REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 324 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 1,2,3,10,19,20,

21,27,35,46,73,74,201,202,206,213,214,220,225,227,232,258,259AND PARAGRAPH 8(e)

OF THE FOURTH SCHEDULE (DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE COUNTY GOVERNMENT)

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE ENERGY ACT, NO. 12 OF 2006

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY OF THE NATIONAL TREASURY.....1ST RESPONDENT

MINISTRYOF ENERGY.....2ND RESPONDENT

KENYA POWER AND LIGHTING COMPANY LTD.....3RD RESPONDENT

ENERGY REGULATION COMMISSION.....4TH RESPONDENT

KENYA ELECTRICITY TRANSMISSION COMPANY LTD.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

EX PARTE :

GITSON ENERGY LTD

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Gitson Energy Ltd, sates that it is a is a registered company providing integrated energy infrastructure services. It has sued the Respondents herein in various capacities. The 1st Respondent, the Cabinet Secretary of the National Treasury, is sued in relation to his mandate under the Constitution of Kenya, the Public Management Act 2012 and the Executive Order No. 2/2013 to formulate, implement and monitor macro-economic policies involving expenditure and revenue. The 2nd Respondent, the Ministry of Energy is sued with respect to its role of development of energy resources for national development and ensuring access to electricity to the Kenyan public.

2. The 3rd Respondent, the Kenya Power and Lighting Company is a limited liability company and is joined arising from its monopoly to transmit, distribute and retail electricity throughout Kenya. The Energy Regulatory Commission, which is sued as the 4th Respondent, is established by the Energy Act, 2006, to among others regulate the electrical energy, petroleum and related products, renewable energy and other forms of energy including setting tariffs. The Kenya Electricity Transmission Company Limited, is sued as the 5th Respondent's arising from its core business is to plan, design, build, operate and maintain electricity transmission lines and associated substations that form the backbone of the National Transmission Grid. Lastly, the Attorney General is sued as the 6th Respondent as the principal legal advisor to the Government with the constitutional mandate to represent the national government pursuant to Article 156 of the Constitution.

3. The crux of the Applicant's case is that it had obtained an approval from the Ministry of Energy, (the 2nd Respondent) for the construction of a wind power project in Marsabit County but the same Ministry has since frustrated its project and discriminated against it. It is therefore seeking the following orders in its Notice of Motion dated 30th November 2018:

> i. That an order of mandamus be issued to compel the 2nd, 3rd, 4th and 5th Respondents to issue a letter of Commission Date (COD) of the year 2021, enter into PPA for 300 Megawatt Wind Power and issue Power Generating License for the project to the Applicant on the same terms as Lake Turkana Wind Power Project which is of the same size and located in the same Marsabit County;
>
> ii. That an order of mandamus be issued to compel the 5th Respondent to construct a switching station/substation to permit connection to Kenya-Ethiopia Transmission line that transits the Applicant project site;
>
> iii. That an order of mandamus be issued to compel the 1st Respondent to include Gibson Energy Project in Public-Private Partnership register and accord it all the necessary support and benefits as other listed wind and energy projects; and
>
> iv. That the costs of this application be provided for.

4. The Application is premised on the Statutory Statement dated 20th July 2018, the Verifying Affidavit sworn on the same date by James Gitau, the Applicant's Chief Executive Officer. After the ex parte filed its application, the 3rd Respondent filed a Notice of Preliminary Objection on the ground that this Court has no jurisdiction to entertain these proceedings in view of the fact that the ex parte Applicant had no *locus standi* as he had not complied with section 26 and 107 of the Energy Act and Rule 2 and 21 of the Energy (Complaints and Disputes Resolution) Regulations. This Court directed that the issue of jurisdiction be dealt with at the hearing of the ex parte Applicant's substantive application.

5. The background to the *ex parte* Applicant's case is long and chequered, and detailed out in its pleadings. I will only highlight the key milestones leading to the dispute herein. the deponent avers contends that he started researching on a wind farm project in 2001y while studying in the United States of America, and he contacted the 2nd Respondent from the US in 2002-2003 requesting for information on wind that it had in its possession, but the said data was not available at the time. He narrated that he travelled to Kenya for the project in 2004 and to collect wind data.

6. The *ex parte* Applicant detailed correspondence and meetings he had with various actors in the energy sector between 2005 and 2009 for co-operation, in the project including the undertaking of a feasibility study and obtaining land for the project. The Applicant contended that it consulted severally with the County Council of Marsabit and Bubisa Area residents over the years, and successfully applied to the County Council of Marsabit for an approval to erect wind met masts. According to the deponent, the County Council of Marsabit approved the leasing of 150,000 acres in 2010 and requested the Applicant to pay an advance leasing fee of Kshs. 500,000/=

7. On 7th July 2009, the *ex parte* Applicant wrote a formal expression of interest to the 2nd Respondent's Permanent Secretary and included the feasibility study and wind data collected from the meteorological mast installed at the site. The ex parte Applicant stated that the Permanent Secretary, through one Eng. Isaac Kiva responded in a letter dated 21st July 2009, and informed that the *ex parte* Applicant's proposed 330 MW wind farm and 50 MW solar projects were beyond the Feed-in Tariff (FiT) program and that the projects will be under

Green Energy Development Program. That, the Applicant was further informed that its said projects would be affected by the nearby Lake Turkana Wind Power (LTWP) 310 project, which the *ex parte* Applicant disputed.

8. The *ex parte* Applicant explained that a Committee for Green Energy Development Initiative was established by Gazette Notice No. 6065 of 2009 on 19th June 2009, and its mandate included coordinating national implementation of the measures recommended and approved by the cabinet as spelt out under in the Gazette Notice for the period of 2009-2012, and submitting a report to the Cabinet by 2012. The *ex parte* Applicant stated that he again wrote to the 2nd Respondent's Permanent Secretary on 1st October 2009 requesting for a formal response to their proposal, provided the Solar data required through Eng. Kiva's letter of 21st July 2009, and accepted the project inclusion in the Green Energy Program

9. The *ex parte* Applicant averred that it subsequently received a formal approval of its 330MW project vide a letter dated 16th February 2010 from the Permanent Secretary at the Ministry of Energy which was copied to the 3rd Respondent's Managing Director of Kenya Power and the Director General of the 4th Respondent. Further, that after receiving the said approval, the ex parte Applicant submitted its Power Purchase Agreement (PPA) proposal for the 300MW to 'the 3rd Respondent's Managing Director, including the feasibility study and wind and solar collected at the project site, who acknowledged the approval letter dated 16th February 2010. In addition, that on29th April 2010 the *ex parte* Applicant's Chief executive officer met with one Eng. Mwangi, the 3rd Respondent's head of distribution and chief planning, and obtained a draft Power Purchase Agreement (PPA) which was forwarded by email.

10. The copies of the approval letter dated 16th February 2010, the response from the 3rd Respondent's managing Director dated 23rd February 2010, and the draft PPA and of the forwarding mail dated 29th April 2010 were annexed by the ex parte Applicant. The next development was a letter dated 29th September 2020 from the 2nd Respondent's Permanent Secretary, which agreed to the ex parte Applicant's request to extend the project commissioning date (COD) due to delays it was experiencing in concluding the land acquisition through the Marsabit County Council. It was indicated that the project was expected to be completed by early 2013.

11. The *ex parte* Applicant detailed events between 2009 and 2011 related to the financing of, and support for its project and acquisition of the project land. Of relevance to these proceedings is that in late 2012, the Bubisa area member of Parliament filed a Petition in the High Court, being Petition 474 of 2012 to quash the gazette notice for 150,000 acres of land garnted to the *ex parte* Applicant for its Project. The High Court gave its ruling on 25th April 2013, whereupon the *ex parte* Applicant appealed to the Court of Appeal in Appeal No 47 of 2014, in which a judgment was delivered on 24th February 2017. The *ex parte* Applicant also annexed various correspondence and media reports during this period touching on the said land.

12. The events after the judgment by the Court of Appeal are the ones that are germane to the current dispute.

The Respondents' Cases

THE 1ST, 2ND AND 6TH RESPONDENT'S CASE

1. The 1st, 2nd and 6th Respondent jointly filed the Replying Affidavit of Dr. Eng. Joseph K. Njoroge, CBS, the Principal Secretary, State Department of Energy under the Ministry of Energy (MOE).

2. It is his averment that the energy sector is a rational sector guided by well-thought out principles and public documents and policies, including the Least Cost Power Development Plan (LCPDP), all in the interest of electricity consumers. The deponent asserts that: i) the power balance strategy of the MOE is consumer welfare driven, as it looks at the most opportunistic energy mix on the national grid and how that may be achieved at the least cost after a consideration of all options available; ii) the LCPDP is also matched to the needs of the national economy, ensuring at all times that only such power plants whose full output can be taken up as contracted are given the greenlight for construction, are commissioned and connected to the national Grid; and iii) the sector's planning takes a long-term view, in light of the extremely onerous costs of setting up a power plant (anecdotal evidence places the cost of generating 1MW of power at USD 1 Million), which goes to demonstrate the immense levels of investment already pumped into the Kenyan economy in the energy sector.

3. According to the deponent, the MOE carries out bi-annual electricity generation and transmission planning to ensure a Least Cost Power Development Plan (LCPDP) is established and maintained; which plan outlines the most optimal generation expansion and seeks to achieve a diversification of the energy mix to ensure adequacy, affordability and reliability of power to consumers. It is averred that the process of making the LCPDT kicks off by first undertaking the demand forecast of electricity for the duration under the plan, and after achieving the demand in form of energy and the power, a simulation of the best generation mix is done. That, the generation mix is taken from committed projects and generic projects, and simulation is such that the system through high level iteration (optimization) picks the least cost projects and ranks them.

4. The deponent refers to committed projects as being those whose feasibility reports have been approved, and projects with no feasibility reports cannot be picked as the data input for simulation is derived from the feasibility study reports. It is averred that whereas the MOE intends to adopt an auction system to replace the Feed-In-Tariff (FIT) System for larger renewable energy projects, the FIT process is a legitimate procurement method and still remains small power producers in small hydro and biomass. It is deponed that the set FIT values include a standardized allowance for interconnection costs and costs of construction, upgrading of transmission/distribution lines, substations, and associated equipment, to be borne by the developer.

5. According to the deponent, any interested investor in renewable energy has to apply to the MOE for the requisite licenses, which applications are considered without discrimination and preferential treatment on any party. It is his averment that the electricity generation licenses flowing from FIT project approvals are valid, legitimate, and the result of a proper and recognized method of procuring goods and services, hence not a violation of the Constitution or any written law, and not driven by skewed award systems. According to the deponent, a

commissioning date is only issued when a project has met the following bare minimums: i) has a comprehensive feasibility study; ii) has land upon which it is to be based; iii) has been included in the Government long term electricity planning; and iv) has been evaluated as being cost effective to the final consumer.

6. As a background on the Applicant's proposed projects, the deponent states that the Applicant was requested by the Ministry in the letter of approval to undertake a detailed feasibility study and forward the same to the Ministry. According to the deponent, this would assist in the project being simulated in the LCPDP. He avers that the Ministry's LCPDP team did not screen Gitson's project because the Ministry had just approved the Government document intended to guide the sector on power expansion for the next 40 months namely "Project 5000+MW", which had specific projects planned in the short to medium term and did not include "Gitson's project".

7. Regarding the letter dated 21st July 2009 from Eng. Isaac Kiva referred to by the Applicant, it is averred that the same was not an approval letter for the project. Rather, that it was advising the developer on available options for approval of the project as it was above the threshold set in Feed in Tarriffs policy of 50MW. And, that the project was later approved by the Ministry to undertake the feasibility study; the letter allegedly allegedly approving Gitson Energy 300MW was for them to undertake feasibility study. That, after approval of the feasibility study report, the project is considered in the LCPDP.

8. It is averred that the Applicant was informed by Energy Regulatory Commission (4th Respondent) vide letter dated 26th April 2017 that:

a. Their project exceeded the limits set under the current FiT policy and they therefore needed to get the relevant approvals from the PPP Unit of the National Treasury and a "go ahead" from the Ministry for the project to be considered in future planning cycles;

b. In the event that they chose to proceed under the FiT Policy, they were expected to pace their project and commence with a capacity of not more than 50MW, and to submit detailed feasibility studies to be used in processing their project further;

c. If they chose to proceed under the PPP Act, the project would be classified as a Privately Initiated Investment Proposal which requires to be captured in the Country's National Integrated Power Plan. For this to happen, ERC would have to be provided with detailed feasibility studies to be used in undertaking necessary analysis and simulations with regard to the least cost power criteria.

9. It is averred that the Green Energy Development Program was based on the former Prime Minister's office and the principle mandate was to accelerate development of green energy. That, Gitson Energy and any other approved project which had not undertaken the feasibility study and submitted reports to the Ministry could not be considered in the Committed projects of the LCPDP. Further, that it is after the approval of the feasibility study that the projects are considered in the planning, and data for simulation in getting the best generation matrix is derived from the approved feasibility study reports. The deponent points out that the approval being referred to here is the go ahead given by the Ministry to the intended investor to proceed with carrying out a detailed feasibility study for consideration by the Ministry.

10. It is deponed that Lake Turkana Wind Power (LTWP) project concept was developed in 2007, and was an opportunity to utilize the readily available wind resource which is green power to generate electricity. And, that it would supply cheap power and increase the security of supply in reducing dependence on imported heavy oil for power generation. It is further averred regarding LTWP that:

i. The project was conceptualized as 300MW for two main reasons: the country needed a large amount of power and to take advantage of economies of scale. Since the project was very far from the load centre, it needed a long transmission line. To reduce the losses due to long transmission line, the line needed to be a high capacity line, hence the conceptualization of the 400KV line;

ii. The Ministry did not share the opinion of the World Bank concerning the viability of the project as communicated in the untitled exhibit relied upon by the Applicant;

iii. The Ministry and other key stake holders of the project were convinced that the project was viable and as a result proceeded to engage African Development Bank (AfDB) for the issuance of a Partial Risk Guarantee (PRG) instrument for the project;

iv. The Ministry has always held the considered view that this project would enhance Kenya's power generation capacity, diversify the energy mix as well as provide power at a cheaper tariff compared to the Medium Speed Diesel (MSD) power plants which are in operation for peak power dispatch;

v. The developer undertook all the technical studies and proved to the Ministry that the wind resource available on site was adequate to develop the 300MW power plant. Thus, the African Development Bank was convinced of the bankability of the project and proceeded to issue both the Partial Risk Guarantee (PRG) and a senior loan to the project;

vi. According to the LCPDP 2011-2031. LTWP was supposed to be commissioned in 2014, where the projected demand peak was expected to be 2,064 MW and the total installed capacity 2,852 MW. Based on this, the system was deemed robust enough to accommodate the 300 MW of wind generated electricity;

vii. The actions of the Ministry were responsible, contractually obligated, and in the public interest;

viii. LTWP project was properly developed, within the LCPDP, and remains one of Kenya's least cost power projects to date;

ix. It was a strategic investment, in line with Kenya's policy on exploiting the potential of our natural resources, and remains a critical asset in the energy sector. More such plants will be developed in accordance with the applicable policies and laws;

x. Like any power plant elsewhere in Kenya, the transaction structure placed some obligations on Government agencies, and some on the power plant developers. Obligations retained by public agencies including Kenya Power (KPLC), and KETRACO were lawful and contractually sound obligations, and any delays if any in their performance do not amount to an intention by GOK to disadvantage electricity consumers or tax payers; and

xi. In aid of investments in Kenya, GOK stands behind its obligations and the response mechanisms to some implementation challenges with the LTWP transmission line project have been well thought out, have been quick, and responsible.

11. It is averred that the MOE follows the procedure set out in the application and implementation of the guidelines of the FiT Policy for projects in renewable energy below a capacity of 50MW for wind and 40MW for solar. That, it is these guidelines that are followed for approval of the EOI, approval of the feasibility study, negotiation of the PPA and eventual issuance of the Power Generating License. It is averred that the approval that the Applicant was for it to undertake a proper feasibility study, confirm its access to land on which the project would be developed, obtain the change of user license from the relevant entity and any other legal requirement for the development of the project. According to the deponent, the Applicant was supposed to submit the feasibility study reports to the MOE for consideration, approval and guidance on the nature/type of capacity the system could be able to uptake, and only after approval of the feasibility study would the Applicant have been able to negotiate a PPA, which is yet to happen.

12. According to the deponent, the said feasibility study would include the technical study showing the energy yield, grid connection study and the financial model to the MOE. It is averred that the MOE has requested the Applicant to submit the said feasibility study reports for consideration but to no avail. And that in any case, the Applicant is yet to obtain the requisite approvals of any feasibility study, the grid connection study and the financial model. Therefore, that it is inconceivable for the Applicant to demand that the MOE be compelled to negotiate a PPA with it and issue a letter of commission date to to that effect or that it be compelled to include Gitson Energy project in the list of public-private partnerships register and accord it all the necessary support and benefits as alleged or at all.

13. It is averred that the instant Application does not meet the threshold required for an order of mandamus to issue against the Respondents herein. It is averred that although the projects are approximately 200km apart, they would be connected to one power system. That in fact having a 600MW of wind power coming from one side of the country would pose some challenges in the operation of the power system, considering that wind power is intermittent. It is averred that the Applicant was informed well advance that the 300MW was much power in addition to the 310 MW that was expected from LTWP.

14. Contrary to the Applicant's allegations, it is averred that the Ministry has at all times acted in accordance with the principles of the Constitution as well as the enabling legislations in the discharge of its constitutional, statutory and/or any other lawful mandate. Therefore, it is averred that the allegations leveled against the two Ministries by the Applicant are devoid of any merit, and the prayers sought unmeritorious and ill-intended.

THE FIFTH RESPONDENT'S CASE

15. The 5th Respondent filed the Replying Affidavit of Duncan Macharia, the Company Secretary of the 5th Respondent. It is averred that the instant Application for leave is incompetent and ought to be struck out as the facts relied upon by the Applicant aree disputed and directed at commanding the 5th Respondent to grant the Applicant a right to which it is not entitled by statute or any other legal obligation. Further, that the orders of mandamus sought would amount to interference with the executive management of the 5th Respondent and the autonomy of executing its functions and decisions rationally.

16. It is averred that the Applicant's prayer for an order of mandamus to compel the 5th Respondent to put up a switching station/substation to permit connection to Eastern Electricity Highway Project (Kenya-Ethiopia transmission line) is untenable as the Applicant is not entitled to any such statutory right and such an order would interfere with the 5th Respondent's duty to prudently carry out its lawful mandate. Further, that the order of mandamus sought is to effectively coerce the 5th Respondent into making compensations for way leave whereas the Applicant has no title or ownership rights to the suit property (see judgment in Civil Appeal No. 47 of 2014).

17. It is averred that the Court in **Gitson Energy Limited v Francis Chachu Ganya & 6 Others [2017] eklr** dismissed the Applicant's appeal and upheld the decision of the High Court in Misc. Civil Application No. 347 of 2012 which quashed the Gazette Notice (No. 13135 dated 11th September 2012) issued by the Commissioner of Lands, which Notice had set apart 60,705 hectares of land in Bubasi Location in favour of the Applicant. According to the deponent, the averments in paragraph 76 of the Applicant's affidavit are untrue as there were no accrued rights capable of being preserved under Section 46 of the Community Land Act since the Court of Appeal and the High Court found that the procedure of setting apart land was not adhered to. And, that despite knowledge o the unsuccessful appeal, the Applicant attempted to hoodwink the 5th Respondent into acceding its compensation demands in spite of knowing it had no title to the suit property.

18. It is averred that prior to the compensation demands, the Applicant had sought the establishment of an escrow account for the sum of Kshs.3,000,000,000,000/= in lieu of way leave compensation for areas traversed by the Eastern Electricity Highway Project which proposal was untenable. Noting that the land which is traversed by the Eastern Electricity Highway Project is Community land under the Community Land Act, the deponent submits that the Applicant lacks capacity to urge any compensation in trust for the Bubisa Community through an order of mandamus or otherwise.

19. It is averred that Section 46 of the Community Lands Act does not grant the Applicant sufficient interest on behalf of or superior to the interest of the Bubisa Community who successfully challenged the Applicant's legal interests in the suit land in the High Court and Court of Appeal to sustain any legal action by way of mandamus. It is averred that the instant suit discloses no reasonable cause of action against the 5th Respondent and therefore leave to institute judicial review proceedings ought to be denied.

THE FOURTH RESPONDENT'S REPLYING AFFIDAVIT

20. The 4th Respondent filed the Replying Affidavit of David K. Kariuki, the Deputy Director in the Energy Planning Department of the Energy Regulatory Commission. It is his submission that the instant Application is frivolous, vexatious, premised on half-truths, without substance and an abuse of the court process as the Applicant seeks to rely on unsound grounds to seek prerogative orders against the Respondents. It is deponed that the Application does not reveal any grounds to move this Honourable Court to certify that this matter is fit for further substantive hearing under judicial review.

21. According to the deponent, the issuance of a commissioning date is only possible when a project at the very least: a) has a comprehensive feasibility study; b) has land upon which it is to be based; c) been included in the Government long term electricity planning; and d) been evaluated as being cost effective to the final consumer.

It is averred that the Applicant's project has not satisfied any of the said criteria, and is, to the best of the deponent's knowledge, merely a concept at the present time.

22. It is deponed that the MOE in the year 2013 requested the 4th Respondent, vide letter dated 4th October 2013, to have its Least Cost Power Development Plan (LCPDP) team analyze the Applicant's project and establish whether its implementation would be appropriate. According to the deponent, the Respondent's LCPDP team did not screen the Applicant's project because the then Ministry of Energy and Petroleum had just approved the Government document intended to guide the sector on power expansion for the next 40 months, namely "Project 5000+MW" which had specific projects planned in the short to medium term and did not include the Applicant's project.

23. It is averred that the Applicant was informed vide letter dated 26th April 2017 that their project exceeded the limits set under the current Feed in Tariffs (FiT) policy and therefore they needed to get the relevant approvals from the Public Private Partnerships (PPP) Unit of the National Treasury and a go ahead from the Ministry of Energy and Petroleum for the project to be considered in future planning cycles. It is averred that in the event the Applicant chose to proceed under the PPP Act, the project would be classified as a privately Initiated Investment proposal which requires to be captured in the Country's National Integrated Power Plan. That, for this to happen, the 4th Respondent would have to be provided with detailed feasibility studies which would be used to undertake necessary analysis and simulations with regard to the least cost power criteria.

24. In the deponent's view, the Applicant is not entitled to any reliefs prayed since it has neither phased their project to be in line with the requirements under the FiT policy nor have they satisfied the requirements under the PPP Act. It is averred that issuance of a commissioning date is the last stage in the approval process of a project and that the same cannot be issued in this case as the Applicant has failed and/or ignored to line their project to the set out guidelines under the law. In the circumstances, it is averred that this is not a case where the Court should exercise its discretion in favour of the Applicant.

25. It is averred that the Applicant is guilty of material non-disclosure and therefore undeserving of the remedies sought. According to the deponent, the Applicant has carefully concealed the real outcome of the case in High Court Miscellaneous Application No. 374 of 2012 wherein the Court quashed the decision of the Commissioner of Lands expressed in Gazette Notice No. 13135 concerning setting aside of 60,705 hectares of community land for the purposes of Gitson Energy and the outcome in Civil Appeal No. 47 of 2014 wherein the lower Court's decision was upheld. In the deponent's words, the effect of the decision is that the Applicant's project has no land for its location. He deponent therefore urges the Court not to grant the orders soght as the same would be in vain, since the Applicant does not possess the 150,000 acre land where the intended project would have been set up.

26. It is averred that the Applicant is required to express interest in developing a wind farm, identify an appropriate land for its development, carry out a feasibility study as appropriate and then present an application to the relevant bodies. It is deponed that the Applicant has not demonstrated an arguable Application or prima facie case worth consideration and determination by this Honourable Court. According to the Applicant, the Court would be wasting time on a long inquiry whereas there is no apparent illegality, unconstitutionality, irrationality, unreasonableness, procedural impropriety and unfaithfulness disclosed in this case. And, that there is no action by the 4th Respondent which was in bad faith or at all violated the Applicant's legitimate expectations as alleged. The deponent prayed that the Application be dismissed.

The Submissions

1. The *ex parte* Applicant submitted on the question of this Court's jurisdiction to entertain the instant application, and cited its right to access to justice as espoused under Article 48 of the Constitution of Kenya. In this regard, reference was made to the decision in the case of **Dry Associates Limited v Capital Markets Authority and Another Interested Party Crown Berger (K) Ltd [2012] eKLR,** and the Court of Appeal case of **Joseph Nyamamba and 4 Others v Kenya Railways Corporation [2015] eKLR**. The Applicant further cited the case of **Republic vs. Town Clerk of Webuye County Council & Another [2014] eKLR, wherein the Court urged an interpretation of Article 48 of the** Constitution that favours enforcement and secures accrued rights for decree holders to ensure that they enjoy the fruits of their judgment.

2. The *ex parte* Applicant further relied on Section 21(1) and (3) of the Government Proceedings Act, which provides for enforcement of money decrees issued against the Government. The Applicant cited the cases of **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza [2012] eKLR**; **Republic v Attorney General and Another ex-parte James Alfred Koroso [2013] eKLR**; and **Republic v Kenya Broadcasting Corporation ex – parte Dorcas Florence Kombo [2018] eKLR** in which the Courts set out the procedure for enforcing a decree or order issued against the government, and for the position that if the court were to decline to grant mandamus in such circumstances, applicants would be left without an effective remedy despite holding a decree.

3. Lastly, thatthe costs of this suit are to be awarded at the Court's discretion. The *ex parte* Applicant however cautioned that the Court's discretion, while absolute and unfettered, must be exercised judicially. The *ex parte* Applicant relied on the case of **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR,** where the Supreme Court held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action. Reference was also made to Odunga J.'s decision in **Republic v Communication Authority of Kenya and another ex – parte Legal**

4. The Respondent on its part submitted that the National Land Commission is an independent Commission established under Article 67(1) of the Constitution, and operationalized by the *National Land Commission Act* No. 5 of 2012. It is the Respondent's submission that the *National Land Commission Act* provides under section 30(b) that any function or transaction, civil proceedings or any other legal or other process in respect of any matter carried out in relation to the administration of public land administration by or on behalf of the Ministry of Lands before the commencement of the Act shall be deemed to have been carried out under the Act. That therefore, any functions previously performed by the Commissioner of Lands are now done by the National Land Commission.

5. The Respondent faulted the *ex parte* Applicant for the joinder of the Principal Secretary Ministry of Lands and Physical Planning to the instant proceedings, since the said Principal Secretary is not the accounting officer of the National Land Commission. The Respondent submits that the said Permanent Secretary does not receive any budgetary allocation from the National Treasury to settle claims on behalf of the Commission, therefore an order of mandamus cannot issue against him. The Respondent further submitted that the instant application arises from the judgment in **Sceneries Limited –Vs- The National Land Commission & 2 Others,** in which it was ordered that the National Land Commission do pay the costs of that suit to the Applicant. Therefore, that the Accounting Officer of the Commission ought to be sued, not the Principal Secretary Further, that the Attorney General and the Ministry of Lands were not a party in **Sceneries Limited vs The National Land Commission & 2 Others,** and cannot therefore be sued for Orders emanating from a suit that they did not take part in.

6. According to the Respondent, under section 21 of the Government Proceedings Act, the party to whom an order of mandamus is to be directed is the Accounting Officer of the respective party. Stating that the *ex parte* Applicant has attached only one demand letter to his application which was served on the Office of the Attorney General and not the National Land Commission, the Respondent submits that it is possible that the National Land Commission does not know that the *ex parte* Applicant has been demanding for payment. That in the absence of a demand letter to the National Land Commission, the *ex parte* Applicant has not met the threshold for an order of mandamus to issue.

7. The Respondent relied on the decisions in **Republic vs County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR**, and **Republic vs Attorney General & 2 Others Ex-parte Associtaed Architects and 3 Others [2018] eKLR,** where it was held that mandamus issues to compel performance of a public or statutory obligation or duty, and that the duty to pay the outstanding sum is bestowed upon the Accounting Officer of the Government State Department.

The Determination

8. I have considered the pleadings and submissions by the *ex parte* Applicant, as well as the discussion by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, (1997) e KLR,** wherein it was held as follows:

> **"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**
>
> **"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."**
>
> **At paragraph 90 headed "the mandate" it is stated:**
>
> **"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."**
>
> **What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed…… ."**

9. It is not disputed in the present application that costs were awarded in the *ex parte* Applicant's favour in **Sceneries Limited vs National Land Commission & 2 Others.** The nature of the orders granted therein as regards costs were that the Respondent and the First Interested Party therein were to pay the costs of the proceedings to the Applicant and Second Interested Party therein. The Respondent in the said suit was the National Land Commission, while the first Interested party was one Ngengi Muigai. The *ex parte* Applicant herein was the Applicant in the said suit, while the second interested party was Kenya Reinsurance Corporation Limited.

10. A perusal of the judgment shows that the main claim in the said suit was in relation to investigations that the National Land Commission was seeking to undertake on certain parcels of land, which would have adversely affected the *ex parte* Applicant, and on which the Court gave various orders. There was no record that the Principal Secretary, Ministry of Lands and Physical Planning and Attorney General were parties to the said suit, nor that they participated in the suit. There was also no order in the said judgment requiring the Principal Secretary, Ministry of Lands and Physical Planning and Attorney General to pay costs.

11. The main issues that therefore require to be determined are firstly, whether the Principal Secretary, Ministry of Lands and Physical Planning is under a public duty and obligation to satisfy the decree and orders on payment of costs issued against the National Land Commission in the judgment in **Sceneries Limited vs National Land Commission & 2 Others**, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief he seeks.

12. As regards the issue of who as between the National Land Commission and the Principal Secretary, Ministry of Lands and Physical Planning are under a duty to pay the costs awarded to it**,** the *ex parte* Applicant made reference to the Supreme Court's advisory opinion in **In the Matter of the National Land Commission [2015] eKLR** on the role of the National Land Commission and the Ministry of Lands and Physical Planning. It was submitted that the Commission and the Ministry are interdependent and work in consultation and cooperation, and further, while citing Rule 7 of the Sixth Schedule of the Constitution, the *ex parte* Applicant submitted that the existing laws need to be interpreted in a manner that conforms with the Constitution of Kenya.

13. The *ex parte* Applicant therefore put forward the following arguments for its case that it is the Respondent's duty to pay the said costs. Firstly, that according to the Supreme Court's interpretation of the provisions governing the National Land Commission, the latter performs its tasks hand in hand with the Ministry of Lands and Physical Planning. Therefore, that considering that the opposition to the application is based on a separation of the respective functions of the Commission and the Ministry, the same cannot hold since the Supreme Court has held otherwise.

14. Secondly, the *ex parte* Applicant submitted that the only requirement under Section 21 (1) and (2) of the Government Proceedings Act is that decree holder serves a Certificate of Costs on the Attorney General, who then arranges for the accounting officer to make the payment. According to the *ex parte* Applicant, the Attorney General is responsible for identifying the relevant accounting officer where there are shared functions like those of the Commission and the Ministry of Lands and Physical Planning. In support of this argument, the *ex parte* Applicant cited the case of **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza (supra).**

15. Thirdly, the *ex parte* Applicant submitted that in any case it is not disputed that the Certificate of Costs was served on the Attorney General, hence the Applicant cannot be held liable for any action which resulted in the Certificate not reaching the Secretary of the National Land Commission. The *ex parte* Applicant disagreed with the narrow view of the functions of the Attorney General as set out in Article 156 of the Constitution and the Government Proceedings Act. According to the *ex parte* Applicant, the word "Government" includes both departments and statutory departments. That, the conferment of independence on a body like the National Land Commission does not take away from the fact that it is a part of Government within the meaning of Section 21 of the Government Proceedings Act. The *ex parte* Applicant urged a broad interpretation of that section.

16. Lastly, the Applicant submits that notwithstanding that the National Land Commission is an independent body governed by the Constitution and the National Land Commission Act, and whose Accounting Officer is the Secretary of the Commission; misjoinder or non-joinder of parties to a judicial review application does not make the application fatally incompetent. The Applicant cited the case of **Republic v Charles Lutta Kasamani and Another ex parte Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officers [2006] eKLR** where the Court of Appeal held that a defect in the form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal, and are curable by amendment.

17. It is therefore the Applicant's submission that as found by the Courts, misjoinder or non-joinder alone does not warrant the dismissal of an application, where the substance of the reliefs sought can still be realised despite the irregularity. The Applicant in this respect faulted the Respondent for not challenging at any point the issuance of Certificate of Order against it as well as the receipt for demand for payment, up until the instant suit was filed against it. In this respect the Applicant was guided by the Court of Appeal's decision in **Nabro Properties Ltd v Sky Structures Ltd and 2 Others [2002] 2 KLR 299** where it was held that a person cannot base his claim on his own wrong.

18. The applicable law on enforcement of orders against Government entities in civil proceedings is section 21 of the Government Proceedings Act, which provides as follows as regards the requirements to be met:

> **"(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:**
>
> **Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.**
>
> **(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.**
>
> **(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:**
>
> **Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.**

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs."

19. In addition, execution proceedings against a government or public authority can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was the holding in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012)** where J. Githua held as follows:

"In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act)* which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon."

20. Statutory underpinning is also now given to the concept of accountability for expenditure of public funds under the Public Finance Management Act, which provide for and allocate responsibility in public expenditure to Accounting Officers. The said accounting officers are appointed by the Cabinet Secretary in charge of Finance under section 67 of the Public Finance Management Act, which also provides for the accounting officers for Constitutional Commissions or Independent Offices. The said section provides as follows:

(**1) The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations.**

(2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.

(3) The Cabinet Secretary shall ensure that at any time there is an accounting officer in each national government entity.

21. In the present application, Article 253 of the Constitution is explicit as regards the legal status of Constitutional Commissions such as the National Land Commission, and states that each Constitutional Commission is a body corporate with perpetual succession and a seal; and is capable of suing and being sued in its corporate name. In addition, while it is desirable that the National Land Commission and the Ministry of the Lands work in harmony, it is notable in this respect that the reference on which the Supreme Court of Kenya's Advisory Opinion was sought in **In the Matter of the National Land Commission [2015] e KLR** was on the National Land Commission's functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development (the Ministry), on the other hand in eight (8) specific areas namely:

(a) On land administration and management functions

(b) On land taxation and revenues

(c) On human resources and staff issues

(d) On land registration and issuance of titles

(e) On the National Land Information Management System (NLIMS)

(f) On transfer of assets

(g) On private land

(h) On land settlement.

22. There was no issue raised in the said Advisory Opinion as regards who the accounting officer of the National Land Commission was, which on the contrary is an issue clearly spelt out in the National Land Commission Act section 20 (4) as follows:

> **"(4) The secretary, shall be the accounting officer of the Commission and shall be responsible to the Commission for— "**
>
> **(a) all income and expenditure of the Commission;**
>
> **(b) all assets and the discharge of all liabilities of the Commission; and**
>
> **(c) the proper and diligent implementation of Part IV of this Act**."

It is also notable that the Secretary to the National Land Commission is a constitutional office established by Article 250(12) of the Constitution which provides that each Constitutional Commission shall have a secretary who shall be the chief executive officer of the Commission.

23. Therefore, it is the finding of this Court that under the National Land Commission Act, the Government Proceedings Act and the Public Finance Management Act, it is the Secretary of the National Land Commission who is the accounting officer for any expenditure and accountable for any money decrees due from the said Commission, and on whom the statutory duty to pay falls. As the order of mandamus is sought to enforce the performance of a statutory duty, the non-joinder of the Secretary and Chief Executive Officer of the National Land Commission in this suit is thus fatal to the Applicant's claim.

24. The provisions of section 21 of the Government Proceedings Act must also be read with the necessary changes in relation to the National Land Commission. In this regard, the National Land Commission is a corporate body, and the service of the certificate of costs that is required by the said section on the Attorney General must read as requiring service on the appropriate officer in the National Land Commission. It is notable in this respect that section 20(3) of the National Land Commission Act provides that the Secretary to the Commission shall also be the head of the secretariat.

25. This Court therefore finds that since it is the Secretary of the National Land Commission that is under a statutory duty as the accounting officer to pay the *ex parte* Applicant the costs awarded in its favour in **Sceneries Limited v National Land Commission & 2 Others,** there is no duty upon the Principal Secretary in the Ministry of Lands and Physical Planning to pay the said costs.

26. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 5th March 2019 is incompetently filed, and the same is hereby struck out with no order as to costs.

27. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2019

P. NYAMWEYA

JUDGE