



**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE TRUST LAND ACT, CAP 288 OAWS OF KENYA**

**AND**

**IN THE MATTER OF THE TRANSITIONAL AUTHORITY ACT 2012 LAWS OF KENYA  
IN THE MATTER OF THE LAND ACT LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE GAZETTE NOTICE NO 13135 OF 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUION OF KENYA SECTIONS 1, 47, 60, 64, 65, 67,70, 71, 80(1), 113, 155, 159, 165**

**AND**

**IN THE MATTER OF LEGAL NOTICE NO 6 OF 2006**

**AND**

**IN THE MATTER OF THE REPUBLIC**

**BETWEEN**

**HON FRANCIS CHACHU GANYA.....1<sup>ST</sup> APPLICANT**

**CHRIS GUYO HUKA (CHAIRMAN BUBISA COMMUNITY).....2<sup>ND</sup> APPLICANT**

**DALACHA ELEMA (COMMUNITY MEMBER BUBISA COMMUNITY).....3<sup>RD</sup> APPLICANT**

**HAJI DIBA BORU (COMMUNITY MEMBER BUBISA COMMUNITY).....4<sup>TH</sup> APPLICANT**

**COL JABA JALDESA (COMMUNITY MEMBER BUBISA COMMUNITY)...5<sup>TH</sup> APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 16<sup>th</sup> October, 2012 filed the same day, the *ex parte* applicants herein seek the following orders:

1. **An order of CERTIORARI to call and/or remove into the High Court and quash the decision of the Commissioner of Lands expressed in Gazette Notice No 13135 dated 11<sup>th</sup> September, 2012 as concerns the setting aside of 60,705 hectares of land in Bubasi Location for the purpose of Gitson Energy by the Commissioner of Lands.**
2. **An order of PROHIBITION to prohibit the Commissioner of lands from proceeding carrying on or undertaking the setting aside of 60,705 hectares of land in Bubasi Location via Gazette Notice No. 13135 dated 11<sup>th</sup> September, 2012 intended for the purpose of Gitson Energy.**
3. **Costs of and incidental to the application be provided for.**
4. **Such further and other reliefs that the Honourable court may deem just and expedient to grant in the circumstances of this case.**

**EX PARTE APPLICANT'S CASE**

2. The application is based on the Statutory Statement filed on 11<sup>th</sup> October, 2012 and a verifying affidavit sworn on 10<sup>th</sup> October 2012 by **Hon. Francis Chachu Ganya**, who describes himself as the Hon. Member of Parliament for North Horr Constituency. According to him, the people of North Horr Constituency are dismayed with the decision leading to the excision and allocation of the land described in Gazette Notice No. 13135 dated 11/9/12 contrary to the clear provisions of the Law and the Constitution. He deposes that the 2<sup>nd</sup> respondent has set aside 60,705 hectares of land in Bubasi Location for the purpose of Gitson Energy contrary to the Law and the wishes of the people of North Horr Constituency as shown by a bundle of exhibits marked as "FCG 1 a, b, and c" and contrary to the provisions of the ***Transition to Devolved Government Act*** that has placed a moratorium on all councils' assets awaiting the establishment of county governments. In his view, the Commissioner of Lands is trying to usurp power that has been donated to the National Land Commission courtesy of section 5 (2) (e) of the ***National Land Commission Act*** 2012. According to him, the Act succinctly states that the National Land Commission shall ".....manage and administer all unregistered trust land and unregistered Community land on behalf of the county governments". According to the deponent, the decision of the Commissioner of Lands is contrary to section 35 of the ***Transition to Devolved Government Act*** which bars any state organ, public office, public entity and local authority from transferring land and that such action is invalid as it ignores the law, is illegal, arbitrary and unreasonable and not justifiable whatsoever in a just and democratic society and is therefore capricious. The failure to adhere to the law by the respondents, according to the deponent, constitutes procedural and administrative failure that is amenable to judicial review. In his view, the law obligates the respondents to perform a function of public nature and the applicants have a legitimate expectation that the respondents will act in good faith and be just in implementing the law. The setting apart of trust land must be preceded by public participation and clear compensation arrangement for the affected parties.

3. It is deposed that the actions of the respondents are illegal, null and void and contrary to the law and should be amenable to judicial review as it intends to set aside and alienate communal land totalling to 60,705 to a private company without adhering to the Constitution and the law hence the actions of the respondents are based on flagrant disregard of the law, abuse of power and office which has caused grievous injury to the applicants, as their grazing land is being excised without compensation. In his view, the decision by respondents to disregard a high constitutional and statutory principle is contrary to the rule of law and due process and it is against public order, public policy and public morality and should be subject to judicial review as it is unfair, unreasonable, arbitrary and an affront to civilized behaviour in

the 21<sup>st</sup> century and cannot be remedied by the purported letter by the Commission of Lands purporting to suspend any documentation relating to the said land. It is therefore contended that it is against the law for respondents to try to abrogate the existing law or bypass the path laid by the law and totally ignore the wishes of the local community and the 1<sup>st</sup> applicant as the Hon. Member of parliament. In his view, the decision by the respondents is not justifiable in a democratic society as it will adversely and irreversibly affect the communities' environment and cultural lifestyles; the allocation is likely to undermine the wishes of the people of North Horr and it is and it is in the public interest, convenient and just to grant the orders and the respondents have a high constitutional and legal duty, mandate and obligation to follow the law while dealing with Community and trust Land the law of they are just about to transgress the law in a manner that offends the Applicants. The decision making process by the Commissioner, according to him, is flawed and devoid of any legal laws, norms and practices and the interests of justice could be better served if the respondents are compelled to comply with the law and prohibited from indecision in implementing the law.

### **RESPONDENT'S CASE**

4. The respondent, in opposition to the application filed a replying affidavit sworn by **Silas Kiogora Mburugu**, a Principal Land Administration Officer, at the Ministry of Lands on 29<sup>th</sup> November 2012. According to him, the suit land is within the County Council of Marsabit currently referred to as Marsabit County. The process of setting apart land, according to him, is usually carried out by the county council of the particular area where the land sought to be set aside is located. Pursuant to the provisions of the **Trust Land Act** Cap 288 Laws of Kenya, the county council of Marsabit commenced the setting apart process of trust land held by itself on behalf of the community after an application by the Interested Party on or about the year 2008. Upon completion of the exercise, the Ministry of Local Government which has been in charge of the administrative functions of County Councils vide a letter dated 2<sup>nd</sup> February, 2012 wrote to the Commissioner of Lands requesting him to process the documents and pursuant to provisions of section 53 of the **Trust Land Act** and on being satisfied the due process had been carried out the 2<sup>nd</sup> respondent then issued the disputed gazette notice setting apart the trust land.

5. That the role of the 2<sup>nd</sup> Respondents in this matter, it is deposed, was limited to issuing the gazette notice and title documents and did not go to the process of setting apart the land. In the deponent's view, the **National Land Commission Act** No. 5 of 2012 came into force on 2<sup>nd</sup> May, 2012 and all land issues and especially pertaining to management and administration of all unregistered trust land and unregistered community land on behalf of the county government are to be carried out by the National Land Commission established under this Act. However, the National Land Commission has not to date assumed office for reasons that pursuant to the provisions therein, names of successful applicants to the National Land Commission were forwarded to the President but before they could be gazette a **Dr Kimpei Munei** moved the court in Nairobi HC Petition No. 266 of 2012 dated 20<sup>th</sup> June 2012 challenging the short listing of the applicants which petition was on 21<sup>st</sup> September, 2012 withdrawn way after the 2<sup>nd</sup> Respondent had issued the disputed gazette notice. According to him, the 2<sup>nd</sup> Respondent herein did and/or has not usurped the powers of the National Land Commission in issuing the disputed gazette notice as the Commission has not taken office to date and it is in public interest that the 2<sup>nd</sup> Respondent has been executing these duties before National Land Commission takes office to ensure smooth running of the institution. According to the legal advice received from the deponent's counsel, the order of prohibition cannot issue in the instant case as the setting apart has already been done and prohibition looks into the future hence the ex parte applicants application is an abuse of the court process and does not warrant judicial review remedies as there are no competent Respondents to ventilate on the issues raised since the orders should be directed to the body making the decision or carrying out the exercise.

### **INTERESTED PARTY'S CASE**

6. On behalf of the interested party, one **Michael Muchemi Ndiritu** swore a replying affidavit on 14<sup>th</sup> November 2012. Although he did not state in what capacity he was swearing the said affidavit, it was

deposed by him that **Gitson Energy Ltd** is the company for which the land named in the application was being set aside by the Commissioner of Lands and is therefore an interested party to this application. **Gitson Energy Ltd**, it is deposed, is a limited liability company registered under **Companies Act** Chapter 486 Laws of Kenya and has been interested in setting up wind power generation in Marsabit County to wit began the process of seeking land allocation in the year 2005 by approaching District Commissioner, District Commissioner, district Development Committee and County Council of Marsabit. The said company embarked in extensive and intensive feasibility studies to establish the viability of the project and the benefits the society and the country at large would get. In its aforementioned process, it is deposed that the company has complied with every law, regulation and approval procedure required of it and the said land has been set aside by the county council of Marsabit after several meetings were conducted and the community input taken into account and all relevant Government Ministries were involved and consent granted by the same and towards this end several minutes and copies of correspondences are exhibited. According to him, the deponent of the verifying affidavit herein received and was copied to most of the aforesaid listed documents and was kept informed at all stages and on the 14<sup>th</sup> day of July 2011 the Interested party chartered a plane from Wilson airport flew the him to Bubisa for a meeting with all the stakeholders and he expressed his satisfaction of the progress made and the benefit to the community. According to the deponent, he has met the said **Hon. Chachu** over this project nine times in the period between 2010 – 2011.

7. It is therefore the deponent's view that the setting aside of the 150,000 acres was procedurally done and with community engagement as required under section 2 (2) of the sixth schedule to the Constitution which has suspended the provision relating to devolved Government including article 187 until the date of the first elections for County Assembly & Governors. In his view, based on his advocate's advice, the Commissioner of lands did not act in contravention of the law as alleged in gazetting the setting aside of the land in gazette notice no 13135 dated 11<sup>th</sup> September, 2012 as alleged by the applicant and that community is not hostile to Gitson Energy Ltd as it has been in constant communication with the residents of Bubisa and in May and December 2009 with the help of the local Chief erected two meteorological masks while the local youth provided food and housing to Gitson Energy Ltd team both of which were selected in public *barazas* and currently Gitson Energy has sponsored 15 high school children from Bubisa through Gitson Energy scholar and mentorship programme.

8. According to the deponent, Bubisa wind project is a 300 mw and US \$831 m project is an enormous opportunities for the people of Bubisa and Kenya and the businesses right from the port of Mombasa to the project site and beyond and the income to be generated by the parties during the construction phase will have a multiplier effect on the Local economies. Apart from that the payment for the application fee of the Kshs 60,000/= the sponsorship of 15 bright students from the area M/s Gitson Energy Ltd was actively involved in lobbying for the tarmacking of Isiolo – Moyale road and was invited to the first and second brain storming session of LAPSSSET project in 2005 under the chairmanship of the late **Alex Muriithi** then Chairman of TARDA and other regional authorities where Gitson Energy made a presentation of wind and solar energy project as some of the anchor projects that would attract investment in the region, a fact that is documented by the Government of Kenya. To him, it is instructive to note that **Hon Chachu** and the other applicants have not questioned the propriety of the process leading to the acquisition of the 150,000 acres as the county council of Marsabit and Gitson Energy has followed the right procedure and stopping the Gazettement at this stage is an effort to frustrate an otherwise good project that is in line with vision 2030 and has support not only of Government but also by donors including securing UNDP growing sustainable Business (GSB) endorsement. Gitson Energy, it is contended, is committed to the corporate social responsibility aspect of the project as shown above and to that end has committed 2.5% of the annual profits for the entire life of the project to the community, a fact documented in the Lease Agreement that has been duly approved by the Minister for Local Government hence **Hon. Chachu** does not come before this court with clean hands and that this application is an abuse of process of this court. It is deposed that **Honourable Chachu** was interested and took steps to set up a similar project in Bubasi and approached the deponent together with a company by the name Kato-e Group requesting technical assistance in the setting up of a similar project and Kato-e even offered the Company a seat in the Board of Directors of Kato-e together with **Hon. Chachu** if the Company agreed to partner with them. However, the deponent declined the said offer from **Hon. Chachu** and Kato-e for legal and ethical issues and it is due to the said refusal that **Hon Chachu** began a

campaign to frustrate Gitson Energy and changed his tune from recommending it to challenging the project. On the 18<sup>th</sup> November, 2010 **Hon Chachu** wrote the Deputy Prime Minister and then Minister for Local Government **Hon. Musalia Mudavadi** making similar allegation that the community had not been engaged and after consultations with the **Hon. Chachu** the professional group of North Horr the office of the Deputy Prime Minister and Ministry of Local Government, US Embassy – Nairobi the Company visited the land and had discussions with the community and **Hon Chachu** wrote an email on September 20 2011 to the Local government Ministry recommending the project and stated he was satisfied with the way the matters were progressing. Although **Hon. Chachu** attempted to bring this matter before parliament on 31<sup>st</sup> July 2012 and 10<sup>th</sup> October 2012 he failed to turn up to ask the question in both days which shows his interest is to fight Gitson Energy Ltd from all angles which to the deponent is abuse of office.

9. According to the deponent, therefore, all of the above actions reveal that **Hon. Chachu** exhibited mal fides and has a conflict of interest in bringing this application and that he has no interest in protecting the community but profiting personally hence the application should not be allowed. It is the deponent's opinion that if the applicants are sincere and genuine in their quest to have the project stopped then they should deposit in court an amount of US \$298,528,000 to cover the expected income and losses the company is undergoing due to road block being put by them since the projected income from the project would be as follows: Energy sale US\$141,912,000 per year at 45% capacity factor of the name plate capacity 300 mega waltz and US\$6,852,000 from sale of carbon credit per year already spent on labour and logistics. To him, confirming that the entire requisite consults and approvals had been obtained and that the only thing that was pending was the registration of the Lease and anticipating no further road blocks from any other quarters Gitson Energy Ltd accepted at the request of the Marsabit County Council. It is his position that Gitson Energy Ltd being very closely involved with the county council of Marsabit and nothing the good will thereof and anticipating no other road block accepted to advance the county council of Marsabit Kshs 500,000/=which was agreed would be deducted from the annual payment after the Lease was approved and it is Gitson Energy case that the land having been set aside prior to the promulgation of the constitution 2010 and all the procedural aspect not being vaulted this Honourable court should not interfere with the process and should immediately lift the stay granted to enable the parties move on so as to forestall further losses being incurred.

### **APPLICANT'S SUBMISSIONS**

10. On behalf of the *ex parte* applicant it was submitted that the application is brought pursuant to Article 22 and 70 of the Constitution which a permit a person whose right has been infringed or threatened to institute legal proceedings and a person who alleges that a right to a clean and healthy environment under Article 42 has been violated or threatened to apply to court for redress.

11. According to the applicant, the people of North Horr were not consulted in the decision leading to the allocation, excision and setting aside of the disputed as required by the law. Apart from that the Commissioner of Lands is acting *ultra vires* by trying to usurp the powers donated to the National Land Commission vide section 5(2) of the **National Land Commission Act, 2010** which donates the power to the Commission to manage and administer all unregistered trust land and unregistered Community Land on behalf of the county governments.

12. According to the applicants the decision made by the Commissioner of Lands to set aside the said land for the purposes of Gitson Energy was in contravention of the provisions of the **Transition to Devolved Government Act** which has placed a moratorium on all councils assets awaiting the establishment of county governments thus the decision of the Commissioner of Lands is contrary to section 35 of the **Transition to Devolved Government Act** which bars any state organ, public office, public entity and local authority from transferring land and is invalid *ab initio*.

13. In the applicant's view, the actions of the Respondents are against the wishes and aspirations of the people of North Horr Constituency, they are illegal, null and void and inconsistent with Article 69(1) of the Constitution and hence amenable to judicial review yet the Respondents being public officials are obligated to act in strict adherence to the rule of law and follow due process.

14. Relying on **Royal Media Services vs. Commission of Customs and Excise HC Misc Application No. 383/95**, it is submitted that any judiciary worth its salt should grasp and uphold the letter and spirit of the constitution of its country and stand as a strong wall against any action of the officials of the Government which is irrational, capricious or arbitrary and term the same as unconstitutional. Relying on **Chitty on Contracts**, it is submitted that the gazettment of the land is against the constitutional provisions as it purports to vest trust land into private hands without following the constitution hence the contract is against public policy, governance and a hindrance to the implementation of the new constitution dispensation. Further it is submitted that by vesting 60,705 hectares of community land which has sources of revenue which benefit the large public into private hands is against public policy and ought not to be enforced. It is therefore submitted that based on **Macfoy vs. United Africa Company Ltd [1961] 3 All ER 1169**, the Court ought to find that the decision leading to the allocation, excision and setting aside of land described in the Gazette Notice No. 13135 dated 11<sup>th</sup> September 2012 to have been unconstitutional and be set aside *ex debito justitiae*. Citing **James Joram Nyoga & Another vs. Attorney General Misc. Application No. 1732 of 2004** it is submitted that any alienation of land contrary to the constitution is void and that the land in dispute being public land held by the government on behalf of the public the Commissioner of Lands could not purport to pass title to the applicants under RTA. In the applicants' submissions, the gazettment that was done clearly shows that the intention of the Commissioner of Lands was aimed at allocation, excision and finally setting aside the land which action was unconstitutional, illegal and such illegality cannot be enforced. In support of this submission, the applicants rely on the **Town Council of Ol'Kalou vs. Nganga General Hardware Civil Appeal No. 269 of 1997**.

#### **RESPONDENT'S SUBMISSIONS**

15. On behalf of the respondent, it is contended that all the parties were consulted and that the Commissioner of Lands did not usurp the powers of the National Land Commission and his actions were lawful. It is submitted that as per the documentation presented by the applicants and interested party the process begun under the Constitution of 1969 hence the said Constitution and the **Trust Land Act** apply in which case the procedure for dealing and setting apart trust land under section 117 of the Constitution is set out in section 13 of the said Act. According to the respondent it is the County Council of the particular area that is involved in the consultation and the applicants chose not to sue the County Council of Marsabit which is well placed to respond to the allegations made herein and not the respondent. In light of the documentation presented by the interested party, it is submitted that the contention of the applicants that they were not consulted cannot stand. Since the respondents were not involved in the process it is submitted that the issue of consultation cannot be implicated against the respondent since it is trite law that judicial review should be brought against the public body performing a judicial or quasi judicial function. In support of this submission the respondent rely on **Wamwere vs. Attorney General [2004] 1 KLR** and **Peter Ngatia vs. Attorney General Nrb HC JR ELC 102/2010**.

16. According to the respondent, since the Commissioner for Lands issued the gazette notice in September 2012 at a time when the National Land Commission had not taken office, the said Commissioner acted as per the law and cannot be said to have acted without powers or usurped the powers of the National Land Commission. It is submitted that since the Commissioner has not transferred the suit property and actually indicated that he had suspended the process of transferring the same, the Respondents have not breached the moratorium. In their view, section 35 of the **Transition to Devolved Government Act, 2012** bars transfer of assets and liabilities during the transition period unless the Transition Authority approves and in this case what the Commissioner did was only to issue a gazette notice in respect of setting apart the land which gazette notice does not translate to title or transfer of the property and/or ownership. The said action, it is submitted, was solely administrative and the Commissioner was only carrying out its statutory duty since the process of transfer had been suspended till the parties agree. Accordingly, it is submitted that these proceedings ought to be dismissed as they lack legal basis.

17. It is further submitted that the orders sought herein are not the most efficacious as they will have serious implications on persons who are not parties to the proceedings. The county council which carried out the process is not a party and that quashing the gazette notice will affect the decision of the council

but does not cure the matter as the same does not address the issue of consultation. More so, the applicants have not demonstrated the prejudice they will suffer in case the orders are not granted. The project being implemented by the interested party, it is submitted, is more beneficial to the public and the court needs to balance on the public and private interest in determining the matter hence the proceedings should be dismissed.

### **INTERESTED PARTY'S SUBMISSIONS**

18. According to the interested party, the transition period under section 35 of the ***Transition to Devolved Government Act*** which Act imposes a moratorium on transfer of assets and liabilities during the transition period is stated as being between 9<sup>th</sup> March 2012 and three years after the first election under the Constitution. It is further submitted that the commencement date for the National Land Commission Act 2012 is 2<sup>nd</sup> May 2012. Since the land was set aside before transition period, it is contended that the moratorium does not apply to the interested party as the land was approved for setting aside on 8<sup>th</sup> July 2010 by the County Council of Marsabit hence the provisions relied on cannot be applied retrospectively as to do so would have the effect of divesting the interested party of their vested rights legitimately accrued before the commencement of the said statutes. In support of this submission the interested party relies on **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited and 2 Others Application No. 2 of 2011** in which it was held that as for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Further reference on the issue is made to ***Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 44 at 570***. It is further submitted that since at the time of the filing of this application the National Land Commission had not been appointed, the matter could not be relegated to a non-existent body. Based on the same decision of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited and 2 Others** (supra) it is submitted that the Constitution cannot be applied retroactively to deny the individual of a right acquired before its promulgation since the setting apart occurred in July 2010 before the New Constitution.

19. Since the functions of the Commissioner of Lands have not been transferred to the National Land Commission, the Commissioner of Lands acted properly. Article 2(4) of the Sixth Schedule to the Constitution, it is submitted, provides that Article 62(2) and (3) is suspended until the National Land Commission is established hence the intention of the Constitution was that there should be no vacuum created in the devolution process and that Government bodies are able to keep functioning in their capacities.

20. It is submitted that the power to set aside Trust Land is provided in section 13 of the Trust Lands Act and section 177 of the repealed Constitution and the same is vested with the County Council for the county where the land is located and not the Commissioner of Lands. It is therefore submitted that the actions of the Commissioner for Lands were proper and pursuant to section 53 of the Trust Lands Act under which the Commissioner acts in compliance with the direction of the Council. According to the interested party the land was set apart in accordance with this statutory provision and the interested party had several meetings with the local community and the County Council leading to the setting apart of the land. Since similar Trust land had been previously set apart for a wind power generation project called the Lake Turkana Project in the same County, it is submitted that to hold that the interested party who is similarly placed be treated differently results in discrimination in contravention of Article 27 of the Constitution and relying on ***Black's Law Dictionary***, it is submitted that discrimination is defined as "The effect of a law or established confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, relation or handicap or differential treatment especially a failure to treat all persona equally when no reasonable distinction can be found between the favoured and not favoured". In the interested party's view and based on the decision in **Anarita Karimi Njeru vs. Attorney General [1979] KLR 154**, that in order for a constitutional claim to be brought, it must meet the threshold by stating the provisions of the Constitution the Applicant considers infringed in relation to him and the manner in which they are alleged to be infringed.

21. It is submitted by the interested party based on the authority of **Shirika La Kusaidia Watoto wa Kenya & Another vs. Rhoda Rop & 4 Others [2005]** that in light of the false statements by the 1<sup>st</sup> applicant in the sworn affidavit that there was no consultation, the court ought to give serious consideration to the veracity of the Applicant's other statements and to dismiss this case and find that it is without merit. In the interested party's view there is no requirement that the Member of Parliament be consulted in setting aside of Trust land since the County, local government and the community are the only persons named in the Trust Land Act and the Constitution. However, it is contended that the 1<sup>st</sup> applicant was duly consulted. Relying on **Peter O Ngoge vs. Francis Ole Kaparo** it is submitted that the application is an abuse of the process of the court and made with unclean hands.

22. Since the Commissioner had already gazetted the setting aside of the disputed land, it is submitted based on **Kenya National Examinations Council vs. Republic ex parte Gathenji Civil Appeal No. 266 of 1996** that prohibition looks into the future and cannot operate retrospectively. In light of the activities undertaken by the interested party, it is deposed that it is not in the public interest to cancel the project hence the application ought to be dismissed with costs.

### **DETERMINATION**

23. I have considered the application, the affidavit in support thereof, the affidavits in opposition as well as the submissions made by the parties.

24. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in **Anarita Karimi Njeru vs. Attorney General** (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss an application merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage sloppy and carelessly drafted applications. What it means is that:

***“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. See Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.***

25. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. Again I must, however, send a word of caution that where a party initiates proceedings well aware that the issues involved ought to be instituted pursuant to the Rules made by the Chief Justice under Article 22 of the Constitution by way of a Petition but deliberately decides to come by a procedure other than the procedure provided, the Court may deem such conduct as amounting to an abuse of the process of the Court in which case the Court may well be entitled to strike out the same. Litigants must always remember the decision in **Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992**, that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of

Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

26. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

27. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

28. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**

29. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.**

30. One of the issues raised in these proceedings is that the ex parte applicants were not consulted before the decision affecting them was made. It is not in dispute that under Article 10 of the Constitution the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. It is also true that under Article 10(2) of the Constitution, national values include participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views. This requirement is also to be found in section 13(2)(b) of the ***Trust Land Act*** which provides that “the Council shall bring the proposal to set apart the land to the notice of the people 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”. In **Republic vs. Ministry of Finance & Another Ex Parte Nyong’o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR 299**, the Court held:

**“Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests.”**

31. Once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made, can no longer be a subject of judicial review since the decision is no longer questionable on the process of arriving thereat but can only be questioned on the merits and that is not within the realm of judicial review.

32. In the replying affidavit filed by the interested party there are minutes of meetings involving the local administrative authorities, members of the community, councillors and the interested party. Whereas the adequacy and extent of the participation of the community in the said meetings and in the decision making process may be challenged, that challenge, in my view would go to the merits rather than to the process that was followed.

33. National Land Commission is established under Article 67 of the Constitution and one of its functions is to manage public land on behalf of the national and county government. Article 62(2) of the Constitution provides that Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission while under Article 62(3) thereof Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. Under Article 62(4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. Since the land the subject of this application is held by a county government in trust for the people resident in the county, it falls under public land which under the foregoing provision cannot be disposed of or otherwise used except in terms of an Act of Parliament. Section 35(1) of the ***Transition to Devolved Government Act 2012*** provides that a State organ, public office, public entity or local authority shall not transfer assets and liabilities during the transition period. "Transition period" according to section 2 of the said Act "means the period between commencement of this Act and three years after the first elections under the Constitution." The said Act commenced on 9<sup>th</sup> March 2012. Therefore any transfer of assets and liabilities by State organ, public entity or local authority before 9<sup>th</sup> March 2012 is not barred by the said Act. The impugned Gazette Notice setting aside the disputed land was dated 11<sup>th</sup> September 2012 and was published on 21<sup>st</sup> September 2012. Clearly therefore if the setting a part of the said land is deemed to be a transfer of assets and liabilities, it would fall squarely within the transition period and would consequently be barred.

34. Section 7 of part IV of the ***Trust Land Act*** under which the impugned notice was purportedly given states that where written notice is given to a council, under subsection (1) of section 118 of the Constitution, that an area of Trust Land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette. Therefore the first step is for the Council to give a notification that it is intended to set apart the land in question. A similar provision appears in section 13(3) of the said Act.

35. Once the land is set apart and compensation awarded, section 7(4) of the Act requires the Council to publish in the Kenya Gazette a notice setting the land part. Whereas the Court cannot make a determination whether or not the notification of the intention to set apart the disputed land was made, the impugned Gazette notice, which states at the material part that "the land described on the schedule hereto has been set apart" on the face of it seems to have been issued by the Commissioner of Lands. In the Uganda case of ***Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300***, the Court citing ***Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2*** and ***An Application by Bukoba Gymkhana Club [1963] EA 478*** at 479 held *inter alia* that:

**"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on**

**the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.”**

36. In my view, it would be an illegality if the body that purports to exercise the powers by giving notice is not the one mandated by law to do so. Therefore the notice that was purportedly issued by the Commissioner of Lands was issued by a person not authorised to do so and to that extent the said notice was either issued without jurisdiction or in excess of jurisdiction. In **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR** the Court of Appeal held *inter alia* as follows:

**“Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

37. It is contended on behalf of the Respondent that since the gazette notice was not a transfer and that in any case the Respondent had suspended the process of transferring the same, the Respondents have not breached the moratorium. However, in my view, the clear intention of the gazette notice was to eventually lead to the transfer of the asset of the Marsabit County and that was what was prohibited under section 35 of the *Transition to Devolved Government Act 2012*. In **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others** (supra) the Court of Appeal held *inter alia* as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.”**

38. It would therefore follow that an order of prohibition could properly issue forbidding the Respondent from setting apart the suit property.

39. It has however been submitted on behalf of the interested party that a similar setting aside had been done in respect of Lake Turkana Project in the same County and that to grant the orders sought herein would amount to discrimination. First, that issue was not raised in the affidavit and therefore has little if any evidential value as the Court is unable to determine the circumstances in which the said setting aside was done if indeed it was done. Secondly, even if that were the position, the mere fact that an illegal action is undertaken and is not challenged does not ipso facto give rise to a legitimate expectation to other people who likewise intend to act illegally. Legitimate expectation as the phrase indicates must be legitimate and cannot be based on actions which are patently illegal. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held:

**“The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims.....Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative “strength of expectation” of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he**

has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn.....A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion.”

40. It follows that the concept of legitimate expectation cannot operate against the law.

41. In my view, a person cannot purport to acquire an interest based solely on the fact that other persons have in the past similarly acquired rights unless a representation has been made by way of a promise or other conduct that he will be treated in one way and the public body wishes to treat him or her in a different way. See **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240.**

42. With respect to the allegation of discrimination, it was held in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 Of 2008 (HCK) [2008] KLR 688** that the law does not prohibit discrimination but rather unfair discrimination which means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. The Court in the said matter expressed itself as follows:

**“The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and nondiscrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”**

43. I further associate myself with the decision in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR** where it was held that:

**“we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality.”**

44. It is therefore my view and I so hold that both the principle of legitimate expectation and non-discrimination cannot be of any assistance to the Respondents and the Interested Party in this case.

45. The Interested party also contends that it would not be in the public interest that this application be allowed. As already stated hereinabove under Article 10 of the Constitution, the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions and one of the said national values is the rule of law. To interpret public interest in such a way as to negate the rule of law would, in my view, be unconstitutional. In my view a constitution is the highest expression of the peoples will. See **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 (HCK) [2008] KLR 728.**

46. Having considered all the issues raised herein I come to the inescapable conclusion that the Respondent's action to set apart 60,705 hectares of land in Bubisa Location for the purpose of Gitson Energy vide Gazette Notice No. 13135 dated 11<sup>th</sup> September 2012 was in excess of his jurisdiction and/or was ultra vires his powers as he had no authority to issue the impugned gazette notice. I further find that the said action was done in contravention of the express provisions of section 35 of the ***Transition to Devolved Government Act 2012.***

### **ORDER**

47. Accordingly the order that commends itself to me is that an order of certiorari is hereby issued calling for and/or removing into the this Court the decision of the Commissioner of Lands expressed in Gazette Notice No 13135 dated 11<sup>th</sup> September, 2012 as concerns the setting aside of 60,705 hectares of land in Bubasi Location for the purpose of Gitson Energy by the Commissioner of Lands and the said decision is hereby quashed.

3. As the setting aside had already been purportedly done and as the same has been quashed there is no longer any reason to grant the prohibition sought as the Respondent if it still intends to proceed with the project will have to start the process afresh in accordance with the law. As was held in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA. No. 1747 of 2004 [2006] 1 EA 47,** once a quashing order is given the decision making body has to act in accordance with the law and the Court cannot make the decision for the challenged body. Since the purpose of certiorari is to bring up and quash the impugned orders, that having been done there is no necessity for an order of prohibition since there is no longer any threat present of an illegal action. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

48. The costs of this application are awarded to the Applicant.

**Dated at Nairobi this 25<sup>th</sup> day of April 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of***

*Mr Akech for Mr Omogeni for the applicant*

*Mr Mwangi for the Interested Party*