head of Public Service of Marsabit County Government since 2017. The witness stated that the suit land predominantly belongs to the Rendille tribe but the other communities like the Turkana, Samburu and the El Molo have access and user rights. He was emphatic that the Plaintiffs come from the area.

61. In cross examination the witness summed his testimony as follows;

> **" it is my evidence that the Divisional Board was not notified of the decision to set apart the land. That no divisional board was set up and that the council did not notify the communities about the decision to set apart the suit land so the views of the community were not recorded at all. There was no determination by the Divisional Board. I am aware that the land belongs to the community and is held in trust for the County Government. No compensation for the land was made to the community. The minutes of the meeting held on the 26/5/2007**

was not of the Divisional Board and the setting apart of the land was not discussed. That there was no public participation by the Town Planning Committee."

The Evidence of the 5th Defendant

62. DW9 – Silas Mburugu stated that he is the Principal Administration officer with the National Land Commission having worked previously in the Ministry of Lands for over 22 years. It was his evidence that the setting apart of the suit land was proper and lawful. He explained that at the point of setting apart the land there was no divisional board in Marsabit and that it was a policy and practice of Government to use the Town Planning Committee in place of the Divisional Board under the repealed Trust Land Act and the Constitution. That this practice had been deployed in Garissa, Wajir, Mandera and Kitui where there were no divisional boards. That the 1st Divisional Board in Marsabit was only set up in 2012.

63. The witness stated that the Commissioner of Lands gazetted the setting apart on behalf of the council as per section 53 of the Trust Land Act.

The evidence of the 3rd and 4th Defendants

64. DW10- Mark Napurdi Ekale stated that he was a resident of Loiyangalani District in Marsabit County. That he has been a councillor from 1997 – 2003 and currently is the Member of County Assembly

for Loiyangalani ward. That he is a Turkana and the Rendille and other communities live in the ward.

65. He informed the court that he supported the project and that to his knowledge several consultative meetings with the community were held over the setting apart of the land. That he attended the meeting of 26/5/2007. That the project has brought a lot of benefits to the local communities.

66. DW11 – Engineer Issac Kiva stated that he is an Engineer at the Ministry of Energy and Petroleum dealing with renewable energy. His evidence in chief was that the project has direct and indirect benefits to the local peoples and the country. He did not deal with the setting apart of the land.

The evidence of the Interested Parties

67. IPW-1- Aaron Iletele Lesiantaan informed the court that he is an employee of the Wings of Change Foundation, a CSR outfit created by the 1st Defendant. That he is a resident of Loiyangalani from the Samburu community and supports the project because of the numerous benefits derived therefrom such as provision of water, health education etc. According to him public participation was undertaken though he never attended any of the meetings.

68. 1PW-2 – Simon Lepelayan Lenarokiishu stated that he was a former chief of Kulal but now retired. He served as chief for 38 years till retirement in 2014. That in 2005 the locals were notified of the project by the District Commissioner. There was no objection to the

project because of the expected benefits to the residents such as jobs, water and education. That he was present in the meeting held on the 26/5/2007 and the project was discussed and the people unanimously supported it. That the land issue was not discussed.

69. IPW-3- Farara Lenaikoi stated that he was a councillor in 1992 - 1994 before he became an Assistant Chief. That he attended two meetings where the project was discussed. The meetings were open and anyone was free to attend. That the land was occupied by the Rendille, Samburu and Turkana and all of them supported the project. He confirmed that the land customarily belongs to the Rendilles.

70. IPW-4 - Amasse Nyangayo informed the court that she is employed by the 1st Defendant. Like the rest of the Interested parties witnesses she stated that she was aware of the many meetings convened by the District Officer and the Chief to discuss the project. That she came to know about the project through the chief. She supported the project on account of various benefits that would accrue to the communities.

C. THE WRITTEN SUBMISSIONS

71. The plaintiffs' framed 8 issues for determination namely, whether the plaintiffs' had Locus Standi to sue; whether the suit land was prior to alienation ancestral land under the TLA; whether the suit property was legally alienated through the setting apart process; whether plaintiffs have suffered socio-economic loss/damage; whether the suit titles

should be revoked; whether the 1st defendant's project on the suit land should be nullified; and lastly who shall bear the costs of the suit.

72. The Plaintiifs relied on the case of *Mumo Matemo –vs- Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR and *Article 22 and 258* of the COK in submitting that they had locus standi to file suit to vindicate the rights of their communities over the alleged unlawful setting apart of their ancestral land. They also cited the case of *Bakhola Mkalini Rhigho & 9 Others –vs- Michael Seth Kaseme & 3 Others [2016] eKLR* whereby it was held that any member of a community can rightly pursue interests over ancestral land individually or collectively.

73. The Plaintiffs pointed out that the legal provisions for alienation of trust land were anchored in **Section 117** of the **repealed constitution** and **section 13(2) of the TLA.** They submitted that the establishment of the Divisional Board was a mandatory requirement. They argued that the Board was not set up in line with section 5 of TLA and without such Board any other institution purporting to take its place was illegal. It was submitted that the 2nd, 3rd, 4th and 5th defendants had admitted the failure to comply with mandatory statutory provisions and that no government policy allowed them to break the law.

74. The Plaintiffs relied on the decision of *Gitson Energy Limited –vs- Francis Chahu Ganya & 6 Others [2017] eKLR* in support of their submission. In that case the Court of Appeal upheld the High Court's decision in quashing a Gazette notice issued by Commissioner of Lands in setting apart of 150,000 acres of land in Marsabit county Bubisa location.

75. On the issue of compensation, the plaintiffs submitted that they were entitled to compensation in line with section 13(4) TLA and section 117(4) repealed constitution. They submitted that it was undisputed that no single resident was compensated for loss of their ancestral land thus a direct breach of a mandatory statutory provision. They urged the court to cancel the suit land title(s) in light of section 26 LRA for having been acquired illegally, unprocedurally or through a corrupt scheme. That customary trust is an overriding interest and protect under section 28 of LRA.

76. It was submitted by the plaintiffs that privatization of community land was in itself an infringement of their right to property and socio-economic rights. They pointed out breach of their cultural right as enshrined under **Article 44** as read with **Article 11** of Constitution of Kenya and various international treaties like ICCCPR, the Banjul charter, ICESR, ILO Convention on indigenous and tribal people. They contended that the suit property was held by the plaintiffs as ancestral, cultural and grazing land for themselves and in trust for their future generations.

77. The 1st Defendant filed its submissions dated 1st March, 2019 and pointed out that the plaintiffs had failed to file their submissions within the timelines stipulated by the court. In submitting that court orders ought to be obeyed, it relied on the case **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others** as quoted by Justice Aburili in **Doric Industries Limited vs Akshrap Real Estate Limited & 2**

Others [2015] eKLR. The 1st defendant submitted that the plaintiffs' action of filing the submissions late was a nullity and they ought to be struck out. It relied on the case of **Macfoy vs United Africa Co. Ltd [1961] 2ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd vs KTDC & 2 Others.**

78. The 1st defendant submitted that the plaintiffs were legally obligated to prove their case as required under sections 107(1) and 109 of the Evidence Act and relied upon the case of **Kiambu County Tenants Welfare Association vs Attorney General & Another [2017] eKLR** and submitted that the plaintiffs had failed to prove their case to the required standard. It was submitted that the suit property was lawfully set aside by the Marsabit County Council upon receiving a recommendation to that effect from its Town Planning Committee since there was no Divisional Board then. It was submitted that it was government policy and practice at the time to make use of the Town Planning Committees in districts which did not have Divisional Boards.

79. The 1st defendant further submitted that it entered into a lease agreement with the 2nd defendant which contained covenants and warrants demonstrating that the process of setting apart was lawful and that the lease agreement created a legitimate expectation that the suit property was lawfully set aside. It invited the court to make a finding of legitimate expectation on the basis of the cases of **Jane Kiongo & 15 Others vs Laikipia University & 6 Others [2019] Eklr** and **National Director of Public Prosecution vs Philips and Others [2002] (4) SA 60 (W).**

80. The 1st defendant submitted that the plaintiffs were guilty of laches having filed the suit seven years after commencement of the project. The 1st defendant cited the cases of **Joshua Ngatu vs Jane Mpinda & 3 Others [2019] eKLR** and **Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited [2014] eKLR** in support of its submission on the issue of delay.

81. On the issue of whether the wind power project should be nullified, it was submitted that the project was of great benefit to the people of Kenya and more so on economic development. It was contended that Kenyans shall benefit from power generated from the wind power project. It was further submitted that nullification of the project shall adversely affect Kenyans and other stakeholders who had invested in the project.

82. The 1st defendant submitted that even though public participation was not required prior to the 2010 Constitution it nevertheless undertook massive public participation. It relied on the various affidavits and minutes of public consultative meetings held prior to the setting apart. It was further submitted that public participation did not connote that every affected person must personally present his views. It relied on the cases of **National Association for the Financial Inclusion of the Informal Sector vs Minister for Finance & Another [2012] eKLR** and **Minister of Health and Another vs New Click (Pty) Limited and Others CCT59/2004, [2005] ZACC 14** in support of that submission.

83. It was the 1st defendant's submission that the rights of the concerned communities were not adversely affected by the project. It was further submitted that the site visit report indicated that the project did not interfere with the communities use and access of the suit property or their access to Lake Turkana.

84. The 1st defendant submitted that the defendants having demonstrated the process of acquisition was lawful, the prayer for cancellation or revocation should not be allowed. It was further contended that the prayer for nullification of the project was ambiguous as the plaintiffs had not demonstrated which wind power they sought to be nullified. It was submitted that the project was part of Vision 2030 flagship programme and nullifying it shall be contrary to public interest. That money had been expended on the project and this court ought to protect investors as nullifying it would be imprudent.

85. The 2nd defendant filed its submissions dated 28th September, 2020 and submitted that the main issue for determination was whether the suit property was procedurally set apart in light of the provisions of Section 117 of the repealed constitution and Section 13(1) of TLA. It was submitted that there was sufficient evidence on record to demonstrate that due process was followed in setting apart the suit property. It was submitted that a recommendation for setting apart was received from the Town Planning Committee and that on 16th August, 2007, during a full council meeting it was unanimously resolved that the suit land be set

apart. It was contended that the Town Planning Committee lawfully initiated the process of setting a part in view of the fact that no Divisional Board was in existence at the material time.

86. The 3rd and 4th defendants vide their submissions dated 19th March, 2020, contended that due process was followed in setting apart the suit land. They conceded that indeed under the repealed TLA, the Minister of Lands was the person empowered to appoint chairpersons of Divisional Board the oversight bodies in setting a part trust land. It was submitted that due to the absence of the Divisional Board the Town Planning Committee stepped in and carried out the mandate of the Board in order to avoid a vacuum.

87. It was further submitted that the project should not be nullified since it would undermine the realization of Kenya's Vision 2030. It was further contended that the suit raised public interest issues and that the project was of great public interest and not for individual gain. The case of **Brian Asin & 2 Others vs Wafula Chebukati & 9 Others [2017] eKLR** was cited on the issue of public interest.

88. The 5th defendant filed its submissions dated 1st September, 2020. It was submitted that the setting apart of the suit property was lawfully carried out in accordance with section 117 of the repealed constitution and section 13 of TLA. It was conceded that there was no Divisional Board at the material time but it was submitted that it was government policy and practice that County councils could set apart trust land

through their Town Planning Committees. The court was urged to give the law a broad and liberal interpretation taking into account the prevailing circumstances whereby the Divisional Board had not been established.

89. On their part, the Interested Parties filed their submissions dated 20th March, 2020. They contended that the plaintiffs lacked locus standi to institute these proceedings and their reference of the suit property as community as opposed to trust land was a misnomer. They contended that being residents of Laisamis district and other parts of Kenya, the plaintiffs lacked locus standi to sue on behalf of the communities they purported to represent.

90. They submitted that there was sufficient evidence on record to demonstrate that adequate public participation was undertaken. It was further submitted that the evidence on record demonstrated that the 1st defendant's project was supported by the local communities and their leaders.

91. It was submitted that whilst compensation was not specifically sought by the Plaintiffs, there was evidence on record to demonstrate that approximately 161 households who were living in Serima village within the suit property were resettled and compensated. They submitted that the project had generated benefits to the local communities including provision of 9 boreholes, employment opportunities, ambulance services etc.

92. The Interested Parties submitted that the plaintiffs had not explained why they commenced their suit about 9 years after the commencement of the project. It was contended that such unexplained delay defeats equity and therefore the reliefs sought in the suit ought to be denied. They cited the cases of *Fanikiwa Ltd –v- Joseph Komen & 5 others [2013] eKLR* and *Abigael Barmao –v- Mwangi Theuri [2013] eKLR* in support of that submission. They consequently urged the court to dismiss the suit with costs.

D. ANALYSIS & DETERMINATION

93. Having carefully read and considered the pleadings, the evidence of the parties, witness statements and the material placed before the court the issues for determination are;

a. **Whether the Plaintiffs have locus to file this suit.**
b. **Whether the setting apart of the suit property was lawfully undertaken.**
c. **Whether the Plaintiffs' environmental and cultural rights were violated**
d. **Whether the Plaintiffs are entitled to compensation in respect of the setting apart of the suit property.**
e. **Whether the title(s) of the suit property should be cancelled?**
f. **Whether the project should be nullified**
g. **What orders should be granted by the court?**
h. **Costs**

a. **Whether the Plaintiffs have locus to file suit.**

94. The term *Locus Standi* refers to a right to appear in Court and be heard. To say that a person has no Locus Standi means that he has no right to appear or be heard in the suit. In the past, for locus to be founded, a person must have established sufficiency of interest to sustain his standing to sue in a Court of Law. **See Black's Law Dictionary, 9th Edition.**

95. Prior to the 2010 Constitutional dispensation the place of locus in our Courts was saddled with various strictures and limitations. Art 258 of the Constitution of Kenya 2010 (COK) has now freed the space of locus in the advent of expanded freedoms and liberties decreed in the new CoK. It states as follows;

(1) Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting on their own interest, court proceedings under clause (1) maybe instituted by-

a) a person acting on behalf of another person who cannot act on their own name

b) a person acting as a member of or in the interest of a group or class of persons

c) a person acting in public interest or

d) an association acting in the interest of one of its members

96. The import of the above provision of the Constitution is that every person has a right to institute Court proceedings, claiming that the Constitution has been contravened or is threatened with contravention. Further the provisions permit a person to file suit in his own interest, on behalf of another person who cannot act in their own name; as a member of or in the interest of a group or class of persons; in public interest and in association or in the interest of one or more of its members.

97. Art 40 of the COK provides protection of property against arbitrary deprivation unless that deprivation results from an acquisition of land or an interest in land in accordance with chapter V; or for public purpose or in the public interest for which requires prompt payment in full of just compensation to the person. Similar provisions were contained in Section 75 of the repealed Constitution.

98. Further under Art 40 (3)(ii) of the COK it is a requirement in any acquisition for the purposes stated in the said Article that the Constitution allows any person who has an interest in or right over that property, a right of access to a Court of law.

99. Section 12 of the TLA is relevant in answering this issue. The right to access the Court by a person aggrieved by the setting apart of land was provided as follows;

> "notwithstanding anything in this Act, any person claiming a right or interest in the land set apart under this Act shall have access to the High Court for; the determination of the legality of

the setting apart; and the purpose of obtaining prompt payment of any compensation awarded". [emphasis added].

100. The rights in trust land were defined under section 69 of the Trust Land Act as;

> "in respect of the occupation use, control, inheritance, succession and disposal of any trust land, every tribe, group, family and individual shall have the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof, in so far as such rights are not repugnant to any of the provisions of this Act, or to any rules made thereunder, or to the provisions of any other law for the time being in force."

101. The Plaintiffs aver that they have ancestral and customary rights of ownership, which rights in our view have not been alleged to be repugnant to any provisions of the law.

102. In the Plaint, the Plaintiffs expressed themselves as suing for themselves and on behalf of the residents of Laisamis constituency and Karare ward. They have described themselves as community members and residents of Marsabit County comprising of the Rendille, Samburu. El Molo and Turkana tribes. That they are nomadic pastoralists who for a long time have been the legitimate owners and occupants of the suit property. They contended that they have held the suit land for themselves and in trust for their future generations.

103. The 1st Defendant and the interested parties denied the plaintiffs' alleged capacity to sue on their own behalf and as representatives of the residents of the area. They contended that the Plaintiffs belong to the Rendille community and lived far away from the suit land. They argued that the suit land is located in Laisamis whereas Karare ward is in a different constituency namely, Saku.

104. To the contrary PW1 PW2, PW3, DW1 DW8, DW10,DW11 and 1PW3were in agreement that the land predominantly belonged to the Rendilles by custom and other tribal groups such as the El Molo, Turkana and the Samburu enjoyed user and occupational rights over the land.It is borne from the certificates of titles that the land is situate in South Horr , a fact that was confirmed by PW1 when he stated that the suit land traverses Mt.Kulal Loiyangalani and South Horr. Going by the provisions of Section 12 of the TLA it is evident that the Plaintiffs are/were ordinarily resident in the area within which the suit land is situate. They therefore had established an interest in the land and are entitled to advert their claim of customary land rights either individually or collectively.

105. Given the weight of evidence placed before the court and the Plaintiffs having laid a firm foundation as to their ancestral interests in the land, in our considered view it mattered not if a Rendille residing in Serima or Loiyangalani or any of the far flung corners of the County filed suit to advert or advocate for the ancestral rights and interests in the suit land. This is a right that was conferred to the community as a whole to be enjoyed severally and or individually. In our view any

person from the other tribes being the ElMolo, Turkana and Samburu, too, would be entitled to file suit on account of their indisputably user and occupational rights and interest over the suit land.

106. It is therefore our conclusion that the Plaintiffs have satisfied the criteria set out in Article 258 of the COK and accordingly have the requisite locus standi before this Court.

b. Whether the setting apart of the suit property was lawfully undertaken

107. The court has considered the material and submissions on this issue. Whereas the Plaintiffs contended that due process was not followed in the setting apart the Defendants and the Interested Parties contended otherwise. The Plaintiffs pointed out that the procedure for setting apart set under section 117 of the repealed Constitution and section 13 of the Trust Land Act (now repealed) was not followed.

108. It was common ground that the suit property was trust land and that the legal regime applicable to it was the repealed Constitution of Kenya and the Trust Land Act (repealed). Section 117 of the retired Constitution stipulated as follows:

> ' **(1) Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation-**
>
> **a) by a public body or authority for public purposes; or**
>
> **(b) for the purpose of the prospecting for or the extraction of**

minerals or mineral oils; or

(c) by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

(2) Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

(3) Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.

(4) No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who-

(a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or

(b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.

(5) No right, interest or other benefit under African customary law shall have effect for the purposes of subsection (4) so far as it is repugnant to any written law."

109. On the other hand, section 13 of the Trust Land Act stipulated as follows:

'(1) In pursuance of section 117(1) of the Constitution, a council may set apart an area of Trust land vested in it for use and occupation—

(a) by any public body or authority for public purposes; or

(b) for the purpose of the extraction of minerals or mineral oils; or

c) by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.

2) The following procedure shall be followed before land is set apart under subsection (1) of this section—

(a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the

council of the day and time of the meeting;

(b) the council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;

(c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

(d) the recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council:

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.

(3) Where the council approves a proposal to set apart land in accordance with subsection (2)(d) of this section, the council shall cause a notice of the setting apart to be published in the *Gazette.*

(4) Subject to this section, sections 7(3) and (4), 8(1), 9, 10 and 11 of this Act shall apply in respect of land set apart under this section, *mutatis mutandis,* and subject to the modification that the compensation shall be paid by the council (without prejudice to the council obtaining reimbursement thereof from any other person)."

110. It is evident from the material on record that the County Council of Marsabit did not notify the Chairman of the Divisional Board of its proposal to set apart the suit property for the purpose of the project. It is also evident that no date was ever fixed for consideration of the setting apart proposal and the Board did not hear any representations from the concerned residents. The 2nd to 4th Defendants conceded that the prescribed process was not followed due to the absence of the Divisional Board. No explanation was given as to why the relevant Minister responsible for lands did not appoint the Divisional Board.

111. The 2nd Defendant contended that due to the absence of the Divisional Board it decided to forward the setting apart proposal to the Chairman of its Town Planning Committee to undertake the duties of the Divisional Board in accordance with government practice and policy. The court is unable to agree with the proposition that the 2nd Defendant was at liberty to short-circuit the statutory procedure prescribed by Parliament. There is no indication on record that the concerned Minister was ever reminded or requested to appoint the Board. There is no indication that there were any legal impediments which prevented the appointment of the Board.

112. The court is also unable to agree that the government policy or custom can lawfully override the statutory procedure prescribed by the legislature in section 13 of the Trust Land Act. In any event, the alleged custom was not proved or demonstrated at the trial. It is

expected that government policy should be documented and made public in an open and democratic society. No official document or gazette notice was tendered at the trial as evidence of the alleged policy, custom or practice.

113. We find it useful to advert to the statement of the late Justice Louis Brandeis of the US Supreme Court in the case of **Olmstead vs United States 277 US 438 (1927)** who opined as follows:

> **"...our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example...if the government becomes a law breaker, it breeds contempt for the law, it invites everyman to become a law unto itself, it invites anarchy."**

It is the duty of this court to deprecate breaking of the law by the government and public bodies. It is also its duty to halt all breakages of the law where they are brought to its attention.

114. In the case of **Gitson Energy Limited v Francis Chachu Ganya & 6 Others [2017] eKLR** the County Council of Samburu had employed a similarly flawed process in setting apart trust land for a similar project and the High Court issued an order of certiorari quashing the setting apart gazette notice. When the appellants appealed the decision, the Court of Appeal upheld the decision of the High Court since due process was not followed in setting apart of the trust land in issue. The Court of Appeal held, inter alia, that:

> **'The elaborate procedure set out at section 13 of the Trust**

Land Act for setting apart land required a council to notify the relevant Divisional Board of the proposal to set apart land. That chairman was required to fix a day, not less than one and not more than three months from the date of notification when the Board would meet to consider the proposal and he was also to notify the council of the day and time of the meeting. Then would follow an important exercise on public participation - it was the duty of the council to notify the public of the day and time of the Divisional Board meeting at which the proposal to set apart land would be considered. The local residents had a right to attend that meeting and fully participate in it, and the Board was required to record in writing the representations of all persons concerned who were present at the meeting and thereafter forward its recommendations together with a record of the representations made in the meeting."

115. The Defendants produced various minutes of meetings and consultations held with local residents. It was contended that the 2nd Defendant had adopted the consultative meetings convened by the 1st Defendant as its own public participation meetings under section 13 of the Trust Land Act. The court is not persuaded that the 1st Defendant had any role to play within the scheme of section 13 of the said Act. Since there was no Divisional Board lawfully established and constituted by the concerned Minister the various minutes of the

consultative meetings cannot validly fit within the scheme of the law.

116. Although the Defendants and the Interested Parties contended that there was so much public consultation and public participation,it must be remembered that there is a distinction between general public participation under Article 10 of the Constitution of Kenya and the public representations required under section 13 of the Trust Land Act. The latter regime specifically required that representations be made before the Divisional Board which was required to reduce them into writing. The composition and representation of the Divisional Board is different from that of the Town Planning Committee which was employed in the instant case.

117. The court is not persuaded by the 1st and 2nd Defendants' contention that the 5th Defendant's letter dated 13 November 2014 was evidence of confirmation of compliance with the relevant constitutional and statutory provisions on setting apart of the suit property. The 2nd Defendant's replying affidavit sworn by Godana Yatani on 19 November 2014 could not be evidence of compliance with the law. There can be no compliance if the Divisional Board was never established and if it never received any representations. There is no record of the proceedings of the Board and of any representations made before it.

118. Similarly, the court is not persuaded by the 1st Defendant's contention that the law should be circumvented on account of its legitimate expectation that the 2nd Defendant should have followed

the law in the setting apart process. The court agrees with the Plaintiff's submission that the principle of legitimate expectation cannot be used to excuse contravention of express constitutional and statutory provisions. In the case of **Invollate Wacike Siboe vs Kenya Railways Corporation & Another [2017] eKLR** the Court of Appeal considered the issue of legitimate expectation and held as follows:

> **"... No legitimate expectation can arise if effectuating the expectation would result in violation of a statute. The contours of the doctrine are well mapped. Legitimate expectation arises where representation by a decision maker has created a genuine legitimate expectation within his power to honour and make good. The law however does not protect every expectation; it protects only legitimate expectations. Where the representation is one, which the decision maker is not competent to make, reliance on it cannot in law give rise to legitimate expectation. Hence legitimate expectation cannot arise when the decision maker is acting ultra vires his or her powers. In addition, where the words of a statute are clear and express, they must override any expectation to the contrary that a party may claim to have. On the same note, where a public authority has made a representation that it does not have power to make, it is not estopped from asserting the correct position in law."**

119. The court has also considered the submissions by the Defendants and the Interested Parties on the issue of public interest. There is no doubt that the project has potential benefits to the

economy and the people of Kenya. The material on record shows the project is operational and is currently generating electric power. There is evidence on record to show that it has generated employment opportunities for some residents of Marsabit County and other socio-economic benefits have accrued to local communities through the 1st Defendant's corporate social responsibility. However, the court is not satisfied that any benefits accruing from the project would justify blatant violation of the law. The court is of the view that it is still possible to comply with the law and still enjoy any benefits which may accrue from the project.

120. In the case of **Gitson Energy Limited v Francis Chachu Ganya** (supra) the court considered the aspect of the potential benefits which may accrue from such a project and held as follows:

> **'I have no doubt that the wind energy project that had been earmarked for the disputed land is a commercial investment venture of a large magnitude with great social-economic prospects. Nonetheless, the setting apart of 150,000 acres of community land to a private company is equally a drastic step and therefore it is important that the process of disposal of such land is flawless..."**

121. The court is therefore satisfied that on the basis of the material on record that due process was not followed by the 2nd Defendant in setting apart the suit property. The court is satisfied that there was no Divisional Board in place at the material time. The court

is further satisfied that the failure to comply with the constitutional and statutory provisions on setting apart of trust land cannot be excused on account of public interest, legitimate expectation, government policy and practice or any other ground. Accordingly, the second issue is answered in the negative.

c. Whether the Plaintiffs' environmental and cultural rights were violated.

122. The Plaintiffs set out acts of violation of their land, environmental, social and cultural rights at paragraphs 11, 34 & 35 of the Plaint. Article 42 of the COK guarantees the right to clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generations through legislation. Article 69 of the COK enjoins the state to ensure that environmental rights are respected and protected. It is the law that citizens have a recourse to the court where their rights to clean and healthy environment are likely or have been denied infringed or threatened with infringement.

123. Section 3 of the Environmental Management and Co-ordination Act provides as follows

(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection

(1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.

124. The above provisions underpin the heritage that Kenyans bequeath to themselves and generations to come at the preamble of the COK.

125. As to whether the Plaintiffs have proved violation of their rights to the environment, the answer lies in the uncontroverted evidence of Prof Professor Francis Muthuri Mbijjiwe who presented detailed reports; the environmental Impact assessment (EIA) report together with the Environmental and social impact assessment (ESIA). The Court has taken cognizance of the EIA licence and the NEMA Approval issued on the 24/7/2009 and the extension dated the 7/9/2011.

126. It is to be noted that nothing was placed before the court by the Plaintiffs to challenge the said licence and or demonstrate the nature and/or extent of the violation of their environmental rights.

127. Further the Plaintiffs have alleged that the setting apart of the suit land violated their cultural and social rights. Article 11 (1) of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. The state is mandated to promote all forms of national and cultural expression of the people through various forms including other cultural heritage.

128. According to the Prof Gunther Schlee the right of passage ceremonies also known as Gulgalame were performed by Rendille along the shores of Lake Turkana for easier access to the source of water. He also went ahead and detailed other areas where the ceremony has been held in the past for security reasons. Evidence was led that the cultural rights predating 1910 are conducted periodically after every 14 years. The last one took place in 2008 and the next one is expected to take place in 2022. Other than the apprehension by the Plaintiffs that the activity will be hindered no evidence was placed before the court to support real or threatened violation of their cultural rights.

129. Evidence was led by Emannuel Ndiema, DW6 that the area is rich in archaeological resources, diversity and significance earning recognition as a UNESCO site. The National Museum of Kenya confirmed that the project has not interfered with these resources. In its letter dated the 22/6/2010, it stated as follows;

> **'The findings of the archaeological assessment study indicate that the area within the project is being**

undertaken in general has modest archaeological heritage to impede the projects development. However, there are modern burial cairns scattered within the low lying areas which should be conserved as these contain a heritage possibly related to the World War 11 personnel who were involved in the war. It is noted that the proposed wind power masts will not be located on any of these burial sites but will be located away on higher grounds (ridges). ..."

130. It is our finding that the Plaintiffs failed to demonstrate any violations and we are therefore unable to agree with the Plaintiffs that their cultural and environmental rights have been violated.

d. Whether the Plaintiffs are entitled to compensation in respect of the setting apart of the suit property.

131. The court has considered this issue in light of the pleadings, evidence and submissions of the parties. Although the Interested Parties contended that the residents affected by the setting apart were compensated there is no evidence on record to demonstrate that any such compensation was made as envisaged under section 117 of the retired Constitution and section 13 of the Trust Land Act. The relocation of some of the local residents from the path of the project to protect them against noise and dust pollution does not constitute compensation for setting apart of a large portion of trust land as happened in this instance.

132. Although the Plaintiffs did not pray for compensation among the reliefs sought in the Plaint, they made reference to the issue of compensation in paragraph 32 of their plaint. The court is aware that had due process been followed in setting apart, the Plaintiffs or the affected communities would have been entitled to compensation under the Trust Land Act. Under Section 9 of the Trust Land Act such compensation was to be assessed by the District Commissioner in Consultation with the Divisional Board. The said section provided that:

'(1) A person who claims to be entitled to compensation under section 8 of this Act shall apply therefor to the District Commissioner.

(2) If, after consultation with the Divisional Board, the District Commissioner is satisfied that the applicant is entitled to compensation, he shall award the applicant a sum of compensation in accordance with subsection (3) of this section; and if he is not so satisfied the District Commissioner shall reject the application.

(3) The compensation to be awarded shall be assessed by the District

Commissioner after consultation with the Divisional Board, and shall be assessed in respect of the loss of the right of occupation referred to in paragraph (a), or in respect of the applicant having been otherwise prejudicially affected as referred to in paragraph (b), of section 8(1) of this Act.

(4) The District Commissioner shall give notice in writing to the

applicant of the award or of the rejection of the application, as the case may be.'

133. In the case of **Mohamed Ahmed Khalid (Chairman) & 10 others v Director of Land Adjudication & 2 others [2013] eKLR** the court considered the issue of compensation as follows:

> "If indeed the survey advisory plan and gazettement of the development plans was aimed at denying the Petitioners their rights to own their ancestral land, then the Petitioners would be entitled to compensation as provided for at Section 8 of the Trust Land Act after complying with the provisions of section 9 of the same Act.
> Section 9 of the Trust Land Act provides that a person who claims to be entitled to compensation under section 8 shall apply therefore to the District Commissioner. Section 10 provides for the appeals as to compensation. The Petitioners have not made such a claim"

134. The court is of the opinion that the Plaintiffs were denied the opportunity of obtaining just compensation for loss of the suit property because due process was not followed in the process of setting apart under the law. The court is, however, not inclined to award any compensation at this stage for two reasons. First, the award of compensation was not specifically prayed for amongst the prayers sought in the plaint and it was not fully canvassed at the trial. No

valuation reports or expert reports were presented on the quantum of compensation. A claim for monetary compensation is in the nature of special damages which should be pleaded with particularity. Second, an award of compensation would be premature at this stage in view of the orders which the court proposes to make in the judgment. The court is of the opinion the it is ill-suited to assess the compensation and that the matter should be left to the organs and institutions entrusted with that task under the law.

e. Whether the title(s) of the suit property should be cancelled

135. From the analysis of the case and the application of the law and the repealed CoK, the entire process for setting apart of the suit land fell far short of the requirements of the Constitution and the law in many fronts; that is to say, the absence of the Divisional Board, the absence of the structured decision making, public participation and procedure set out under section 13 of the LTA Act, the issuance of title under the wrong legal framework; the absence of any form of assessment and payment of compensation to make the setting part effective.

136. It was not contested that the suit land herein was initially held in Trust by the defunct County council of Marsabit for its people. It is also not in dispute that 150,000 acres was set apart and granted to the 1st Defendant on 1st March 2009 for 33 years.

137. The applicable laws at the time the cause of action arose, were; the Government Land Act cap 280, Registration of Titles Act cap 281, Trust Land Act and Registered Land Act cap 300. These laws were repealed and respective land regimes consolidated into the Land Registration Act of 2012 and the Land Act, 2012.

138. Whereas Article 40 of CoK guarantees protection of the right to own property, such protection is not absolute. Article 40(6) is to the effect that such protection does not extend to any property that has been found to have been unlawfully acquired. Having found that the process of setting apart the suit land was flawed, it is not in doubt then that Article 40(6) is applicable to this case.

139. Section 143 of the repealed Registered Land Act (RLA) provides;

(1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

140. The above provision is equivalent to Section 80 of Land Registration Act which repealed the RLA. It states as follows;

"Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."

141. Section 26 of the Land Registration Act stipulates as follows;

"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original"

142. The effect of the above provisions is that where an illegality is proven a title is liable to be cancelled even if it is a first registration, for first registration alone is no immunity to a tainted title. Following

the finding of the Court in issue No (b) above, to the effect that the setting a part of the suit land was unlawful, it follows that the titles held by the 1st Defendant are illegal and are liable for cancellation having been procured through a flawed process. No amount of public interest or public good as urged by the Defendants can sanitize illegality, unconstitutionality and unlawfulness.

143. In the case of **Funzi Island Development Limited & 2 Others v County Council of Kwale & 2 Others [2014] eKLR** the Court held in part that:

> **"The procedural safeguards in section 13(2) of the Trust Land Act which are described as mandatory particularly the requirement for issuing a notice, hearing and recording the residents' representations and ultimately, and more importantly, approval by council by resolution passed by a majority of the members of the council went to the jurisdiction to set apart Trust land. Even if the land were Trust Land, the non-compliance with the mandatory procedural requirements together with the breaches of the law by the Commissioner of Lands as shown above rendered the setting apart ultra vires and the subsequent Grant a nullity. The finding by the High Court that the required procedure was complied with is therefore patently erroneous. If the land was indeed Trust land, which it was not, the procedural irregularities and the non-compliance with the law by the commissioner of lands, rendered the setting apart ultra vires and the subsequent Grant**

illegal".

144. In this case although the Court noted that the appellants had built a 5-star hotel on the suit land, it went ahead and quashed the title in view of the procedural infirmities. A flawed process births a nullity in law. When a thing is found to be a nullity it amounts to a naught. We agree with the dicta of the Court in the case of **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169** where Lord Denning at page 1172 (1) said;

> **"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

145. The second reason why the titles should be cancelled is because the Grants in the name of the 1st Defendant were issued contrary to the statute. Section 2(d) of the Registered Land Act (repealed) which commenced on 16th September 1963 provides that the Registered Land Act shall apply to:

> **"All land which from time to time is set apart under section 117 or section 118 of the Constitution."**

146. It follows that the Commissioner of Lands could only have issued a Certificate of Lease in the prescribed form under the Registered Land Act. In this case the titles were issued under the Registration of Titles Act. A Grant which does not conform with the law is invalid.

147. The process of conversion of public land or land held in trust to private land must be beyond reproach. Compliance with the law is the highest expression of public interest. It is not lost on this Court that the clean energy project set up on the suit land is a private commercial venture of enormous investment. That said the process of alienating the suit land measuring 150,000 acres of land touted to be the size of Nairobi County is also a drastic step that must comply with the law to its fullest extent. It is equally worthy to note that a departure from the law begets a nullity and if encouraged results in the breakdown of the rule of law in the society. In addition a departure from the rule of law would have adverse effects in the choice of Kenya as an ideal destination for investment purposes.

148. The Court answers this issue in the affirmative.

f. Whether the project should be nullified

149. The court has fully considered the Plaintiffs prayer for 'nullification' of the project. The Plaintiffs did not clearly explain how a project which is complete and which is already generating electric

power should be nullified. When the Plaintiffs' advocates were highlighting their written submissions, the court inquired from them what they meant by nullification of the project. There was no clear and straightforward answer to the inquiry.

150. According to the online Oxford Advanced Learners Dictionary **[https://www.oxfordlearnersdictionaries.com/definition/english/nullity]** to nullify means any of the following:

a) **make legally null and void; invalidate**

b) **make of no use or value, cancel out**

c) **counteracting completely the force, effectiveness, or value of something**

151. The Merriam-Webster online Dictionary **[https://www.merrian – webster.com/dictionary/nullity]** defines the term in the following manner:

a) **to make null especially to make legally null and void**

e.g. nullify a law

b) **to make of no value or consequence**

The synonyms of nullify captured in the dictionary include; abate, abolish, abrogate, annul, cancel, dissolve, invalidate, negate, quash, rescind, roll back, strike down, vacate and void.

152. On the other hand, the online Cambridge Dictionary **[https://dictionary.cambridge.org/dictionary/english/nullity]** defines the term as follows:

a) **to make a legal agreement or decision have no legal force**

b) **to cause something to have no value or effect**

153. It would therefore appear that the Plaintiffs wanted the court to annul, abolish, cancel, dissolve, quash, rescind, roll back and strike down the project. They wanted the project to be obliterated and brought down. The court is not inclined to grant that prayer for at least two reasons. First, the court is not satisfied that the project is capable of being cancelled, dissolved, rescinded, rolled back, quashed or vacated. The only effective remedy against a complete project would probably be an order for demolition or removal which was not sought in the instant suit. Secondly, the court is not inclined to grant the order in view of the final orders the court shall grant in the end.

D. FINAL ORDERS AND DISPOSITION

154. Having found that the process culminating in the setting apart of the suit land was veritably tainted with illegality, this court has no difficulty in finding that the title of the 1st Defendant is impeachable. Firstly, the 1st defendant had expectations that it would carry out its project without unexpected encumbrances. This is because this project is said to have been approved by the highest levels of the Kenya Government and the Commissioner of lands had purportedly issued a legitimate title. Secondly, the 1st defendant had been assured that its project was a vision 2030 project. This must have given the 1st defendant the courage to engage itself in implementing the project

with inimitable gusto. As a result, by the time this suit was filed, the 1st defendant had invested billions of Kenya Shillings in the project. The plaintiffs themselves did not file this suit until several years after the suit land had purportedly been set aside, even though the evidence on record shows that they were all along aware of the process that led to the impugned setting apart of the suit land. Moreover, the material on record shows that during the pendency of the suit the plaintiffs consented to have the 1st defendant continue with its project on a portion of 87.5 acres out of the suit property.

155. The delay by the plaintiffs in filing this suit, does not change the fact that the setting apart process was not only highly irregular but also eminently and plainly illegal. The defunct County Council and the National Government, if they followed the laid down legal process were in a position to properly set apart the suit land and to issue a valid or valid titles to the 1st defendant. Both levels of Government are to blame for the ensuing debacle. A Town Planning Committee established under the Local Government Act cannot, by whatever stretch of imagination, be deemed to be a Divisional Board.

156. We do opine that one of the cardinal responsibilities of a government is to ensure untramelled obeisance to the law of the land. In this regard, the government should exemplify the highest integrity to the law of the land. We are hereby constrained to agree with the view of United States of America Supreme Court Justice Louis Brandeis in the case of **Olmstead V United States 277 US 438 (1927)** who opined as

follows:

> **"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a Government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. If the government becomes the law breaker, it breeds contempt for law; it invites everyman to become a law unto himself; it invites anarchy."**

The law exists to obviate this possibility. This is why courts of law exist.

157. The 1st defendant should not be allowed to escape without some blame. As an investor in a project involving billions of shillings, it should have undertaken careful and foolproof due diligence. The court has, however, taken into account that the impugned project is already complete and is supplying a substantial portion of the national electricity needs. However, national exigencies cannot cure blatant illegalities. Our order in this respect will take into account the reality that the project is already complete.

158. This court will not reinvent the wheel. In **Mohamed Ali Baadi & Others Vs AG and 11 Others [2018] eKLR** the court gave the project proponents one year to make required corrections. We are inclined to follow this route in view of the special circumstances of this case. As we

have already found that the titles to the suit land were issued unprocedurally or illegally, by operation of the law they automatically invite cancellation. We shall, however, give the 2nd, 3rd, 4th and 5th defendants a period of one year to strictly follow the laid down process on setting apart failing which the titles will automatically stand cancelled and the suit land will revert to the community.

159. From our earlier discourse in this judgment we are not inclined to nullify a completed project.

160. We do find that this suit constitutes public interest litigation. This finding will inform our eventual order on costs.

161. In the circumstances, we make the following orders for disposal of the suit:

a. A declaration be and is hereby made that the setting apart of the suit properties was irregular, unlawful and unconstitutional.

b. The titles issued to the 1st Defendant are irregular and unlawful and this court declares that they should be cancelled but the 2nd, 3rd, 4th and 5th defendants are granted one year to strictly comply with the existing law on setting apart failing which the impugned titles will stand cancelled and the suit land shall revert to the community.

c. The prayer by the Plaintiffs for nullification of the Wind Power Project is hereby denied.

d. Having found that this suit constitutes Public Interest Litigation, all

parties will bear their own costs.

162. Orders accordingly.

DATED, SIGNED & DELIVERD AT MERU THIS 19TH DAY OF OCTOBER 2021.

P. M. NJOROGE	J.G. KEMEI	Y. M. ANGIMA
(PRESIDING JUDGE)	(JUDGE)	(JUDGE)