



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

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

MINISTRY OF ENERGY.....2ND RESPONDENT

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

ENERGY REGULATORY COMMISSION.....4TH RESPONDENT

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

THE ATTORNEY GENERAL.....6TH RESPONDENT

EX PARTE :

GITSON ENERGY LTD

JUDGMENT

Introduction

1. The *ex parte* Applicant herein, Gitson Energy Ltd, 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 and the Public Finance Management Act 2012 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 in this suit arising from the role it plays in the transmission, distribution and retailing of electricity throughout Kenya. The Energy Regulatory Commission, which is sued as the 4th Respondent, is established by the Energy Act, 2006, to among other functions regulate the electrical energy, petroleum and related products, renewable energy and other forms of energy. The Kenya Electricity Transmission Company Limited, whose core business is to plan, design, build, operate and maintain electricity transmission lines and associated substations, is sued as the 5th Respondent. Lastly, the Attorney General is sued as the 6th Respondent, arising from his constitutional mandate as the principal legal advisor to the Government pursuant to Article 156 of the Constitution.

3. The crux of the *ex parte* 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 that the same Ministry has since frustrated its project and discriminated against

it. It is therefore seeking the following orders in a Notice of Motion application dated 30th November 2018:

a) 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 a Power Purchase Agreement (PPA) for 300 Megawatt Wind Power and issue a 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.

b) 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.

c) 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.

d) That the costs of this application be provided for.

4. After the *ex parte* Applicant 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 would be addressed during the hearing and determination of the *ex parte* Applicant's substantive application. Parties were accordingly directed to file and serve their pleadings on the said application, and their respective cases are highlighted in the following sections.

The *ex parte* Applicant's Case

5. The background to the *ex parte* Applicant's case is long and chequered, and detailed out in its pleadings. The *ex parte* Applicant in this respect filed a statutory statement dated 20th July 2018, and a verifying affidavit sworn on the same date by James Gitau, the Applicant's Chief Executive Officer, in support of its application. The said deponent in addition filed two supplementary affidavits in reply to the Respondents' preliminary objection and responses. The said affidavits were supported by various annexures. The following sections of this judgment highlight the key milestones leading to the dispute herein and the *ex parte* Applicant's grievance, as stated in the said pleadings.

6. The *ex parte* Applicant's Chief Executive avers that he started researching on a wind farm project in 2001 while based in the United States of America, and he contacted the 2nd Respondent requesting for information on wind that it had in its possession. However, that the said data was not available at the time, and he travelled to Kenya in 2004 to collect wind data for his project. The *ex parte* Applicant detailed the correspondence and meetings it subsequently held 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.

7. The *ex parte* Applicant also 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 approval to erect wind meteorological masts. According to the deponent, in 2010, the County Council of Marsabit approved the leasing of 150,000 acres to it, and requested the *ex parte* Applicant to pay an advance leasing fee of Kshs. 500,000/=

8. On 7th July 2009, the *ex parte* Applicant wrote to the 2nd Respondent's Permanent Secretary, communicating its formal expression of interest in wind energy production in Kenya, and included its business proposal. 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 capacity of their Feed-in Tariff (FiT) policy, and that the project would therefore be included in the Green Energy Development Program. The *ex parte* Applicant was further informed that its project would be affected by the nearby Lake Turkana Wind Power (LTWP) 310 project, which the *ex parte* Applicant disputed on the ground that the two projects were approximately 200 kilometers apart.

9. The *ex parte* Applicant further explained that a Committee for Green Energy Development Initiative was subsequently 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 stated in the said Gazette Notice for the period of 2009-2012. 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 data that had been requested in Eng. Kiva's letter of 21st July 2009, and accepted the inclusion of the project in the Green Energy Program.

10. The *ex parte* Applicant averred that it subsequently received a formal approval of its 330MW project by way of a letter dated 16th February 2010 from the 2nd Respondent's Permanent Secretary, which was copied to the 3rd Respondent's Managing Director, 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 by a letter dated 23rd February 2010. In addition, that on 29th April 2010 the *ex parte* Applicant's Chief Executive Officer met with the 3rd Respondent's head of distribution and chief planning, and obtained a draft Power Purchase Agreement (PPA) which was forwarded by email.

11. 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 e-mail dated 29th April 2010 forwarding the draft PPA were annexed by the *ex parte* Applicant. The next development averred to by the *ex parte* Applicant was a letter dated 29th September 2010 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 the said Applicant was experiencing in concluding the land acquisition with the Marsabit County Council. It was indicated in the said letter that the project was expected to be completed by early 2013.

12. The *ex parte* Applicant detailed the events that happened between 2009 and 2011 related to the financing of and support for its project, and acquisition of the project land. The *ex parte* Applicant in this respect annexed various correspondence and media reports during this period touching on the said 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 the grant of 150,000 acres of land 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.

13. The events that occurred during the hearing of the said appeal, and after the judgment by the Court of Appeal provide the genesis of the current dispute. The *ex parte* Applicant averred that prior to the Court of Appeal decision, it became aware that the 5th Respondent was building the Kenya – Ethiopia transmission line on the property that was the subject matter of the suit in Civil Appeal 47 of 2014, and thereupon wrote a cease and desist letter to the 5th Respondent's Managing Director dated 5th December 2016, a copy of which it attached. However, that the 5th Respondent did not stop its construction activities, whereupon the *ex parte* Applicant then sought compensation of Kshs three (3) billion as way leave funds. The *ex parte* Applicant averred that the 5th Respondent thereafter in a letter dated 19th January 2017 indicated its willingness to follow the law, but did not stop building on the suit land. That to date the local community have not received, or been informed on the way leave compensation.

14. The *ex parte* Applicant further stated that after judgement was rendered by the Court of Appeal in Civil Appeal 47 of 2014, it informed the 2nd Respondent's Permanent Secretary of the decision in a meeting held at his office in February 2017, and gave him a copy of the same. Further, that the *ex parte* Applicant then wrote a letter dated 11th April, 2017 to the 4th Respondent requesting another Commissioning Date (COD) of its project, since the initial COD of early 2013 was not met due to the matter pending before both High Court and Court of Appeal in Nairobi.

15. The 4th Respondent subsequently responded in a letter dated 26th April 2017, indicating that the country had by then committed itself to development of 466MW of solar capacity and a further 896 MW of wind capacity, and that the 300MW wind and 50 MW solar from the *ex parte* Applicant's project exceeded the set limits under the Feed-in- Tariffs (FiT) policy. Further, that the *ex parte* Applicant needed to get the relevant approvals from Public Private Partnerships (PPP) Unit of the National Treasury and a "go ahead" by the Ministry of Energy & Petroleum for the project to be considered in the future planning cycles. The *ex parte* Applicant annexed a copy of the said letter.

16. Further correspondence was exchanged between the 4th Respondent and the *ex parte* Applicant, who protested that its project has been ongoing for a long time, and was approved on 16th February 2010, and was therefore not a new application. On 29th June 2017, the *ex parte* Applicant wrote to the Director General of the PPP unit at the National Treasury for approval, who responded that the *ex parte* Applicant's project was under Feed-in Tariff policy and thus needed the Ministry of Energy approval. This position was reiterated by the PPP unit in follow up letters, whereupon the *ex parte* Applicant wrote letters dated 25th July 2017 and 2nd October 2017 to the Ministry of Energy, requesting affirmation of the project approval issued on 16th February 2010, which it averred had not been rescinded.

17. The *ex parte* Applicant contends that the 2nd Respondent's Permanent Secretary thereupon in a letter dated 9th October, 2017, affirmed the earlier approval, but suggested that the *ex parte* Applicant accepts the advice of PPP Unit to develop the project in the 50MW phase, since it was under the Feed- in Tariff (FiT) policy, and that that should this advice be disregarded, then the project must be included in the National Integrated Power Plan which would take some time, due to limited demand. That this position was again repeated by the 2nd Respondent's Permanent Secretary in a letter dated 20th November 2017.

18. According to the *ex parte* Applicant, this position is misleading as it's project had been omitted in the Least Cost Power Development Plan 2011-2030 released in February 2011, and the National Energy Policy released in May 2012, and that the omission of its project was deliberate, as there is no documentation to reflect the continuous classification of the said project as being under the Feed-in Tariff (FiT) policy. Further, that the letter dated 21st July 2002 from Eng. Isaac Kiva was clear that the *ex parte* Applicant's project is under the Green Energy Development program, yet it was being asked to scale it down.

19. The *ex parte* Applicant was of the view that the 2nd Respondent was unfairly disadvantaging it by asking that its project be scaled down, while other big projects like Kipeto, Lake Turkana, and Kinangop Wind Projects have neither been commissioned nor supply power to Kenyan people, and yet they continue to receive Ministry of Energy support as their commissioning dates remained intact.

20. In conclusion, the *ex parte* Applicant gave a detailed opinion and reasons as to the causes of the predicament it was facing, which were implicating and making allegations of wrongdoing against persons who are not parties to this suit. The said allegations and averments cannot therefore be reproduced nor considered herein, as the said parties have not been afforded an opportunity to respond.

The Respondents' Cases

The 1st, 2nd And 6th Respondents' Case

21. The 1st, 2nd and 6th Respondent jointly filed Grounds of Opposition dated 17th June 2019 and a Replying Affidavit sworn on 23rd April 2019 by Dr. Eng. Joseph K. Njoroge, CBS, the Principal Secretary, State Department of Energy under the Ministry of Energy. The said Respondents oppose the application on the grounds that it does not meet the threshold for the grant of the judicial review order of *mandamus*, for the reason that the *ex parte* Applicant has not demonstrated the nature of the statutory/public duty owed to it by the Respondents, and how the Respondents have failed to perform the public/statutory duty conferred on them, if at all.

22. Further, that the *ex parte* Applicant's proposed project exceeded the limits set under the current 2nd Respondent's Feed in Tariffs (FiT) policy, and therefore it needed to get the relevant approvals from the Public Private Partnerships (PPP) Unit of the National Treasury and a "go ahead" from the Ministry for the project to be considered in future planning cycles.

23. The last set of grounds raised in opposition were that the *ex parte* Applicant's prayer that it be issued with a letter of commission date is premature, for the reasons that the proposed project has no comprehensive feasibility study, has no demonstrated land upon which it is to be based; has not been included in the Government long term electricity planning; and has not been evaluated as being cost effective to the final consumer. Lastly, that the *ex parte* Applicant cannot be included in the register of Public-Private Partnerships unless it complies with all the applicable laws.

24. These grounds were elaborated upon by the Principal Secretary in the Ministry of Energy in his affidavit, wherein he averred that the energy sector is 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 explained that the Ministry's strategy is consumer welfare driven, and aims to achieve the most opportunistic energy mix on the national grid at the least cost. In addition, that 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 are given the greenlight for construction, are commissioned and connected to the national Grid.

25. It was averred that whereas the 2nd Respondent 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 for small power producers, and 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. The FiT values were detailed by the deponent, who further stated that any interested investor in renewable energy has to apply to the 2nd Respondent for the requisite licenses, which applications are considered without discrimination and preferential treatment on any party. The deponent reiterated that 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.

26. Specifically, on the approval of the *ex parte* Applicant's project, the deponent stated that the letter of approval relied upon was requesting the *ex parte* Applicant to undertake a detailed feasibility study and forward the same to the 2nd Respondent, to assist in the project being simulated in the LCPDP. He averred that the 2nd Respondent's LCPDP team did not screen the *ex parte* Applicant's project because the Government had by the time already approved the 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 which did not include the *ex parte* Applicant's project.

27. Regarding the letter dated 21st July 2009 from Eng. Isaac Kiva referred to by the *ex parte* Applicant, the 2nd Respondent 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 the Feed in Tariffs (FiT) policy of 50MW. In addition, that the project was later approved by the Ministry to undertake the feasibility study; and it was only after approval of the feasibility study report that the project would be considered in the LCPDP. The deponent also made reference to the letter by the 4th Respondent dated 26th April 2017 informing the *ex parte* Applicant that its project exceeded the limits set under the current FiT policy, and therefore needed to get the relevant approvals from the PPP Unit of the National Treasury and the 2nd Respondent for the project to be considered in future planning cycles.

28. The 2nd Respondent averred that the Green Energy Development Program was based in the former Prime Minister's office, its principal mandate was to accelerate development of green energy. However, that the *ex parte* Applicant's project and any other approved project under the Program which had not undertaken the feasibility study and submitted reports to the 2nd Respondent 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 the data to be used in the energy and power generation matrix is derived from the approved feasibility study reports.

29. On the Lake Turkana Wind Power project, the deponent averred that the concept for the project was developed in 2007, and was an opportunity to utilize the readily available wind resource which is green power to generate electricity. Further, that the project was conceptualized as 300MW for the reasons that the country needed a large amount of power, and to take advantage of economies of scale. In addition, that since the project was very far from the load centre, it needed a long transmission line of a high capacity to reduce losses, hence the conceptualization of the 400KV line. The deponent gave a detailed reasons and justification for the viability of the project, and stated that the after feasibility studies conducted by the developer, the project was deemed robust enough to accommodate the 300 MW of wind generated electricity, and was therefore properly developed within the LCPDP, and remains one of Kenya's least cost power projects to date.

30. It was averred that although the *ex parte* Applicant's project and the Lake Turkana Wind Power projects are approximately 200km apart, they would be connected to one power system, and having 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. Lastly on the Lake Turkana Wind Power, the deponent stated that its transaction structure placed some obligations on Government agencies, and some on the power plant developers. Therefore, that the obligations retained by public agencies including the 3rd and 5th Respondents were lawful and contractually sound obligations, and any delays if any, in their performance do not amount to an intention to disadvantage electricity consumers or tax payers. In addition, that the response mechanisms to the implementation challenges with the Lake Turkana Wind Power transmission line project have been well thought out, have been quick, and responsible.

31. It is the 1st 2nd and 6th Respondents case therefore, that they follow the procedure set out in the FiT Policy for projects in renewable energy below a capacity of 50MW for wind and 40MW for solar. Further, that the guidelines in the policy are the ones used for the approval of the expressions of interest and feasibility study, negotiation of the PPA and eventual issuance of the Power Generating License. According to the deponent, the *ex parte* Applicant was supposed to submit the feasibility study reports to the 2nd Respondent for consideration, approval and guidance on the nature/type of capacity the system could be able to uptake, which is yet to happen, and it is only after approval of the feasibility study that the *ex parte* Applicant will be able to negotiate a PPA.

32. The said Respondents detailed what the feasibility study should contain, and averred that the 2nd Respondent has requested the *ex parte* Applicant to submit the said feasibility study reports for consideration but to no avail. That it is therefore inconceivable for the *ex parte* Applicant to demand that the Respondents be compelled to negotiate a PPA with it and issue a letter of commission date, or that it be compelled to include its project in the list of public-private partnerships register.

33. In conclusion, it was averred that the instant application does not meet the threshold required for an order of mandamus to issue against the Respondents herein, and that the 1st, 2nd and 6th Respondents have at all times acted in accordance with the principles of the Constitution as well as the enabling legislations in the discharge of their constitutional, statutory and/or any other lawful mandate.

The 3rd Respondent's Case

34. In addition to the preliminary objection raised on this Court's jurisdiction, the 3rd Respondent filed Grounds of Opposition dated 21st November 2019. The 3rd Respondent opposed the *ex parte* Applicant's application firstly on the ground that the same is incompetent as it seeks orders which are against the Rules and Regulations governing the mandate of the 3rd Respondent. It was stated in this respect that the 3rd Respondent has no legal obligation to issue a letter of commission date and enter into a PPA for 300 Megawatt wind power with the *ex parte* Applicant, neither does it have the mandate issue a Power Generating License to the *ex parte* Applicant.

35. Secondly, that the *ex parte* Applicant has not met the legal requirements to grant the orders sought in the application, for reasons that it has no ownership to the property in which the purported project is to be undertaken and in which relief for compensation for wayleave is being sought; it has no *locus standi* to seek compensation on behalf of the Bubisa Community, and no alternative dispute resolution mechanism has been initiated by the *ex parte* Applicant as is required under the Community Land Act 2016. Further, that there is no legitimate expectation that has been violated by the Respondents, and the application is an abuse of the court process as the issue raised of compensation for wayleave is *res judicata*.

36. Lastly, the 3rd Respondent avers that the application seeks orders which are in contravention of the principles of privity of contracts, and that the orders sought by the *ex parte* Applicant are of a commercial nature and the application therefore does not meet the threshold for judicial review proceedings.

The 4th Respondent's Case

37. The response by the 4th Respondent was in a replying affidavit deposed to by David K. Kariuki, its Deputy Director in the Energy Planning Department. According to the deponent, the *ex parte* Applicant's project has not satisfied the criteria for issuance of a commissioning date, and reiterated the criteria set out by the 2nd Respondent hereinabove. Therefore, that to the best of the deponent's knowledge, the *ex parte* Applicant's project is merely a concept at the present time.

38. The deponent also gave similar explanations as those of the 2nd Respondent as to why its Least Cost Power Development Plan (LCPDP) team did not include the *ex parte* Applicant's project, after it was requested by the 2nd Respondent in a letter dated 4th October 2013 to analyze the said project. The 4th Respondent also proffered similar explanations as those of the 2nd Respondent as to why the *ex parte* Applicant 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 its project, since its project did not fall in the Feed-in-Tariff (FiT) policy, as indicated in its letter to the *ex parte* Applicant dated 26th April 2017.

39. According to the 4th Respondent, the options that were available to the *ex parte* Applicant were as follows:

- a) In the event that the *ex parte* Applicant chose to proceed under the FiT Policy, it was 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 its project further.
- b) If the *ex parte* 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. For this to happen, the 4th Respondent 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.

40. In the deponent's view, the *ex parte* 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 *ex parte* Applicant has failed and/or ignored to line their project to the set out guidelines under the law.

41. It was also averred that the *ex parte* Applicant is guilty of material non-disclosure and therefore undeserving of the remedies sought. According to the 4th Respondent, the *ex parte* Applicant has 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. It was the deponent's view that the effect of the decision is that the Applicant's project has no land for its location. The deponent therefore urged the Court not to grant the orders sought as the same would be in vain, since the *ex parte* Applicant does not possess the 150,000-acre land where the intended project would have been set up.

The 5th Respondent's Case

42. The 5th Respondent filed a replying affidavit sworn by Duncan Macharia, its Company Secretary. It is averred that the instant application is incompetent and ought to be struck out, as the facts relied upon by the *ex parte* Applicant are 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.

43. It was further averred that the *ex parte* 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 *ex parte* 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 will effectively coerce the 5th Respondent into making compensations for way leave, whereas the *ex parte* Applicant has no title or ownership rights to the suit property.

44. Reference was made to the judgment of the Court of Appeal in **Gitson Energy Limited vs Francis Chachu Ganya & 6 Others, [2017] e KLR** which according to the 5th Respondent dismissed the *ex parte* Applicant's appeal, and upheld the decision of the High Court in Misc. Civil Application No. 347 of 2012 which quashed 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 *ex parte* Applicant. According to the deponent, 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.

45. It was also averred that prior to the compensation demands, the *ex parte* 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. The 5th Respondent stated that the proposal was untenable as the land which is traversed by the Eastern Electricity Highway Project is community land under the Community Land Act, and the *ex parte* Applicant lacks capacity to urge any compensation in trust for the Bubisa Community through an order of mandamus or otherwise.

46. Lastly, it was averred that section 46 of the Community Lands Act does not grant the *ex parte* Applicant sufficient interest on behalf of, or superior to the interest of the Bubisa Community, who successfully challenged the *ex parte* 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.

The *ex parte* Applicant's Reply

47. In response to the Grounds of Opposition and responses by the Respondents, the *ex parte* Applicant reiterated that that the 2nd Respondent in a letter dated 29th September 2010 issued it with a Commissioning Date (COD) of early 2013, which is still valid and has never been revoked or altered. Further, that the rights to the COD of early 2013 lapsed due to the legal process that started in late 2012 and took five (5) years to be resolved at the Court of Appeal in **Civil Appeal No. 47 of 2014**. Therefore, that the *ex parte* Applicant's rights to the 2013 COD are still pending to be realized.

48. The *ex parte* Applicant also reiterated that that their COD of 2013 were issued by a competent office holder with full power granted by the then appointing authority to perform duties in that office. Furthermore, that it repeatedly in 2017 through several letters requested and demanded for fair administrative actions on its new COD from the Respondents without any success. That *ex parte* Applicant therefore asserted that it is seeking the reinstatement of the earlier issued commissioning date (COD) of early 2013 from the 2nd Respondent given in the letter dated 29th September 2010, which was not cancelled, reversed or rescinded and only lapsed as a result of the Court cases since which concluded on 24th February, 2017. It was also its contention that its 300MW project approval of February 16th, 2010 issued by 2nd Respondent under the Green Energy Development Initiative Plan as has never been cancelled or rescinded.

49. It was also the *ex parte* Applicant's deposition that the 2nd Respondent is attempting to apply the FiT policy retrospectively to its project which had been approved on 16th February 2010, and does not dispute their claim that the Lake Turkana Wind Project exceeds the FiT policy limits yet it was allowed and supported by the Respondents. The *ex parte* Applicant accordingly demanded the same treatment. It was also the *ex parte* Applicant's averment that the PPP unit was established post its project's approval on 16th February 2010, and the PPP Act of 2013 was assented to on 14th January, 2013 almost 5 years after the *ex parte* Applicant's project had been approved. The *ex parte* Applicant also averred that a feasibility study by the world acclaimed wind consulting company, Garrad Hassan (UK) was done in 2007 in coordination with the 2nd and 3rd Respondents, who have received the said feasibility study severally and repeatedly. Further, that it is an undeniable fact that 3rd Respondent's top managers under the direction of the then Managing Director and current 2nd Respondent Principal Secretary provided and coordinated grid information to the *ex parte* Applicant and its consultants in the 2007- 2008 grid study.

50. According to the *ex parte* Applicant, the 2nd Respondent concedes that the Lake Turkana Wind Project had an COD of 2014 yet they only connected the project to the National grid in August 2018, 4 or 5 years later. Therefore, that the Respondents accommodated the Lake Turkana Wind Project delays, yet the *ex parte* Applicant was in court for 5 years and could not move forward with project tasks including completing the project by early 2013 as previously approved. Further, that the 1st, 2nd & 6th Respondents have failed in their fiduciary duty by sanctioning the Suswa- Loyagalani Transmission line that will cost Kenyan people Ksh 45billion instead of the initial Ksh 18billion planned, which line should not have been funded through public funds as it is for the Lake Turkana Wind Project. The *ex parte* Applicant further averred that the 2nd Respondent is being disingenuous and discriminatory when they acknowledge that the Lake Turkana Wind Project site is 200KM away and will be affected by the *ex parte* Applicant's 300MW project, yet Kengen is attempting another 300MW wind farm adjacent to the *ex parte* Applicant's site and is listed in the 2017-2037 LCPDP.

51. Furthermore, that the 6th Respondent has failed to defend the rule of law and the Constitution by allowing the Respondents to include the Kengen 300MW wind farm in Bubisa which is next to the *ex parte* Applicant's site in the 2017-2037 LCPDP while the *ex parte* Applicant was not, yet Kengen does not have the land which is one of the requirements the Respondents have listed before inclusion in the Least Cost

Power Development Plan (LCPDP), which is a demonstration of their application of double standards, unfair discrimination, illegal and dereliction of duty. In addition, that KENGEN could not have obtained the wind farm land post 27th August 2010 after the promulgation of the Constitution without the establishment of National Land Commission and Community Land Act which was done in 2016, and as the operationalization guidelines to appoint Community Land Registrars have not been passed by Parliament to date, and which are also awaited by the *ex parte* Applicant to complete its remaining tasks as held in the Civil Appeal No. 47 of 2014.

52. It was also the *ex parte* Applicant's reply that the LCPDP was poorly thought out and full of errors and inconsistencies, that resulted in unfair and illegal discrimination of some projects which were perceived uncooperative in failing to allocate shares, bribes or personal gains to the Respondents. Further, that the Respondents lack of attention to details, proper planning and basic management is evident as they could have evaluated and factored in the previously project pipelines and plans including the Accelerated Energy project plan under Green Energy Development program for 2000MW, which they have acknowledged was a government power plan which was ran and coordinated from the office of the then Prime Minister as per then law and Constitution. In addition, that the 2nd Respondent was categorical in Eng. Kiva's letter of 21st July 2009, that the *ex parte* Applicant's project had been moved to the Accelerated Development of Green Energy: Green Energy Development Initiative program, which was a fully owned and driven Government plan led by the former the Prime Minister in the National Unity Government of 2008-2013 to inject 2000MW to the National grid by 2012.

53. Accordingly, the *ex parte* Applicant reiterated that the Respondents quest is to give LTWP a head start and an illegal opportunity to break-even and have a PPA discount which is meant to unfairly and illegally lock out other viable large scale renewable projects, where economies of scale would apply to benefit Kenya people and economy. It averred that the Government of Kenya support to renewable projects must be uniform to all the players of similar size and fuel, and indicated that its project like LTWP is 300MW, in Marsabit County, 200KM part, uses wind energy. Further, that it has legitimate expectations for fair treatment from the Respondents for all similarly placed wind farm projects in Marsabit where both Lake Turkana Wind Power and its projects are located

54. In addition, that the 2nd Respondent has indicated that projects are evaluated as being cost effective to the final consumer, and they have indicated that LTWP is one of the least cost power projects to date in Kenya, whereas Gitson Energy seeks to obtain and match the terms of LTWP thus also being a least cost power project, and was also the first to buy the wind atlas in 2004, 3 years ahead of the LTWP conceptualization. It was further his averment that 2nd Respondent wrote a letter of support for Gitson in May 2007, and the Gitson Energy project obtained UNDP endorsement 2007 and undertook feasibility and Grid study in 2007. Therefore, that there is no reason for the 2nd Respondent and others to accord LTWP preferential, unfair and illegal treatment.

55. On the averments made by the Respondents on its claims for wayleave compensation, the *ex parte* Applicant contended that the Community Land Act of 2016, Energy Act 2006 and Article 40 of the Constitution require that just and prompt payments of the compensation on wayleaves or easements obtained by government or public interest. Further, that the Respondents have not adduced any evidence that these monies have been deposited in an interest-bearing account for the unregistered communities in Marsabit, Samburu, Isiolo, Laikipia, Nyandarua and Nakuru counties as outlined in the Community Land Act of 2016.

56. Furthermore, the aversion that the wayleave route by the 5th Respondent is not on *ex parte* Applicant's project land is untrue and misguided, as the Kenya-Ethiopia Transmission line route is in public domain and clearly shows the grid line transiting on the *ex parte* Applicant's land. It was also the *ex parte* Applicant's averment that Articles 22 (1) (2) (a)(b) and 258 of the Constitution of Kenya provides that anyone can raise or seek enforcement of Bill of rights on its own behalf and others. The *ex parte* Applicant asserted that the Kenya-Ethiopia Interconnector Transmission that transits on its project site will impact the wind farm layout as some wind turbines may need to be relocated to less than optimal positions resulting into huge economic loss during the life of the project.

57. On the import of the Court of Appeal decision in **Civil Appeal No. 47 of 2014**, the *ex parte* Applicant averred that after the said judgment, it wrote to National Land Commission on 30th May, 2017 who in turn forwarded its letter to the Cabinet Secretary of Lands for action. Further, the Chief Lands Registrar responded in a letter dated 28th August, 2017 indicating the appointment of Community Lands Registrars was waiting on Parliament to pass the law and guidelines to actualize some aspect of Community Lands Act of 2016. That the delay by Parliament in passing the necessary laws and the appointment of Community Lands Registrars have not been occasioned by Gitson Energy, but impacts the continuation and eventually the completion of the process. Further, that the delay does not erode, invalidate or extinguish any accrued rights of Gitson Energy and the project that were affirmed by the Court of Appeal.

58. The *ex parte* Applicant reiterated that the 4th Respondent has subjected Gitson Energy to undue disadvantage compared to Lake Turkana Wind Power (LTWP), a project of similar size of 310MW project, in the same county where each firm got 150,000 acres in Marsabit County. Furthermore, that several wind farm projects including Lake Turkana Wind Power 310MW have had their commissioning date varied, revised severally and over the years by the Respondents to accommodate their project delays. However, that the 4th Respondent has consistently omitted the *ex parte* Applicant's project in its Least Cost Power Development Projects Plans of 2011-2030 released in 2012 and subsequent annual Energy reports from 2011-2018, and in its Least Cost Power Development Projects Plans of recently released for 2017-2037, including the expected commissioning dates (COD).

59. Therefore, that Gitson Energy's quest for a new COD in 2021 to be reissued by the respondents is no different from other projects who have received similar treatment on their COD revisions from the Respondents, neither is it unreasonable or illegal. The *ex parte* Applicant further averred that the 4th Respondent is being untruthful as the LCPDP 2011-2030 Plan was published in May 2012 and omitted Gitson Energy's project, yet the project had been approved on 16th February 2010 and allocated a Commissioning date of early 2013 on 29th September, 2010, and had been accepted under the Green Energy Development Initiative in 2009. He further averred that the 5000MW Power Plan was announced in May 2013 after the Jubilee Government came to power and again, Gitson Energy was omitted 3 years after the Gitson Energy project and COD approvals of 2010. Further, he averred that Gitson Energy was refused the enrolment to the Feed-in- Tariff (FiT) in 2009 by the 2nd Respondent, whereas the Respondents went ahead to approve other wind projects post the 16th February, 2010 approval date.

60. Lastly, the *ex parte* Applicant averred that that the continued delay by Respondents in re-issuing another Commissioning Date (COD) to

Gitson Energy is costing a loss of Ksh 29B per year. Further, that relocation of any wind turbine to a less optimal position even in few meters from the current layouts will bring significant economic loss to Gitson Energy now and in the life of the project, and the Respondents must compensate for this loss. It was thus the *ex parte* Applicant's conclusion that the Respondents have failed and neglected some of their functions and tasks and it would be in the interest of justice that the prayers sought are granted.

The Determination

61. I have considered the pleadings and submissions by the *ex parte* Applicant and Respondents, and note that a preliminary issue was raised on whether the *ex parte* Applicant's application is properly brought before this Court for want of exhaustion of internal remedies. If found to be properly before this Court, the Court will consider the main substantive issue raised by the pleadings and orders sought therein, namely whether the Respondents owe the *ex parte* Applicant any duty in relation to its power generating project, and lastly if the orders sought are merited.

62. In considering the preliminary issue, this Court is guided by the decision of the Court of Appeal on the circumstances in which a preliminary objection may be raised in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, wherein it was held as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

63. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. On the other hand, a preliminary objection cannot be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion. It is with this guidance that I shall proceed to consider the issue of exhaustion of internal remedies.

On Exhaustion of Internal Remedies

64. The issue of exhaustion of internal remedies was raised in the 3rd Respondent's Preliminary Objection filed alongside its Grounds of Opposition, which challenge this Court's jurisdiction to entertain the instant matter, as well as by the 4th Respondent. The 3rd Respondent submitted that the Preliminary Objection is raised pursuant to the Energy Act No. 12 of 2006 (Repealed) as read with the Energy (Complaints and Dispute Resolution) Regulations 2012. The 3rd Respondent further submitted that the Energy (Complaints and Disputes Resolution) Regulations were gazetted on 25th May 2012, and that under section 2 thereof, the Regulations apply to any person who has a complaint or a dispute regarding any license, permit, contract, code, conduct, practice or operation of any party of any matter regulated under the Act.

65. Reference was also made to section 107 of the Energy Act, which provides that appeals from the decisions of the Energy Regulatory Commission shall lie to the Energy Tribunal, and to section 108 which establishes a tribunal known as the Energy Tribunal, for purpose of hearing and determining the said appeals. The 3rd Respondent also relied on Article 159 (2) (c) of the Constitution which provides that Courts shall be guided by alternative forms of dispute resolution and the same shall be promoted. It is submitted that the *ex parte* Applicant did not approach the Energy Regulatory Commission with a complaint on the issues before this Court, considering that the actions of the Respondent were within its powers as provided under sections 46 to 50 of the Energy Act. Section 48 of the Act which provides for raising of objections to the laying of power supply lines was cited in this regard, and reference was also made to Section 49 of the Act which sets out the procedure for lodging a complaint before the Commission for applications made under Section 48.

66. Reliance was placed on various decisions where this position was upheld, including the cases of **Alice Mweru Ngai vs KPLC Kerugoya ELC 287 of 2014**, **Paul Magoma vs Gianchore EA Company & 2 Others, Kisii HC Petition 4 of 2015**, **Waweru Kiruki vs Kenya Power and Lighting Company, Nakuru HCCC 197 of 2019** and **James Kibui Githinji vs Kenya Power and Lighting Company Limited, Nairobi HCCC 146 of 2011**. It was thus submitted that the dispute between the parties herein ought to be handled by the 4th Respondent, and thereafter the Energy Tribunal, and that this Court can only be approached in its appellate jurisdiction if a litigant demonstrates dissatisfaction with the previous two avenues. Hence, it is submitted that the instant suit is premature and ought to be struck out for lack of jurisdiction.

67. Lastly, while noting that the Energy Act 2006 has since been repealed by the Energy Act 2019, the 3rd Respondent submitted that Part X of the Act deals with repeals, saving and transitional clauses, and section 224 (2) (e) provides that any subsidiary legislation issued before the commencement of this Act shall, as long as it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation. Hence, that the Energy (Complaints and Dispute Resolution) Regulations 2012 is still enforceable under the Energy Act 2019.

68. The 4th Respondent on its part submitted that this Court's jurisdiction must be exercised in accordance with the Constitution or statute as held in **Kenya Revenue Authority & 2 Others vs Darasa Investments Limited [2018] eKLR** and **The Owners of Motor Vehicle 'Lillian S' V Caltex Oil Kenya Ltd [1989] KLR 1**. Reference was made to section 9 of the Fair Administrative Action Act, 2015 which provides that the Court shall not review the decision of an administrative body unless the mechanisms for appeal or review and all remedies available under any other law are exhausted. It was submitted that the *ex parte* Applicant has not exhausted the available remedies provided under the Energy Act, as it did not appeal to the Energy and Petroleum Tribunal established under Section 108 of the Energy Act, 2006 (repealed). Hence, that the instant application is prematurely before this Court and ought to be dismissed.

69. The 4th Respondent cited the cases of **Republic vs Energy Regulatory Commission ex-Parte Pekenya Gas Supplies Limited [2016] eKLR**; **Republic vs Principal Magistrate Lamu Magistrate's Court & Another Ex-Parte Kenya Forest Service [2016] e KLR**; and **Republic vs County Government of Kiambu Ex-Parte Fechim Investments Limited [2016] e KLR** in support of its submissions.

70. The *ex parte* Applicant's submission on its *locus standi* and the jurisdiction of this Court were that the 1st, 2nd, 3rd, 4th, and 5th Respondents acted unlawfully and illegally, and in contravention of Article 47 of the Constitution that affords every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, that their actions are contrary to the national values and principles of governance of non-discrimination, transparency and accountability as envisaged by Article 10 of the Constitution. In addition, that they are in violation of Article 232 of the Constitution which includes high standards of professional ethics, involvement of the people in policy making and accountability for administrative acts.

71. It was further submitted that Article 22 of the Constitution grants every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. Further, that sub-article 2 provides that in addition to a person acting on their own interest, proceedings under clause 1 may be instituted by a person acting as a member of or in the interest of a group or class of persons; a person acting in public interest.

72. Lastly, the *ex parte* Applicant's position is that sections 26 and 107 of Energy Act No. 12 of 2006 do not make the Tribunal the only and mandatory avenue to address any grievances. Furthermore, the issues raised in this application are complex, impact public interest, involve the constitutional Bill of rights and fundamental freedoms of Gitson Energy and others, thus requiring to be determined by the High Court. The *ex parte* Applicant submitted that the issue in this application revolves around the Respondents' obligations to restore its COD which had previously been granted, and therefore there is no dispute as regards the issue of the COD capable of being referred to the Tribunal.

73. I am in this respect guided by the case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

74. The Court of Appeal proceeded to define jurisdiction and its source as follows:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

75. A Court's or tribunal's jurisdiction therefore flows from either the Constitution or statute, or from principles laid out in judicial precedent. It is thus a pure question of law. The judicial review jurisdiction of this Court is in this respect granted by Articles 47 and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged, or unfair action by an administrator is alleged. In addition, Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

76. On the issue raised by the 3rd and 4th Respondents on exhaustion of internal remedies, it is the position that the exhaustion of alternative remedies is now a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act. Article 159(2)(c) of the Constitution obliges this Court to observe the principle of alternative dispute resolution. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

77. The doctrine of exhaustion of remedies was first embodied by the Court of Appeal in **Speaker of National Assembly vs Karume (1992)**

KLR 21. The said Court further clarified the doctrine under the current constitutional dispensation in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

78. It is therefore necessary at the outset to clarify the dispute that is before this Court, and whether it is one that falls within the dispute resolution methods provided by the Energy Act. It is not in dispute in this regard that the *ex parte* Applicant has commenced judicial review proceedings in relation to various decisions made by the Respondents on its proposed project to generate wind and solar power for connection to the grid. This Court is being asked in exercise its supervisory jurisdiction, to review the lawfulness of the proceedings and decisions of various Respondents in this regard.

79. Under section 25 of the Energy Act of 2006, the jurisdiction of the Energy and Petroleum Tribunal established thereunder is to hear and determine disputes and appeals in accordance with the Act or any other written law. Section 107 of the said Act further sets out the jurisdiction of the Energy Tribunal as follows:

“Where under this Act the provision is made for appeals from the decisions of the Commission, all such appeals shall be made to the Energy Tribunal, in accordance with the provisions of this Part.”

80. It is thus evident that the jurisdiction of the Tribunal is limited to instances where there is statutory provision for dispute and appeals resolution by it, including appeals from decisions of the Commission, which is the 4th Respondent herein. The jurisdiction is therefore limited to matters arising under the Energy Act, or specifically referred to the Tribunal by other Acts. It is in this regard notable that some of the decisions that are the subject of this application were made by actors who are not players in the energy sector and not subject to the regulatory framework set out in the Energy Act of 2006, notably the 1st Respondent.

81. In addition, there are provisions of the Constitution and principles of law relied upon in the instant application, which may beyond the purview of the internal dispute resolution mechanisms of the Energy Act. In considering whether an alternative remedy is effective, the Court must consider the adequacy of the alternative remedy as a matter of substance in addition to its availability. In this respect the alternative remedy should be convenient, expeditious and effective in practical terms, and the procedure employed should provide the claimant with the outcome sought as a matter of substance.

82. It is for this reason that section 9 (4) of the Fair Administrative Action Act, provides that the Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. While the exceptions to the exhaustion requirement are not clearly delineated, the Court of Appeal gave guidelines when they would apply in Republic vs. National Environment Management Authority, Civil Appeal No. 84 of 2010, as follows:

“...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge.”

83. Likewise, it was held by the High Court In the Matter of the Mui Coal Basin Local Community (2013) e KLR, R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya and Mohamed Ali Baadi and others vs The Attorney General & 11 others [2018] eKLR that in reaching a decision as to whether an exception applies, courts will undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved including the level of public interest involved, and the polycentricity of the issues and the ability of a statutory forum to determine them.

84. In my view the myriad of arguments made in the instant application in relation to the multiple parties involved, can only be resolved by considering various regulatory frameworks and principles of law, and may not therefore be appropriately resolved by the Energy Tribunal. It is thus my finding that the alternative remedies provided under the Energy Act are ineffective to deal with the issues raised in the *ex parte* Applicant's application for the foregoing reasons. It is also important to underscore the fact that an alternative dispute resolution method does not divest a Court of jurisdiction to entertain a claim for judicial review. Its existence is only relevant to the extent that it is a material consideration in the exercise of the Court's discretion to grant the relief sought, for the reasons that judicial review is a remedy of last resort.

85. In addition, Courts still retain the residual jurisdiction to intervene despite the existence of an alternative remedy, as was noted by the Court of Appeal in Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR:

“Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where

arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

86. Lastly, it needs to be restated in this respect that this Court has **inherent and wide jurisdiction under Articles 47 and 165(6) to supervise the Respondents in this respect**. In the premise, I find that the *ex parte* Applicant’s Notice of Motion application dated 30th November 2018 is properly before this Court.

On the Respondents’ Legal Duties.

87. The *ex parte* Applicant has sought various orders of mandamus against the Respondents. The purpose of an order of mandamus is to compel the performance of a public duty or any act contrary to or evasive of the law. It therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; the court will not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will pose implementation challenges that require the Court’s supervision. See in this regard the decision in **Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.**

88. It was further been held in **Republic vs The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M’agere, Nairobi High Court Misc. Application No. 395 of 2012** that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms.

89. In this respect, the main issue that this Court will therefore explore and determine is whether the Respondents have legal duties in relation to the commissioning of the *ex parte* Applicant’s wind power generating project, and to enter into a Public-Private Partnership Agreement and consequential arrangements with respect to the said project.

The Submissions

90. The *ex parte* Applicant in this respect submitted that after the Court of Appeal’s judgment delivered on 24th February 2017 in **Civil Appeal No. 47 of 2014**, it repeatedly sought fair administrative action from the Respondents through several letters and in person meetings to have his project COD reinstated and reissued without success. Further, that it has a right to fair administration action as provided under Article 47 of the Constitution, which sets the parameters for what amounts to reasonableness in the actions taken by public bodies, and cited section 2 of the Fair Administrative Action Act which defines administrative action. Reliance was placed on the decision of the Court of Appeal in **Judicial Service Commission vs Mbalu Mutava and Another [2015] e KLR** that Article 47(1) lays a constitutional foundation for control of the powers of state organs and other administrative bodies and entrenches the right to fair administrative action in the Bill of Rights.

91. The *ex parte* Applicant further submitted that the 1st, 2nd and 3rd Respondents ought to have accorded it a fair hearing if it wanted to reduce the size of the 300MW project. Accordingly, reference was made to the case of **Mwangi Stephen Muriithi vs National Land Commission & 3 Others** where it was held that the right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/ or present their case. Such a person is entitled to be furnished, in good time, with information, including reports and documents in the body’s possession that may be prejudicial to his/her case and which would guide that body relied in arriving at its decision. The *ex parte* Applicant also cited the case of **Miguna Miguna vs Fred Okengo Matiang’I, Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 Others; Kenya National Commission on Human Rights (Interested Party) [2018] e KLR** for the position that the one of the safeguards guaranteed by Articles 47(1) and 50(1) of the Constitution and is fair administrative action and hearing.

92. It was thus submitted that since the *ex parte* Applicant has demonstrated that the Respondents violated its right to fair administrative action, such actions being unlawful, unreasonable and unfair, and that an order should be issued compelling the Respondents to issue it with a Power Purchase Agreement (PPA) and Letter of Commission Date (COD). The *ex parte* Applicant cited the case of **Republic vs Commissioner of Customs Services ex Parte Imperial Bank Limited [2015] e KLR** for the position that this Court has the power to grant the orders sought.

93. It is also the *ex parte* Applicant’s submission that the act by the 5th Respondent of constructing the Kenya-Ethiopia Transmission line without consulting and justly compensating it cannot be sanitized by claiming public interest. Reference was made to the holding in the case of **Mike Maina Kamau vs Attorney General [2017] e KLR** that even if the public interest supersedes private interest, due process ought to have been followed and the State has no right whatsoever to breach rights to property as provided by Article 40 of the Constitution. Therefore, that the 5th Respondent violated the *ex parte* Applicant’s right to property under Article 40 by construction of the Kenya-Ethiopia Transmission without consulting and paying just compensation. It was further submitted that the *ex parte* Applicant and Bubisa Community are waiting for Parliament to pass the Community Land Registrars guidelines as advised by the Chief Land Registrar, before they can proceed to finalize the land acquisition as held by the Court of Appeal in **Civil Appeal No. 47 of 2014**, and as provided by Section 46 of the Community land Act, 2016.

94. Further, that the 5th Respondent’s refusal to allow Gitson Energy project to connect to Kenya-Ethiopia transmission line that transits its project site is unfair and discriminatory, as the said Respondent spent public funds to build the Suswa-Loyangalani grid line for Lake Turkana Wind Power (LTWP). It is submitted that the *ex parte* Applicant’s project was one of the energy projects referred in the Government of Kenya PPP Policy Statement (2011) just like LTWP. According to the *ex parte* Applicant, the Respondents accorded LTWP unfair advantage and preferential treatment over the years, including varying its commissioning dates repeatedly, giving it take or pay, constructing grid line, and signing a PPA. It was also submitted that the Respondents have approved other projects post the *ex parte* Applicant’s approval date of 16th February 2010, and some are queued for commissioning until 2037, yet Gitson Energy’s project continues to be omitted,

excluded and unfairly discriminated against by the Respondents by refusing to reissue a new COD to restore the project to its status before the court cases.

95. According to the *ex parte* Applicant, the Respondents also acted in excess of their powers by referring the project to the FiT policy yet it was under the Green Energy Development Program. Further, that the privately initiated investment proposal option is only possible under the Public-Private Partnership Act which became law in January 2013 and was revised in 2015, 3 years after the Gitson Energy's project had been approved. The *ex parte* Applicant highlighted sections of the Government of Kenya's PPP Policy on public-private partnerships in Kenya and the legal framework in the Public Procurement and Disposal (Public-Private Partnership) Regulations, 2009, to submitted that that the Respondents are attempting to illegally apply the Public-Private Partnership Act retrospectively to Gitson Energy.

96. The *ex parte* Applicant cited the case of **John Kipkoech Rotich & 29 Others vs Drinks Regulation Committee Exparte John Kipkoech Rotich t/a Silent Pub & 29 Others [2019] eKLR** for the holding that the purpose of judicial review is **to ensure that the individual is given fair treatment by the authority to which he has been subjected**. Reference was also made to the Supreme Court of Kenya decision in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] e KLR** on the unconstitutionality of retrospective law.

97. In conclusion, the *ex parte* Applicant submitted that its accrued interest to develop the project is in real danger through the acts of commission and omission of the Respondents. Further, that the Applicant had legitimate expectation that approval for its project from the 2nd Respondent was valid, adding that the Court of Appeal decision in **Civil Appeal No. 47 of 2014** was a finality in affirming its accrued interests on the land to develop the project. It is further submitted that the *ex parte* Applicant had the legitimate expectation that the Respondents will treat it fairly in their dealings in their official capacity just like all similarly placed projects, and that it did not expect to be discriminated against by the Respondents or be divested by the 5th Respondent who illegally took up way leave easement without following the law or consulting it. The *ex parte* Applicant thus submitted that it must enjoy equal benefits and protections guaranteed in the Constitution.

98. The Attorney General filed submissions on behalf of the 1st, 2nd and 6th Respondents, and cited the case of **Kenya National Examination Council v Republic, Ex-Parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** where the Court of Appeal summarized the purpose and reach of an order of mandamus, and submitted that the *ex parte* Applicant has been unable to demonstrate the nature of the legal duty that is imposed upon the Respondents herein, or that the Respondents have refused to perform that particular duty. While reiterating the averments made in the pleadings, the said Respondents submitted that that the *ex parte* Applicant failed to demonstrate compliance with the procedure for it to be considered in the LCPDP. Hence, there is no legal duty imposed on the Respondents to be performed which they have refused to perform.

99. The 3rd Respondent on its part submitted that **the orders sought offend the basic elements of contractual agreements under statute and common law. To wit, a contract comes into existence when an offer by one party is unequivocally accepted by another, and both parties have the requisite capacity. That, some consideration must pass and the parties must have intended their dealings to give rise to a legally binding agreement. It is submitted that this Court has no power to issue orders to the effect that the Respondents will be forced to enter into a Power Purchase Agreement with the *ex parte* Applicant. Reference was made to the case of Charles Mwirigi v Thananga Tea Growers Sacco Ltd & Another [2014] e KLR where the Court stated that it is trite that there are three elements of a valid contract; an offer, acceptance and consideration. It is submitted that the Court should not allow the *ex parte* Applicant to try and use it to force the Respondents to accept its offer to enter into Power Purchase Agreement without considering the elements of contract making.**

100. **The 3rd Respondent also** submitted that the doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations arising under it or any person or agent except the parties to it. Therefore, that the *ex parte* Applicant cannot seek orders against the Respondents to compel them to enter into an agreement in similar terms as other entities who have no relationship whatsoever with the *ex parte* Applicant. Reference was made to the holding in the case of **Agricultural Finance Corporation vs Lengetia Ltd** that as a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party. **It was thus submitted that it is not the role of the courts to impose upon parties in a dispute with a view of forcing them to enter into agreements of which a party has no intention to enter. That, the courts can only ensure the enforceability of an existing contract.**

101. The 4th Respondent's submissions were that the *ex parte* Applicant failed to comply with the requisite requirement for the performance of the public duty. In this case, the requirement is obtaining the necessary approvals and consensus for development of the wind power project. Particularly, it is submitted that the *ex parte* Applicant has not completed the comprehensive feasibility studies as requested to, and has not disclosed to the Court that it lost the land on which the project was to be developed. It was submitted that the orders sought would amount to issuing the *ex parte* Applicant with a power generation license without fulfilling the license conditions prescribed under the Energy Act and the Energy (Electricity Licensing) Regulations, 2012. Further, that, granting the orders sought would amount to the Court performing an executive action in contravention of the constitutional principle of separation of powers.

102. The 4th Respondent further submitted that the orders sought are not practicable, as the *ex parte* Applicant's proposed project exceeds the maximum capacity under the FiT policy, and the capacity proposed cannot be accommodate in the current planning period, because the Government and the MOE have already committed projects. In this respect, it is submitted that the *ex parte* Applicant fails the test for an order of mandamus as captured in **Republic v Principal Secretary, Ministry of Internal Security & Another Ex-Parte Schon Noorani & Another [2018] e KLR**. According to the 4th Respondent, no decision was made on whether or not to issue the *ex parte* Applicant with the power generation license, to approve the PPA, and to issue letter of Commission Date. Further, that, the *ex parte* Applicant's proposed project had not reached a stage where the Respondents would be under duty to consider whether to approve the proposed project. It was reiterated that issuance of letter of Commission Date is only possible when a project has at least the met the requirements including: comprehensive feasibility study, has acquire land where the proposed project will be based, has been included in the Government's long term electricity planning, has been evaluated as cost effective and obtained the necessary approvals and consents from the relevant statutory bodies. The 4th Respondent added that in order for the *ex parte* Applicant to be issued with a power generation license, it was to comply with basic requirements outlined in Regulations 4,5,6,7 and 11 of the Energy (Electricity Licensing) Regulations, 2012 and Section 28 of the

103. The 4th Respondent urged the Court to be guided by the decision in **Kenya Revenue Authority & 2 Others v Darasa Investment Limited [2018] e KLR** where the Court of Appeal allowed an appeal against a decision granting judicial review orders, on the basis that the Applicant had not complied with the prerequisite to the issuance of the relief sought in the application. The 4th Respondent also cited the case of **Republic vs County Government of Kiambu Ex-Parte Fechim Investment Limited [2016] e KLR** at 32 where the Court in declining to allow the orders sought said that the Applicant was guilty of non-compliance which disentitled him to the reliefs sought.

104. According to the 4th Respondent, there is no evidence that it subjected the *ex parte* Applicant to differential treatment or discrimination by approving and commissioning other projects without the latter complying with the prerequisites for approval and issuance of commission date and PPA, as similarly held in **Kenya Revenue Authority & 2 Others v Darasa Investment Limited [2018] e KLR** Further, that legitimate expectation does not arise since the *ex parte* Applicant failed to comply with the prerequisites to the performance of the said duties. **It was submitted that the promise made to the *ex parte* Applicant was that if it conducts full feasibility studies and submits the same to the 2nd and 4th Respondent for analysis and review, its proposed project would be considered for approval. Further, that if it made an application for issuance of a power generating license, the 4th Respondent would give it consideration. It is submitted that in the face of the *ex parte* Applicant's non-compliance, no legitimate expectation arose, hence approving the *ex parte* Applicant's project and issuing the power generation license would have been void for illegality.**

105. The 5th Respondent submitted that the *ex parte* Applicant has not demonstrated that he is entitled to performance of duties, as there was no legitimate expectation in the form of a promise that the *ex parte* Applicant could rely on to found a right. According to the 5th Respondent, the Kenya-Ethiopia transmission line was designed or intended for taking up power from a generating plant in Kenya and transmitting it to the national grid. It was submitted that the *ex parte* Applicant is seeking a redesign and reassignment of the purpose of the Kenya-Ethiopia transmission line, something that was not foreseeable. Further, that no power plant has been built up so that power can be evacuated into the transmission line, and it's uncertain whether the *ex parte* Applicant will acquire the land in dispute and set up a power plant that the substation can be built. To wit, that the *ex parte* Applicant wants the 5th Respondent to speculate on the possibilities and construct a substation for future speculation, yet orders for mandamus cannot be issued on what is non-existent.

106. It was also submitted that the construction of a substation is a complex matter which the Court lacks the expertise to supervise, and that the order if granted will be incapable of performance since there are other requirements involved, including an environmental impact assessment which is done by a separate body.

The Analysis

107. I have considered the arguments made by the parties, and the opportune starting point of my determination is to restate the parameters of this Court's jurisdiction as a judicial review Court. In addition to the traditional grounds for judicial review of illegality, irrationality and procedural impropriety expounded in **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300**, judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action. Section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

108. In addition, it was noted by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that **Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

109. It is thus necessary to clarify the acts and omissions in relation to the *ex parte* Applicant's proposed wind project that have been demonstrated by the evidence provided by the *ex parte* Applicant, and that are the subject of this Court's judicial review jurisdiction. The first decision made by the Respondents in this regard is evidenced in a letter dated 21st July 2009 from the 2nd Respondent, was as follows:

“James Gitau,

Chief Executive Officer

Gitson Energy Ltd

P.O. Box 60684-00200

NAIROBI.

Dear James,

RE: EXPRESSION OF INTEREST FOR WIND AND SOLAR ENERGY DEVELOPMENT IN BUBISA MARSABIT

Reference is made to your letter dated 9th July 2009.

The Ministry of Energy supports the exploitation of renewable energy resources for power development in the country and welcomes your expression of interest to generate wind and solar power for connection to the grid.

I wish to advise that the proposed capacity of the wind farm is beyond the threshold for projects to be considered under the Feed-in-Tariffs Policy (which is 50 MW), and that solar energy generated electricity is not also covered under policy.

Your proposals will thus be considered under the Green Energy Development Programme, part of the issues to be advised on include how your proposed wind energy development and other technical factors may be affected by the planned 300MW lake Turkana Wind Power Project, which is near your proposed site. Please send us also your detailed proposal on generation of electricity from solar, whose attachment was missing.

Yours Sincerely,

ENG. ISAAC N. KIVA

For: PERMANENT SECRETARY

110. It is evident that this letter was advising on the factors that the *ex parte* Applicant needed to take into account in its proposal on the wind power project. Months later on 16th February 2010, and after further correspondence, the 2nd Respondent wrote to the *ex parte* Applicant as follows:

James Gitau,

Chief Executive Officer

Gitson energy Ltd

P.O. Box 60684-00200

NAIROBI

Dear Gitau,

RE: DEVELOPMENT OF 300 MW WIND FARM IN BUBISA MARSABIT

I refer to your letter dated 20th January 2010 on the above captioned subject.

It is noted that considerable progress has been made in the preparatory activities to facilitate development of energy resource.

In view of this, approval is hereby granted for development of the project. You will be expected to finalize the detailed feasibility study within the next eight (8) months.

Your detailed studies should also include the transmission line and the interconnection facilities for completeness. Please keep us informed of the progress you will be making.

Lastly, we would like to point out that we have no control of the ownership of the land at the proposed site. It is therefore upto you to ensure that you secure land rights for the proposed wind farm.

We look forward to speedy conclusion of the detailed feasibility studies and eventual construction of the wind farm.

Please do not hesitate to contact us should you require further assistance.

Yours sincerely,

Patrick M. Nyoike CBS

PERMANENT SECRETARY

111. On 23rd February 2010, the following letter addressed to the *ex parte* Applicant was also written by the 3rd Respondent's Managing Director:

James Gitau,

Chief Executive Officer

Gitson energy Ltd

P.O. Box 60684-00200

NAIROBI.

Dear James,

RE: WIND FARM PROJECT IN BUBISA

Reference is made to your proposal for Power purchase for the proposed 300 MW wind farm at Bubisa. We also refer to the letter written to you by the Permanent Secretary, Ministry of Energy, reference ME/CONF./4/1/4B dated 16th February 2010.

As mentioned in the letter from the Permanent Secretary, you are expected to finalize the detailed feasibility study within 8 months and the study should include the transmission line and the interconnection facilities for completeness.

Once we receive a copy of the detailed feasibility study report, we will be able to discuss the way forward with yourselves, including the Power Purchase Agreement.

Yours sincerely,

Eng. Joseph K. Njoroge, MBS

Managing Director &

Chief Executive Officer

112. On 29th September 2010, a couple of weeks' shy of the 8-months deadline imposed by the previous letter within which the *ex parte* Applicant was expected to complete and submit the detailed feasibility study, the 2nd Respondent granted it an extension as follows:

Dr. Micheal Ndiritu

Managing Director

Gitson Energy Ltd

P.O. Box 60864-00200

NAIROBI.

Dear Nderitu,

RE: REQUEST FOR 12 MONTH EXTENSION FOR GITSON ENERGY WIND FARM PROJECT IN BUBISA

I refer to the letter dated 20th September, 2010 on the above captioned subject matter.

It is noted that you have made good progress including collection of wind data from two masts and advanced negotiations for land lease agreement with the Marsabit County Council. Based on this I have granted your request for extension of time for a period of 12 months to complete the detailed feasibility study. As you have pointed out we expect this not to affect the proposed project completion date of early 2013.

Yours Sincerely,

Patrick M. Nyoike CBS

PERMANENT SECRETARY

113. A plain reading and construction of the said correspondence leads to two conclusions. First, there was an express and definite approval granted to the *ex parte* Applicant by the 2nd Respondent in the letter of 16th February 2010, which approval was for the development of the project which was the subject of the said letter, namely a "300 MW Wind Farm in Bubisa Marsabit". Therefore, the averments by the Respondents that the approval given was for conduct of the feasibility studies are incorrect and inaccurate. Second, the only requirement given was that the *ex parte* Applicant was expected to complete its feasibility studies, including the transmission line and the interconnection facilities by early 2013, for purposes of construction of the wind project.

114. The legal import of this approval was that the 2nd Respondent did make a clear representation and commitment to the *ex parte* Applicant about the approval proposed project and which, the *ex parte* Applicant, as demonstrated by the ensuing correspondence, acted upon. This is

particularly relevant in light of the legal implications thereof, which shall be discussed later on in this judgment.

115. In 2013, the 2nd Respondent then wrote letters to the 4th Respondent dated 4th October 2013 and 2th April 2014 on the *ex parte* Applicant's request for the project to be included in the LCPDP. The response by the 4th Respondent's in a letter dated 26th April 2017, 3 years later, set the stage for the instant dispute, and reads as follows:

Mr. James Gitau

Chief Executive Officer

Gitson Energy Limited

P.O. Box 7501 00200

NAIROBI

Dear Sir

RE PROPOSED COMMISSIONING DATE FOR 300MW WIND POWER PLANT IN MARSABIT, BUBISA WIND FARM PROJECT- GITSON ENERGY LIMITED

We refer to your unreferenced letter dated 11th April, 2017 and that of the Ministry of Energy and Petroleum Ref. No. ME/5/1/2014 on the above subject matter.

We wish to advise that the country has so far committed itself to development of 466MW of solar capacity and a further 896MW of wind capacity against an installed capacity of 2,321MW and a demand not exceeding 1,650MW as at April 2017.

It is also noted that the proposed 300MW of wind and 50MW of solar exceeds the limits set under the current FiT Policy, which offers priority development of power plants of this nature. The investor will therefore need to get relevant approvals from the Public Private Partnerships (PPP Unit) of the National Treasury and a "go ahead" by the Ministry of Energy and Petroleum for the project to be considered in future planning cycles.

From the foregoing, the said capacity cannot be accommodated in the current planning period and should be considered as a candidate for the auctions process or as may be advised by the Ministry of Energy and Petroleum.

Yours faithfully

Mueni Mutung'a

Ag Director General

116. The *ex parte* Applicant's exasperation started to manifest itself in its lengthy response dated 30th May 2017, wherein it detailed the background to the project as follows:

Ms. Mueni Mutung'a

Ag. Director General

Energy Regulatory Commission

Eagle Africa Centre,

Longonot Road,

Upper Hill,

P.O. Box 42681-00100 GPO,

Nairobi

Dear Madam,

Re: Request for the review of Commissioning date decision for 300MW Bubisa wind farm project

Thank you for your letter dated 26th April, 2017 ref.ERCI/ER/1/Vol.4/DK/cm. Upon review of its content, we have noted

with concerns that Energy Regulatory Commission (ERC) made its decision not to allocate Commissioning Date (COD) to our project without considering other factors and the full impact of this decision on our project or ERC. Please see below:

1. The project has been in flight for long time since 2001. In fact you will note that in 2007, the then Permanent Secretary at Ministry of Energy wrote a letter of support on our behalf among others (please see the attached).
2. In 2010, the PS Energy Mr. Nyoike wrote to us and copied both MD KPLC Eng. Njoroge (Now the current PS at Energy Ministry) and Energy Regulatory Commission ERC) Director General (DG) Mr. Kaburu Mwirichia regarding the next steps of our project. We have been collecting data at the site since 2009.
3. We met severally with KPLC MD and his team as we prepared for the PPA negotiations (please see the attached).
4. We have repeatedly written to ERC requesting to be listed and for many years without a response. We finally got a response after our latest follow up letter dated 11th April 2017.
5. Both PS Energy Dr. Eng. Njoroge and Renewable Director at the Energy Ministry Eng Kiva had written previously in 2013 and 2014 to ERC acting DG then Mr. Fred Nyang on our behalf requesting the listing of our project in LCPDP. No response was ever received on both letters (please see the attached).

ERC decision is late and incorrectly made on the assumption that our project or COD request is new. This project has been in the knowledge of the Ministry of Energy (2003) and ERC leadership (since 2010). It will be unfair, discriminatory and illegal to be pushed to the proposed auction system yet our project is one of the oldest wind and largest farm project in Kenya that ERC never responded to its requests for listing in last 4 years. ERC as the energy regulator must be even-handed in its affairs and granting the commissioning dates (COD). ERC have granted the same to other projects who applied after our project. Gitson Energy is seeking equal and fair treatment from ERC.

We kindly request that you review your decision and do justice to our issue that has been in the knowledge at ERC for over 7 years and pending listing for the last 4 years despite repeated requests for review and conclusion of this matter.

Gitson Energy stands to lose billions of shillings through referral to the proposed auction system. In addition to this, there is no clear timeline when this system will be rolled out thus further delaying the realization of our project. Without prejudice, Gitson Energy is committed to have an amicable solution and speedy conclusion of this matter by June 16th, 2017.

I look forward to hearing from you.

Your Sincerely,

James' Gitau

C.E.O

Gitson Energy Ltd.

117. The 4th Respondent thereupon reiterated its position of 26th April 2017 in a reply dated 20th June 2017. The *ex parte* Applicant then wrote a letter dated 29th June 2017 to the 1st Respondent, seeking approval of its proposed wind project as a PPP project. The 1st Respondent in its response, in a letter by the Director of the PPP Directorate dated 19th July 2017, washed its hands off the project and clearly indicated that it had no role to play. The Director stated as follows:

“Such projects ideally fall under the Fit framework and require the approval of the Ministry of Energy and Petroleum. We therefore request that you submit your proposal to the Ministry of Energy and Petroleum for their consideration for approval”

118. Consequently, upon the *ex parte* Applicant writing several letters to the 2nd Respondent for affirmation of its approval of the proposed project, the penultimate decision that triggered the instant application was then made by the 2nd Respondent in a letter dated 9th October 2017, which read as follows:

James Gitau,

Chief Executive Officer

Gitson energy Ltd

P.O. Box 60684-00200

NAIROBI

Dear James,

RE: REQUEST FOR 300 MW WIND FARM AND 50 MW APPROVAL AFFIRMATIONS

Reference is made to your dated 2nd October, 2017 and other previous correspondences on the same, in particular the letter from ERC Ref. No. ERC/ER/7/Vol.6/FN/am dated 20th June, 2017, and the letter from the National Treasury Ref. DGIPE/PPP/9 'C' dated 19th July 2017.

We note that vide our letter of even reference dated 16th February 2020, you had been granted approval for development of the Wind Project and you had been expected to finalize your feasibility study within the next eight (8) months. Consequently, upon your request, vide our letter ref. ME/5/1/4 dated 29th September, 2010, you were granted an extension for a period of 12 months to complete the detailed feasibility study. At that time, it was noted you were making good progress in advancing negotiations for land with the Marsabit County Council. thereafter, the issue of land acquisition underwent litigation which you inform to have been completed in February 2017.

In their letter, the National Treasury advises that this wind project could be processed under the Feed-in-Tariffs Policy. Should you heed this advice you will be expected to phase your project, and commence with a capacity not more than 50 MW. You will then be required to submit detailed feasibility studies which should include Grid interconnection study, ESIA as well as the Financial Model, which will be used to process your project further.

Should you elect to develop the whole capacity, then you may only proceed to do so in line with the PPP Act. In this case, you will progress its development as a Privately Initiated Investment Proposal, which requires that it be captured in our National Integrated Power Plan. For ERC to programme this, you will require to avail to ERC complete detailed feasibility Studies, which they will use to undertake necessary analysis and simulations with regard to the least cost power criteria. Due to our limited demand at the moment, it will take quite sometime before this entire 300MW is accommodatable by the grid. ERC would simulate and advise you that the earliest time possible for this development.

This is to advise as foregoing and seek your action as appropriate to progress the matter.

Your sincerely,

Dr. Eng. Joseph K. Njoroge, CBS

PRINCIPAL SECRETARY

119. This position was reiterated by the 2nd Respondent in a further letter dated 20th November 2017, in response to the *ex parte* Applicants proposals on how to meet the conditions set out in the letter. There were thus three new conditions placed by the 2nd and 4th Respondents by their letters dated 9th October 2017 and 26th April 2017, namely that the current Feed-In-Tariffs (FiT) Policy now applied to the project, that the *ex parte* Applicant commences the project with a capacity not more than 50 MW, and that it proceed to do so in line with the Public-Private Partnership Act.

120. It is also notable that the evidence by the *ex parte* Applicant shows that at the time of the impugned decision, the proposed project was at the commissioning stage, with the 2nd and 4th Respondents being the main actors at the stage. The involvement of the other Respondents at this stage appears to have been minimal. In this respect, the 3rd Respondent in its letter of 23rd February 2010 specifically stated that it would only be able to act, including on the Power Purchase Agreement, once it received a copy of the detailed feasibility study report. It is also notable in this respect that the 1st Respondent expressly stated that it had no role to play in the approval or commissioning of the *ex parte* Applicant's project.

121. As regards the 5th Respondent's involvement, while the intervening events and court cases leading to the delay of the commissioning date have not been disputed by the Respondents, this Court finds that it has no jurisdiction to address the arguments made by the *ex parte* Applicant as regards the duty of the 5th Respondent to pay wayleave compensation, and to construct a switching station/substation to permit connection to Kenya-Ethiopia Transmission line that transits the *ex parte* Applicant's project site. The lack of jurisdiction arises for two reasons. First, a determination of the issues raised thereby would require evidence and argument to ascertain various facts, including the location and status of the said transmission line, and the rights to and ownership of the subject land. This will entail a merit review that is beyond the judicial review jurisdiction of this Court.

122. Second, these are issues that touch on the ownership, use and occupation of land which is within the exclusive jurisdiction of the Environment and Land Court under Articles 162 (2) (b) and 165(5)(b) of the Constitution. In like vein the legal import and effect of the decision of the Court of Appeal in **Gitson Energy Limited vs Francis Chachu Ganya & 6 Others**, [2017] e KLR will have to be decided upon by the said Court.

123. The only clarification that however needs to be made at this stage is that the 3rd and 5th Respondents, being key actors and players in the energy sector, are subject to regulation under the Energy Act and Regulations, and to certain statutory duties thereunder. Therefore, it is quite possible for the two actors to be subject to the judicial review jurisdiction of this Court in respect of their statutory duties that are of a public nature. The 3rd Respondent in this respect purchases electrical energy from power producers and undertakes transmission, distribution, supply and retail of electric power to the public, while the 5th Respondent is responsible for the development, maintenance and operation of the national electricity transmission grid network. In the circumstances of this case however, the said statutory duties were yet to crystallize, as it is not in dispute that the *ex parte* Applicant's project has not yet started operation.

124. On the duty of the 2nd and 4th Respondents in relation the *ex parte* Applicant's proposed project, the applicable legal provision at the time was section 103 of the Energy Act of 2006, which gave powers to the 2nd Respondent to regulate renewable energy as follows:

(1) The Minister shall promote the development and use of renewable energy technologies, including but not limited to biomass, biodiesel, bioethanol, charcoal, fuelwood, solar, wind, tidal waves, hydropower, biogas and municipal waste.

(2) The Minister may perform such functions and exercise such powers as may be necessary under this Act to promote the development and use of renewable energy, including but not limited to—

(a) formulating a national strategy for coordinating research in renewable energy;

(b) providing an enabling framework for the efficient and sustainable production, distribution and marketing of biomass, solar, wind, small hydros, municipal waste, geothermal and charcoal;

(c) promoting the use of fast maturing trees for energy production including biofuels and the establishment of commercial woodlots including peri-urban plantations;

(d) promoting the use of municipal waste for energy production; and

(e) promoting the development of appropriate local capacity for the manufacture, installation, maintenance and operation of basic renewable technologies such as bio-digesters, solar systems and hydro turbines;

(f) promoting international co-operation on programmes focusing on renewable energy sources;

(g) harnessing opportunities offered under clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources;

(h) promoting the utilization of renewable energy sources for either power generation or transportation;

(i) promoting co-generation of electric power by sugar millers and sale of such electric power through the national grid directly to the consumers;

(j) promoting the production and use of gasohol and biodiesel.

125. Section 111 of the said Act also provided for the powers of the 2nd Respondent's Minister as follows

(1) The Minister shall be responsible for—

(a) formulation of policy relating to the energy sector;

(b) the appointment of Commissioners of the Commission, members of the Authority, and the Tribunal;

(c) the imposition of levies under this Act;

(d) formulation and co-ordination of a disaster preparedness plan for the energy sector;

(e) policy relating to financing, procurement, maintenance and management of strategic petroleum stocks; and

(f) the performance of such other functions as are provided under this Act or any other written law.

(2) On the occurrence of an emergency the Minister may, in consultation with the Commission, exercise such authority and give such directions as may be necessary in the public interest for the proper continuance or resumption of the production or supply of energy.

(3) The Minister may, from time to time, give directions in writing to the Commission with respect to the policy to be observed and implemented by the Commission.

126. The duties of the 4th Respondent on the other hand were provided under section 5 of the Act, and include the regulation of the production, distribution, supply and use of renewable and other forms of energy. The 4th Respondent is also given power to issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector under section 6. The Principal Secretary of the 2nd Respondent in his letters of 9th October 2017 introduced the application of the Public-Private Partnership Act, when he indicated that if the *ex parte* Applicant sought to proceed with the project at the capacity of 300MW, that this could only be in line with the Public-Private Partnership Act, as a Privately Initiated Investment Proposal. The 4th Respondent in its letter dated 26th April 2017 had also in this regard advised the *ex parte* Applicant to get approval from the Public Private Partnerships (PPP) Unit of the National Treasury.

127. In this respect, it is notable that the Public-Private Partnership Act regulates the participation of the private sector in the financing, construction, development, operation, and maintenance of government infrastructure and development projects through concession and other contractual arrangements. Section 3 specifically states that the Act applies to every contract for the financing, construction, operation, equipping or maintenance of a project or for the provision of public services undertaken as a public private partnership.

128. Section 29 of the Act further provides that such projects shall be procured through a competitive bidding process, and the contracting authority shall be guided by the principles and guidelines set out in the Act. Under section 61, a contracting authority may consider a privately initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process. Lastly, a contracting authority," is defined in section 2 to mean a State department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private party.

129. This Court is therefore, agrees with the 1st Respondent that the Public-Private Partnership Act does not apply to the *ex parte* Applicant's project, This is for the reason that the *ex parte* Applicant in its expression of interest dated 7th July 2009 for the Feed-in-Program stated as follows:

“This letter is to communicate Gitson’s Expression of Interest (EOI) in wind energy production in Kenya. Consequently, this is in fulfillment of one of the requirements from the Ministry of Energy, for the Feed-in-Tariff for Renewable Energy Resource Generating Electricity in Kenya”

130. Under the Feed-in-Tariff Policy of 2012, it is stated at page 6 thereof that a Feed-in-Tariff allows power producers to sell renewable energy generated electricity to an Off-taker at a pre-determined tariff for a given period of time. An off-taker is defined in the policy as the Buyer of electrical energy for the purpose of selling the electricity to customers connected to the national grid or off-grid (mini-grid) systems. Therefore, the *ex parte* Applicant's expression of interest and subsequent approval was to undertake the project as an independent power provider. It is also notable that the 2nd and 4th Respondent did not submit on, nor identify the applicable legal provisions of the Public-Private Partnership Act which require that the said *ex parte* Applicant submits a Privately Initiated Investment Proposal or approval from the Public-Private Partnership Unit.

131. In addition, the Public-Private Partnership Act was assented to in January 2013, and came into effect thereafter, whereas the *ex parte* Applicant was granted approval to undertake its project in February 2010. In this respect there is a general presumption against retrospective operation of an Act, and especially where such a construction of the enactment inflicts a detriment, as it does in this case upon the *ex parte* Applicant. Furthermore, in the absence of a clear indication in an amending enactment, the substantive rights of the parties to any civil legal proceedings fall to be determined by the law as it existed when the action commenced.

132. The Supreme Court of Kenya restated the law in this regard in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR as follows:

(61) 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. (Halsbury’s Laws of England, 4th Edition Vol. 44 at p.570). ”

133. Arising from the foregoing reasons, it is the finding of this Court that the requirements by the 2nd and 4th Respondents that the *ex parte* Applicant submits a Privately Initiated Investment Proposal or approval from the Public-Private Partnership Unit had no legal basis.

134. Accordingly, the only outstanding question that requires to be answered in the issue at hand is whether the 2nd and 4th Respondents can be allowed to change the terms of the express approval that had been granted to the *ex parte* Applicant on 16th February 2010 on its wind energy project, and insist that he should now proceed under the terms of the Feed-in-Tariff Policy. The ground for judicial review that comes into play in this regard is that of legitimate expectation. The abiding principle which underpins legitimate expectation is the court's insistence that public power should not be abused. As noted in Nadarajah vs Secretary of State for the Home Department (2005) EWCA Civ 1363 at paragraph 68 :

“where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public..”

135. A five judge bench of the High Court in the case of Kalpna H. Rawal v Judicial Service Commission & 4 others [2015] eKLR exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine in a decision that was affirmed by the Court of appeal . The said bench observed as follows:

“207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury’s Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or

promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.”

136. The Supreme Court in the **Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others**, (2014) eKLR further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

“[269] The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

137. Applying these principles to the present case, it is notable that despite the *ex parte* Applicant’s expression of interest dated 7th July 2009 having been made pursuant to the Feed-in-Tariff Policy, it is the 2nd Respondent who specifically stated in its response of 21st July 2009 that the said policy was not applicable due to the nature and capacity of the *ex parte* Applicant’s wind energy project, which was beyond the threshold for projects to be considered under the Feed-in-Tariff Policy, and which included a solar energy generated electricity, which was then not covered under policy. The 2nd Respondent in the said letter also expressly stated that the *ex parte* Applicant’s proposals would be considered under the Green Energy Development Programme.

138. The subsequent approval of the project on 16th February 2010 can only therefore be constructed as having been under the Green Energy Development Programme for two reasons, firstly, the approval was a continuum and follow up to the 2nd Respondent’s previous correspondence dated 21st July 2009, and secondly the approval was for a 300MW wind farm, which is outside the capacity of projects covered by the Feed-in-Tariff Policy. The *ex parte* Applicant in this regard annexed evidence of approval of the Green Energy Development Programme, and the Respondents did not dispute the existence and application of the said Programme.

139. In addition, the 2nd Respondent had the legal power under section 103 of the Energy Act of 2006 to give the said approval, and gave specific reasons as to why the Feed-in-Tariff Policy was inapplicable and exempted the *ex parte* Applicant’s project from the said policy. Furthermore, it has been found that the Public Private Partnership Act and procedures thereunder did not apply to the *ex parte* Applicant’s project, as alleged by the 2nd and 4th Respondents. In this respect, the arguments by the Respondents that the *ex parte* Applicant should abide by the procedure in the the Energy (Electricity Licensing) Regulations of 2012 also suffer the same fate as the arguments on the application of the Public-Private Partnership Act, since the said regulations were made on 4th April 2012, after the *ex parte* Applicant had already been made its application, an approval thereon given, and rights in the project had vested. The said regulations cannot therefore operate retrospectively.

140. The *ex parte* Applicant has also demonstrated that he relied on the approval to pursue various investments in the project, including land rights, financing arrangements, and installing infrastructure for the wind energy project. A legitimate expectation was thereby created by the approval given to the *ex parte* Applicant by the 2nd Respondents in the letter dated 16th February 2010. This Court therefore finds that no good reason has been demonstrated by the 2nd and 4th Respondents to depart from the approval given to the *ex parte* Applicant’s wind energy project on 16th February 2010, and their impugned decisions in this regard were thereby unlawful. Further, the said Respondents are under a duty to give effect to the said approval in light of the legitimate expectation thereby created.

141. Lastly, this Court will comment on the *ex parte* Applicant’s allegations that there was discriminatory exclusion of its project as compared with other similar projects, and specifically the Lake Turkana Wind Project. This Court faced difficulty in accepting this argument as a basis for the order of mandamus sought for two reasons. First, there were adverse allegations made against Lake Turkana Wind Project, and orders sought that were likely to affect the said project, yet the entity that owns the said project was not joined as a party herein to respond. Second, and more importantly, the *ex parte* Applicant did not bring any evidence on the processes leading to the approval and commissioning of the Lake Turkana Wind Project, for this Court to be able to determine the differential treatment if any, and breach on the part of the Respondents in this regard.

142. In this regard I wholly adopt the following holding by the Supreme Court in **Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others** [2020] eKLR as regards the proof in a case on the constitutional right of freedom from discrimination:

(49) “Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary.”

The Disposition

143. . As stated earlier, an order of mandamus requires a public body to do some particular act as specified in the order, to enforce public law duties. The Court of Appeal in the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR explained the applicable principles for an order of mandamus to issue 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....”

144. In Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441, it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

145. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.

146. In the present case, an order of mandamus lies against the 2nd and 4th Respondent, as they have acted unlawfully contrary to their duties under the Energy Act, and breached the legitimate expectations of the *ex parte* Applicant, by reneging on the approval given to the *ex parte* Applicant on 16th February 2010 to develop a wind energy project. Therefore, in the circumstances of this case, it is necessary for the order of mandamus to issue, to prevent further changing of goal posts by the 2nd and 4th Respondents in relation to the said project.

147. it is notable that in the initial approval given on 16th February 2010, the *ex parte* Applicant was required to finalise its detailed feasibility studies of the project within certain timelines, which were overtaken by events due to litigation surrounding the project’s land. The *ex parte* Applicant on its part averred that the said feasibility studies were conducted in 2007, but did not provide evidence of their submission to the 2nd Respondent, and this requirement was still cited in various correspondence after the approval and by the Respondents. I am of the view that this omission is not a bar to an order of mandamus, since the 4th Respondent has the power under both the Energy Act of 2006 and of 2019 to prescribe the conditions which may be attached to a grant of a licence or permits, and can still include the said requirement.

148. Before I conclude, I would like to take this opportunity to appreciate the detailed arguments and submissions made by all the parties herein, and the patience that they have all exhibited, in light of the time it has taken to prepare and finalise this judgment. The Court in this regard faced various challenges in accessing all the pleadings filed in this matter, and also various logistical and personal challenges arising from the COVID 19 pandemic.

149. I accordingly allow the *ex parte* Applicant's Notice of Motion dated 30th November 2018 to the extent of the following orders:

I. An order of mandamus be and is hereby issued to compel the 2nd and 4th Respondents to forthwith include the *ex parte* Applicant's 300MW Wind Energy Project in the 4th Respondent's list of approved projects, and to, in consultation with the *ex parte* Applicant, issue the appropriate permit and licence to the *ex parte* Applicant in line with the approval dated 16th February 2010 granted to the *ex parte* Applicant by the 2nd Respondent to develop a 300MW Wind Energy Project in Bubisa, Marsabit .

II. The 2nd and 4th Respondents shall meet the costs of the *ex parte* Applicants Notice of Motion dated 18th November 2018.

150. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF NOVEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2021

A. NDUNG'U

JUDGE