



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL SUIT NO 163 OF 2014 (FORMERLY NAIROBI ELC NO. 1330 OF 2014)

MOHAMUD ILTARAKWA KOCHALE.....1ST APPLICANT

KOCHALE SOMO CHALE.....2ND APPLICANT

ISSA JITEWE GAMBARE3RD APPLICANT

DAVID TAMASOT ARAKHOLE.....4TH APPLICANT

WILLIAM LENGOYIAP.....5TH APPLICANT

SEKOTEY SEYE.....6TH APPLICANT

(Suing on behalf of the residents of Laisamis Constituency and Karare Ward of Marsabit County)

VERSUS

LAKE TURKANA WIND POWER LTD.....1ST RESPONDENT

MARSABIT COUNTY GOVERMENT2ND RESPONDENT

THE ATTORNEY GENERAL.....3ND RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

THE NATIONAL LAND COMMISSION5TH RESPONDENT

AARON ILTELE LESIANTAM1ST INTERESTED PARTY

HENRY PARASIAN SAKALPO.....2ND INTERESTED PARTY

STEPHEN NAKENO.....3RD INTERESTED PARTY

JOB LMALASIAN LENGOYA.....4TH INTERESTED PARTY

DAIR LENTIPAN.....5TH INTERESTED PARTY

(As representatives of the residents of Loiyangalani District, Marsabit County)

R U L I N G

1. This application, brought to Court by way of a Notice of Motion is dated 14th October, 2014 and seeks orders THAT:-

i. This matter be certified urgent and heard ex-parte in the first instance.

ii. This Honourable Court be pleased to grant an order of injunction restraining the Respondents, their agents/ servants, employees and/or anyone acting in their names or under their instructions from selling, transferring and or in any manner dealing in all that piece of land known as Land Reference Number 28031/1 and Land Reference 28031/2, measuring 150,000 acres, situated in Marsabit County in the Republic of Kenya (the suit property) which is subject matter of this suit pending the hearing and determination of this application inter parte.

iii. This Honourable Court be pleased to issue an order of interlocutory injunction restraining the 1st Respondent or any of the Respondents either through themselves, servants or agents from carrying out developments of whatever nature including digging, levelling, construction of roads, construction of any wayleave and/or any structures and from implementing any development of whatever nature on the suit property pending the hearing and determination of the suit filed herein.

iv. THAT costs of this application be provided for;

2. The application is based on the grounds: THAT:-

i. The 1st Respondent was unprocedurally and illegally allocated 150,00 acres of the land belonging to the Plaintiffs in a flawed process of setting apart thereby inhibiting the Plaintiffs from continuance ownership of their Community land and/or accessing it for seasonal, cultural and cyclic use and for pasture for their livestock.

ii. The express provisions of section 13 of the Trust Land Act and Section 117 of the Repealed Constitution on the procedure of setting apart of Trust land was not followed by the then Marsabit County Council and the Defendants herein in that:

(a) there was no public consultation organized or held between the residents of Laisamis Constituency and Karare Ward;

(b) no notice of the proposal to set apart the land in dispute was issued;

(c) no reservations were recorded from the residents of Laisamis Constituency and Karare Ward.

(d) No compensation or alternative settlement was offered to the Plaintiffs;

(e) There was no Divisional Board constituted as per section 13 (2) of the Trust Land Act (the documentation presented by the 1st Respondent to evidence the purported meeting with the Plaintiffs is a Town Planning Committee Meeting sitting at the administrative headquarters, and held on the 13th August, 2013. it purports that the discussion relating to the process of setting apart the suit property was unanimously approved. However. It does not make reference to the recommendation of the Divisional Board Pursuant to Section 13(2) (c) of the TLA).

(f) No proposal to set apart the Suit Land was ever presented to the Applicants by the County Council of Marsabit nor were the Applicants informed of a date and a time of the purported meeting of the Divisional Board at which the said proposal of setting apart would have been discussed so that they could raise their recommendation prior to the resolution for setting Apart being reached;

(g) The Divisional Board (which the Applicants contend was non-existent at the time of the impugned process of setting apart) failed (if at all it was in existence) to hear and record in writing the representations of all the supposed persons concerned who supposedly were present at the meeting and further failed to submit to the county council its written recommendation concerning the proposal to set apart land, together with a record of representations made at the meeting;

(h) No compensation or assessment of damages was ever made to the Applicants, a fact which flies in the face of the express provisions of section 8 as read together with Section 9 and 10 of the Trust Land Act and Section 117 of the repealed Constitution;

iii. The 1st Respondent carried out a self-serving Environmental and Social Impact assessment of the Project without involving the Plaintiffs and without evaluating the possible negative impact to the Project of the economic, social, cultural and physical wellbeing of the local community and holistic wellbeing of the indigenous community.

iv. The 1st Respondent has now obtained private ownership of Community Land (the Suit Property) in a clandestine and suspicious manner despite the fact that it had been given a 33 year lease over the suit property.

v. The 1st Respondent has previously demonstrated that it only required 40,000 acres to undertake the impugned Project and it is not clear how the remaining 110,000 acres will be utilized. The 1st Respondent has further presented a request to Marsabit County Council for an additional 75,000 acres.

vi. The Project will occasion land wastage. Land speculation and dereliction and will permanently alter the usage of the Suit Property as pastoral land and to the immense detriment of the Applicants.

vii. The Applicants have now discovered that African Development Bank is at an advanced stage of releasing the finances to the 1st Defendant to facilitate the Project. This is a clear violation of the International Finance Corporation (IFC) Performance Standards especially No. 7 on indigenous Peoples and No.8 on Cultural Heritage.

viii. This illegal process of setting apart the Suit Land will occasion economic challenges and hardships to the Applicants in that: The Applicant's land having been illegally allocated to the 1st Respondent leaves them without part of their ancestral land and accordingly renders them unable to access it for seasonal and cyclic use as pasture land, grazing corridors and for cultural purposes; the path used by the Applicants as a camel corridor to access Lake Turkana with their livestock has been subsumed and taken over by the 1st Respondent; the cultural activities performed by the Applicants on the Suit property have been rendered impossible owing to the impugned process of setting apart; The Plaintiffs were not compensated nor their customary ancestral land rights protected and were not recognized as the true owners of the Suit Property.

ix. It is just and equitable that the interim injunction sought herein be granted to safeguard the Applicants' interests in the Suit Property pending the hearing and determination of this Suit.

3. The Applicants say that the application is based on the averments contained in the Verifying Affidavit sworn by SEKOTEY SEYE and upon other further grounds to be adduced at the hearing of the application.

4. On 22/10/2014, Mr. Menge for the Plaintiffs/Applicants told this Court that he was seeking Interim Orders to stop developments being carried on the suit land by Lake Turkana Wind Power Limited. He told the Court that Lake Turkana Wind Power Limited had been allocated a vast swathe of land in Marsabit.

5. Mr. Menge told the Court that the land was illegally set apart by the defunct County Council of Marsabit.
6. Mr. Menge informed the Court that on 15/10/2014, the Hon Lady Justice Nyamwenya, J, sitting at Milimani Law Courts had directed that this matter be transferred to Meru and be mentioned for directions on 05/11/2014.
7. Mr. Menge told the Court that due to the urgency of the matter he had filed another application under Certificate of Urgency seeking the Courts' indulgence to vary the orders issued in Nairobi and especially the order that the matter be mentioned for directions on 05/11/2014. The Variation Mr. Menge sought was that the application be heard interpartes on 05/11/2014. I allowed the variation.
8. When the matter came up for interpartes hearing, Mr. Sagana for the applicants told the Court that all the parties had been served and that he was ready to canvass the application.
9. Mr. Menge told the Court that the challenged project was one of the pillars of vision 2030. He told the Court that the amount of money set aside for this project was colossal. He told the Court that a letter he had in his possession showed that the project had been planned for over a long period of time. He craved for time to respond to the issues raised in the application.
10. Mr. Abdi Hassan associated himself with the sentiments expressed by Mr. Menge. He contended that the County Government of Marsabit and the National Government had followed all necessary procedures. He sought time to have all issues raised by the application addressed. He told the Court that the project would take only 87.5 acres.
11. Mr. Kiprop informed the Court that his clients had not been served and needed time for their advocate to regularize his appointment. He told the Court that his Clients, the proposed interested Parties, were the ones directly affected by the project. He said that they had been consulted in all matters concerning the challenged project and that the consultations started around 2005. He felt that his clients should participate in the proceedings.
12. Mr. Kiprop told the Court that his clients would argue that the Plaintiffs/Applicants were strangers. He said that for the 1st time since independence, the Interested Parties were seeing the fruits of Independence through the challenged project. He implored the Court to maintain the Status Quo.
13. Mr. Sagana told the Court that this matter had been filed under a Certificate of urgency all parties were served and there was no reason why any party should not have filed the requisite Replying Affidavit.
14. Mr. Sagana told the Court that this suit is about the process of acquisition of community land. He opined that mere acclamation as to who supported the project was not enough. He said that the main issue was how 150,000 acres of Community land had been put into the hands of individuals irregularly. He urged the Court to allow the hearing of the application.
15. Having heard the parties the Court ruled as follows: -

(1) The oral application by Mr. Kiprop to have 5 members of the local Community enjoined in the suit, having not been opposed and in the interests of time and justice is allowed.

(2) Due to the enormity of the issues raised in this application, the hearing of the application dated 14th October, 2014 is adjourned to allow the respondents and the Interested Parties to put in their responses within 14 days.

(3) In the meantime, status Quo should be maintained and the activities of the 1st and 2nd respondents to be confined to the 87.5 acres they have informed the Court the project will be utilizing.

(4) Hearing of the application and directions regarding the application on 24/11/2014.

16. On 24/11/2014 the parties informed the Court that they wished to present a consent which they prayed that it be adopted as an order of the Court.

The Consent was in the following terms:-

1. The Plaintiffs/Applicants to file and serve a further affidavit and written submissions to the Notice of Motion dated 14th October, 2014 within 14 days from today.

2. The Respondents to file and serve their response to the written submissions within 14 days of service.

3. The Plaintiffs/Applicants to file and serve their replies to the written submissions on points of law within 7 days of service by the Respondents.

4. The written submissions shall:

(I) Not exceed 10 pages.

(ii) Be in font 12.

(iii) Be spaced at 1.5.

5. Interim Orders shall be extended until the next date for directions/highlighting.

6. All the pleadings and written submissions shall be sent to Court in Soft copy to the addresses as shown here below:-

(a) merucourt@judiciary.go.ke

(b) waigia@yahoo.com

(c) agnes.waigi@judiciary.go.ke

7. Upon request by the Deputy Registrar of this Court, the parties shall deliver to the Court soft copies of the pleadings and written submissions saved in compact disks.

8. The e-mails sent shall be copied to all parties and any compact discs sent to Court shall also be sent to all other parties.

9. The applicants and the 1st Respondent shall have 10 minutes each to highlight their submissions and the other respondents and the Interested Party shall have 5 minutes each. The plaintiffs, if necessary, will have 3 minutes to respond.

10. We have agreed to return for highlighting on 19.01.2015

17. The Consent was adopted as an order of the Court.

18. On 20/04/2015, the parties proffered a Consent for adoption by the Court . It was in the following terms:-

(1) Parties to send all submissions with respect to the application dated 14th October, 2015 in word format within 30 days of today.

(2) Consent dated 20/4/2015 signed by the advocates on behalf of the parties is adopted as an

order of this Court.

(3) Directions on 22nd June, 2015.

(4) The 2nd Respondent is granted leave to file a further affidavit if need be, if there will have been no settlement out of Court and following the parties report to Court on 22/06/2015.

(5) All parties to be at liberty to file further affidavits after the 2nd defendants affidavit, if any is filed.

19. The Consent was adopted as an order of the Court.

20. On 22/06/2015, the Parties proffered a Consent which they asked the Court to adopt as its order. The Consent was in the following terms:-

1. That we take out the matter to allow the parties to continue with negotiations which are ongoing.

2. That the matter be mentioned in a months time to record a settlement or take out a date for highlighting the Submissions.

3. That the 2nd Respondent be allowed to file a further affidavit, if need be.

4. That other parties be at liberty to file further affidavit after the 2nd defendant files his.

5. That Interim Orders be extended till Monday, 27/07/2015.

21. The Consent was adopted as an order of the Court.

22. On 27/07/2015, Miss Kigera holding brief for Mr. Sagana for the Plaintiffs told the Court that the parties had not arrived at any agreement. She told the Court that the Plaintiffs sought a date for highlighting of Submissions.

23. Mr. Hassan for the 2nd Respondent told the Court that the parties were still negotiating. He said that they required 3 Months to see if they could complete the negotiations. Mr. Hassan was supported by Mr. Wairoto for the 1st respondent, Miss Kungu for the 3rd, 4th and 5th respondents and by Mr. Kiprop for the Interested Parties. Except for the Plaintiffs, the other parties supported a site visit.

24. The Court ruled as follows:-

(1) Decision regarding the proposed site visit to be made at the appropriate time and to be addressed on 09/11/2015.

(2) Parties allowed 3 months to further explore an out of Court settlement.

(3) Further directions and highlighting of Submissions on 09/11/2015.

(4) Interim Orders, by Consent extended.

25. The parties filed Written Submissions . They were directed to highlight their submission on 9/11/2015.

26. On 9/11/2015, the parties, except for the advocate representing the 2nd Respondent, told the Court that they were ready for the highlighting of Submissions. Except for the applicants, the other parties excepting the 2nd Respondent, indicated that they were adopting their Submissions but asked the Court to allow Mr. Nyaoga, the 1st Respondent's advocate, to, on their behalf, give a conspectus of their

Submissions.

27. My perusal of the Submissions proffered by the applicants, the 1st, 3rd 4th and 5th Respondents, and the Interested Parties shows that the points raised during highlighting constitute a conspectus of the apposite Submissions.

28. Madam Hashi for the applicants told the Court that Section 117 of the repealed Constitution of Kenya and Section 13 of the Trust Land Act provided for a Mandatory formula concerning setting apart of land. She opined that anything else amounted to an untenable action.

29. Madam Hashi told the Court that a title was as good as the procedure leading to its issuance. There had to be a divisional land board as envisaged by the law. She told the Court that the purport of the Trust Land Act was protection of ancestral land.

30. Madam Hashi told the Court that although the Community stood to lose 150,000 areas , there had been no public participation. She opined that privatization of their land had the effect of making them trespassers and will lead to the Community's extinction.

31. Madam Hashi posed the Question: What is the use of land juxtaposed with compensation when they are led to extinction? She submitted that creation of jobs among other claims was irrelevant .

32. Madam Hashi referred the Court to Hon. Justice Angote's decision in Civil Case No 168 of 2012(Malindi) -BAHOLA MKALINDI RHIGHO VERSUS MICHAEL SETH KASOME AND 2 OTHERS where he ruled that any member of the Community had locus.

33. Madam Hashi submitted that the Order for Injunction sought by the Plaintiffs was merited as damages cannot suffice in the circumstances of this case as the specific procedure provided by the law had not been adhered to in the setting apart of the suit land.

34. The Plaintiffs proffered the following authorities:-.

(1) Hon Francis Chachu Ganya and 4 others Versus Hon Attorney General General and another (2013) e KLR.

(2) Civil Case 113 of 2004 (Machakos) James Mwangangi and 64 others Versus Wote Town Council.

(3) Misc. Appl. 383 of 1995 (Nairobi) Royal Media Services (ltd) VersusCommissioner of Customs & excise.

(4) PET. 15 of 2011 (Nairobi) The Chairman John Kabui Mwai and 3 others Versus Kenya National Examination Council and 2 others.

(5) Civil suit 168 of 2012 (Malindi) Bahola Mkalindi Rhigho Versus Michael Seth Kasame & 2 others.

(6) Misc Civil Appl. 1078 of 2007 (Millimani Commercial -Nairobi) Republic Versus Minister for Finance & Another, Exparte Hon Nyang'o and 2 others.

(7) Civil Appeal 252 of 2005 (Mombasa) Funzi Island Development Limited and 2 others Versus County Council of Kwale and 2 others.

(8) Civil Case 27 of 2001 (Machakos) Charels Mutwiri Marulya and 2 others Versus County Council of Mwingi

(9) Civil Misc. Appl. 55 of 2010 (Kisumu) Republic Versus Minister for Forestry and Wildlife and 2

others, exparte Charles Okello & 5 Others.

35. For all the respondents and the Interested Parties, Mr. Nyaoga highlighted their filed Submissions.
36. Mr. Nyaoga told the Court that the land in question in this matter is currently uninhabited . He told the Court that this would be made clear if the Court agreed to visit the suit land. Mr. Nyaoga opined that the Community was not merely being left on the roadside.
37. Mr. Nyaoga submitted that the institutors of the suit that had spawned this application were not inhabitants of the affected area. He argued that one can only have ancestral rights if one was a descendant of known ancestors and a denizen of the apposite area
38. Mr. Nyaoga submitted that this suit was filed way out of time. He said that the process to put up the challenged project commenced way back in the year 2005. He told the Court that there was no secret about it as the required Gazettment had been done.
39. Despite Gazettment as per law, no one opposed the setting apart of the concerned land. According to him, the applicants who came to Court under a Certificate of Urgency concealed many facts. He submitted that, for this reason, Injunctive Orders were not merited.
40. Mr. Nyaoga told the Court that the respondents and the Interested Parties recognized the Importance of the challenged project. He said that it was a Vision 2030 project . He said that the Community had benefited Immensely and will continue to benefit.
41. Mr. Nyaoga submitted that the issues raised by the applicants in this application can only be canvassed conclusively in the main trial. Mr. Nyaoga reiterated his earlier position that Injunctive Orders were not tenable at this interlocutory stage.
42. Mr. Nyaoga concluded by making an oral application to visit the land in Question. He told the Court that his Client was ready to meet all the costs of the visit to the suit land if the Court agreed to have the Land visited by the Court's Deputy Registrar.
43. Mr. Sagana responded to the Submissions proffered by Mr. Nyaoga on behalf of the Plaintiffs. He categorically stated that the proposed site visit was irrelevant. He also said that the issues regarding the importance of the challenged project were irrelevant . He was categorical that the suggested visit was merely mischievous and meant to delay the hearing of this matter.
44. Mr. Abdi for the 2nd Defendant told the Court that he supported the site visit so that the Court could appreciate what was involved in the dispute. He told the Court that he was, himself, a pastoralist and even though pastoralists moved from place to place, the Court, after visiting the site would appreciate that the nomads of Marsabit have never occupied the disputed parcel of land.
45. He told the Court that since Miss Hashi had said that the disputed 150,000 acres were equivalent to a County, a Visit was necessary so that the Court could see that there was more than sufficient land remaining for the concerned Marsabit nomads.
46. Mr. Nyaoga reiterated his earlier position that the 1st Respondent was ready to meet all the costs of the site visit.
47. Miss Kungu for the 3rd, 4th and 5th respondents told the Court that she wholly associated herself with what Mr. Nyaoga had told the Court.
48. This Court after considering the parties' Submissions ruled as follows:-

(1) In terms of Section 63, CPA, the Interim Orders extant in this matter to the effect that status quo be maintained and the activities of the 1st and 2nd respondents be confined to 87.5 acres

they have been utilizing are extended.

(2) The disputed land to be visited by the litigants and their advocates, in the company of this Court's Deputy Registrar, who will give a report to this Court regarding the disputed land and the issues the Advocates will raise during the visit.

(3) Directions on 09/03/2016 to confirm filing of the DR'S report and for Mr. Abdi, if he will still be so desiring, to give his highlights for the County Government of Marsabit in 10 minutes or less.

49. The site visit took place on 25th February, 2016. The Deputy Registrar's Report states as follows:-

SCENE VISIT REPORT

50. Pursuant to the directions of the trial court issued on 9th day of November, 2015 that the Courts' Deputy Registrar visits the disputed land in the company of the litigants and their advocates, I report that I visited the scene on 25th day of February, 2016 as directed. The coram was taken at Isiolo airport upon the request of the parties since counsels had flown directly from Nairobi and it would not have been fair for them to come back to Meru to take coram.

The parties who accompanied me were; Mr. Ondieki for the Plaintiffs, Mr. Wetangula and Mr. Wairoto for the 1st Defendant, Mr. Taylor the Chief operating Officer of the 1st Defendant, Ms. Wambui for the 2nd Defendant, and Ms. Kungu for the 3rd, 4th and 5th Defendants. Mr. Mwirito held brief for Mr. Kiprop for the interested parties.

Before proceeding to the scene, Mr Ondieki, counsel for the plaintiffs raised issues that he had wished his client who was in Nairobi to be flown to the scene by the 1st Defendant in compliance with the Court's directions that the 1st respondents to cater for transport of the parties to the scene and back but he was told they only had space for one person. He also stated that parties had not set the agenda of the scene visit as directed by the Court.

Counsels for the Defendants argued that the Plaintiff's counsel had a chance to attend Court before the Courts' Deputy Registrar on 11th February, 2016 and agree on the agenda and other modalities of the scene visit but counsel wasted the chance. They maintained that counsel was served with the directions on how the scene visit was to proceed but he never applied for review of the directions.

Having confirmed from the Court records that the Plaintiffs counsel had been invited to attend Court and agree on the logistics of the scene visit and having been further served with the Courts directions on how the scene visit would proceed, I deemed it only fair to proceed with the scene visit which had already started. We were already at Isiolo airport.

We took off for the scene at about 11:00 am and arrived at about 12:00 pm. We over flew the suit premises with the counsel and the 1st Defendant's COO who guided us and gave all the information about the project. My observations were as follows;

The suit land was quite extensive but the portion with buildings rested on a small portion of the entire land.

- We were informed that the buildings we saw were offices and residential houses for the workers of the 1st Defendant most of who were locals and for employees of the Non Governmental Organization that was coming to put up the turbines sometime in March this year.
- There was one Manyatta within the suit premises occupied by members of the local community. We were informed that the Manyatta has been there even before the 1st defendant occupied the land. I noted that most of the 1st Defendant's workers were members of the local community.
- I noted that the 1st Defendant had built a school for children from the local community.
- There was no pasture on the land and it was very dry with visible shrubs. I spotted two men with

- about three or four goats passing through the land.
- There was no fence preventing the locals accessing the land. There was no river or lake running through the land.
 - The suit land is situated in the middle of no where. Apart from the Manyatta and the houses within the suit premises, there were no other houses nearby. There were several ancillary roads constructed within the suit premises.
 - A lot of massive construction had been done and several pictures were taken by the Courts ICT officer. The photos are attached as reference material. Video clips of the scene were also taken and are submitted herewith.
 - There were several bore holes dug and we were informed that one had been given to the locals. Construction of the ground where the 365 turbines will rest was complete. We were informed that the turbines will be put up in March this year.
 - We were informed that the lease was for 15 years. That once the construction is over, one of the buildings will be donated as a police post.
 - I spoke to one of the locals at random and he expressed his happiness with the project. He told me he was happy because he could now afford to drink clean water.
 - There was no representative from the Plaintiff's side. Apart from the locals who work for the 1st defendant there were no other members of the local community at the scene. I was therefor not able to get their views.

DATED AT MERU THIS 8TH DAY OF MARCH, 2016

51. On 09/03/2016 , the Court confirmed to the parties that the Deputy Registrar had filed her Site Visit Report. After hearing the parties, the Court ruled as follows:-

(1) 2nd Respondent reluctantly allowed to sort out its house and highlight its Submissions on 23/05/2016 on which dated a date for Ruling in this matter will be pronounced.

(2) All parties allowed to put in a 2 pages conspectus/submissions on the Deputy Registrar's report and file and serve the same 10 days before the next mention date.

(3) In terms of Section 63 CPA, Interim Orders are extended.

(4) Highlighting of Submissions by the 2nd Defendant and further directions on 23/05/2016.

52. On 23/05/2016, the parties confirmed that they had filed their Submissions in respect of the Site Visit report filed by the Deputy Registrar.

53. Mr. Abdi for the 2nd respondent told the Court that on 09/03/2016, he had been accosted and harassed by a crowd. He Submitted that whereas everyone had a right to come to Court, such a right should not threaten the rights and security of another person.

54. The Court took this matter seriously as when an officer of the Court is harassed and threatened, this threatens delivery of justice. The Court adjourned for some ten minutes and directed the Plaintiffs to impress upon their supporters the need to uphold law and order. The Plaintiffs confirmed to Court that they had talked to their supporters and that they would keep order and obey the law.

55. At long last Mr. Abdi for the 2nd Respondent highlighted his Submissions. He told the Court that the 2nd respondent wished to adopt its Written Submissions. He, however, indicated that he would highlight only parts of the Submissions.

56. He told the Court that the 1st Defendant approached the then County Council of Marsabit with its intention to embark on a wind energy project in 2005. He said that from the year 2005, continuous consultation between the defunct County Council of Marsabit and the local community had taken place. He also told the Court that the defunct County Council of Marsabit and the National Government had been in consultations for a period of 9 years.

57. Mr. Abdi told the Court that the 1st, 2nd, 3rd and 4th applicants/plaintiffs were members of the Marsabit County Assembly. He said that they had not at any one time engaged the 2nd Defendant on their concerns about the 1st defendant's project over a period of 9 years. He opined that when litigants come to a Court of equity to seek Injunctive Orders, as the applicants did, they must come to Court with clean hands and evince utmost good faith.

58. Mr. Abdi told the Court that the applicants failed to demonstrate why they had waited for 9 years and watched the 1st respondent conduct many activities including feasibility studies, digging wells etc only to find belatedly that such activities would be injurious to them. He submitted that granting the Injunctive Orders sought would injure the 2nd defendant, the National Government and the Community. He opined that this application had been brought to Court in bad faith and ought to be dismissed.

59. Concerning the Visit Report, Mr. Abdi told the Court that it was a true reflection of what was on the ground. He urged the Court to adopt it in its entirety.

60. Regarding the applicants' Submissions with respect to the Site Visit Report, Mr. Abdi told the Court that he took exception to the consistent, persistent and unprofessional conduct on the part of the Plaintiffs' Advocates. He opined that the statement contained in paragraph 15 of the apposite Submissions to the effect that "he who pays the piper, gets the tune" was an egregious attack on the integrity of the Court.

61. Miss Hashi, in response to Mr. Abdi's Submissions, told the Court that the applicants' case concerned the unprocedural alienation of land against Section 117 of the defunct Constitution of Kenya. She informed the Court that the 1st, 2nd, 3rd and 4th applicants have only been MCA'S since 2013, and therefore, the period of 9 years when the alleged consultations were taking place was irrelevant. She reiterated that what was before the Court was existence of ancestral rights which could only be extinguished through a legal process. She told the Court that the Plaintiffs had never doubted the integrity of the Court.

62. The respondents and the interested parties wholeheartedly supported the Deputy Registrar's report concerning the apposite site visit.

63. The applicants, however, trashed the report. They maintained their opposition to the site visit. Among other things, their submissions stated that they had been excluded from participation in the Site Visit contrary to the orders of this Court. Among other things they took issue with the fact that the visit was financed by the 1st defendant who is a litigant in this matter. I, however, note that this objection has only been raised after the visit had taken place. They felt that reference to several projects such as boreholes, roads etc was of no relevance to this matter as what they were challenging was, according to them, the illegal process of setting apart of the suit land.

64. The 1st Respondent has proffered the following authorities:-

(1) Land case No. 49 of 2014 (Kitale) John Chege Njoroge & another Versus Kenya Electricity Transmission Co. Limited.

(2) ELC No. 407 of 2012 (Eldoret) Fanikiwa Limited Versus Joseph Komen & 5 others.

(3) Civil Appl. No. Sup. 16 of 2012 (court of Appeal at Nairobi) Benjoh Amalgamated Limited and another Versus Kenya Commercial Bank Limited.

*(4) Misc. Civil Appl. 384 of 1996 (Mombasa) Republic Versus County Council of Kwale and another, *ex parte* Kondo & 57 others.*

(5) Civil Appeal No. 210 of 1997 (Nairobi) Bahadurah Ebrahim Shamji Versus Alnoor and 2 others.

(6) Civil Case 14 of 2010 Abdalla Rhova Hiribae & 3 others versus The Hon. Attorney General and 6 oher, Kituo cha Sheria Interested Party.

(7) ELC 911 of 2013 Veronicah Waithira, Trustee of Inter Christian Churches & 3 others Versus Kenya National Highways Authority.

(8) Civil Case 1078 of 2003 Amir Suleiman Versus Amboseli Resort Limited.

65. The 2nd Respondent has proffered the following authorities:-

(1) Civil suit 288 of 2004 (Nairobi). Hon Martha Karua Versus Radio Africa Ltd t/a Kiss FM Station and 2 others.

(2) Civil case No. 14 OF 2010 (Nairobi) Abdalla Rhova Hiribae & 3 Others versus Attorney General & 7 Others.

66. The Interested Parties have proffered the following authorities:-

(1) ELC 541 of 2013 (kerugoya) Archibald Wamburu Kahora Versus National Bank of Kenya Ltd and another

(2) Civil suit No. 47 of 2012 (Malindi) Hussein Ali and 4 others Versus Commissioner for Lands, Lands Registrar Lamu and 7 others.

(3) Civil case No. 233 of 2004 RLCO Steel Fabricators Limited and another Versus Commercial Bank of Africa Limited & 3 others.

(4) ELC 407 of 2012 (Eldoret) Fanikiwa Limited Versus Joseph Komen and 5 others.

67. I have considered the pleadings, the Submissions and the authorities proffered by the parties in support of their respective assertions.

68. I find it necessary to juxtaposition the Plaintiffs' prayers in their plaint dated 14 October, 2014 with the prayers in this application.

69. The Plaintiffs prayers are for Judgment against the defendants for: -

(a) Cancellation /Revocation of the title comprising of the suit property and in particular IR NO. 6395/1(L.R 28031) and IR No. 6396/1(L.R 28031/2).

(b) Nullification of the wind power project.

(c) Costs of this suit herein.

70. In this application the applicants seek orders that:-

1. This matter be certified urgent and heard ex-parte in the first instance.

2. This Honourable Court be pleased to grant an order of injunction restraining the Respondents, their agents/ servants, employees and/or anyone acting in their names or under their instructions from selling, transferring and or in any manner dealing in all that piece of land known as Land Reference Number 28031/1 and Land Reference 28031/2, measuring 150,000 acres, situated in Marsabit County in the Republic of Kenya (the suit property) which is subject matter of this suit pending the hearing and determination of this application inter parte.

3. This Honourable Court be pleased to issue an order of interlocutory injunction restraining the

1st Respondent or any of the Respondents either through themselves, servants or agents from carrying out developments of whatever nature including digging, leveling, construction of roads, construction of any wayleave and/or any structures and from implementing any development of whatever nature on the suit property pending the hearing and determination of the suit filed herein.

5. THAT costs of this application be provided for;

71. It is incumbent upon a Court of law to consider the effects that orders granted at the Interlocutory Stage may have on the orders sought in the plaint.

72. I opine that granting the prayers sought by the Plaintiffs at this Interlocutory Stage will impact on the prayers sought in the plaint. The prayer in the plaint for nullification of the Wind Power Project is veritably apposite.

73. The Plaintiffs' case in this application is predicated upon what they say was lack of procedural integrity in the process.

74. The Plaintiffs contend that there was no public consultation, no notice of the proposal for setting apart given, no reservations from the residents of Laisamis Constituency and Karare Ward recorded and no compensation or alternative settlement was offered to the Plaintiffs thus making the entire process of setting apart illegal, unprocedural and in total disregard to the provisions of the Constitution and the Trust Land Act.

75. They say that they were not notified of the intended process of setting apart the suit property.

76. They claim that there was no Divisional Board constituted as per section 13 (2) of the Trust Land Act. The Plaintiffs contend that there was no meeting. Further, the documentation in the possession of the 2nd defendant's records as evidence of such a purported meeting with the Plaintiffs is a Town Planning Committee Meeting sitting at the administrative headquarters, and held on the 13th August, 2013. It purports, that the discussion relating to the process of setting apart was unanimously; approved. However, It does not make reference to the recommendation of the Divisional Board pursuant to Section 13 (2) (c) of the TLA.

77. They contend that no proposal to set apart the land was ever presented to the Plaintiffs by the County Council of Marsabit nor were the Plaintiffs informed of the day and time of the purported meeting of the Divisional Board, at which the said proposal would be discussed so that they could raise their recommendation prior to the resolution for Setting Apart being reached.

78. They assert that the Divisional Board (which the Plaintiffs contend was non-existent at the time of the impugned process of setting apart) failed to hear and record in writing the representations of all the supposed persons concerned who supposedly were present at the meeting and also failed to submit to the county council its written recommendation concerning the proposal to set apart land, together with a record of representations made at the meeting.

79. The Plaintiffs contend that the purported full council meeting held on 26th August 2007 to ratify the Town Planning Committee Meeting lacked quorum.

80. The Plaintiffs claim that no compensation or assessment of damages was ever made to the them by the County Council, a fact, they say, which flies in the face of the express provisions of Section 8 as read together with Sections 9 and 10 of the Trust Land Act and Section 117 of the repealed Constitution.

81. The Plaintiffs assert that the defendant carried out a self-serving Environmental and Social Impact assessment of the project without involving the Plaintiffs and without evaluating the possible negative impact of the Project on the health and well being of the local Community.

82. The Plaintiffs aver that, without prejudice to their assertion that the suit property was illegally set apart, out of the 150,000 acres which according to them were illegally set apart to the 1st Defendant, only 40,000 acres will be utilized for the project.

83. The applicants contend that the 1st Defendant has not explained the purpose for which the remaining 110,000 acres will be utilized.

84. It is the Plaintiffs' contention that the illegal process, according to them, of setting apart the suit land, has occasioned and will continue to occasion economic and social challenges and hardships to them. They particularize the apposite Economic and Social hardships as:-

i. The Plaintiffs' land having been illegally and unprocedurally set apart in favour of the 1st Defendant, this leaves them without access to an important seasonal pasture land and accordingly shall jeopardize their pastoralist way of life and survival of their livestock and livelihood.

ii. The path used by the Plaintiffs as a camel corridor to access Lake Turkana with their livestock has been subsumed and taken over by the 1st Defendant.

iii. The cultural activities performed by the Plaintiffs on the suit property have been rendered impossible owing to this impugned process of setting apart. The heart of the wind farm, Serima area and eastern shores of Lake Turkana is an important cultural site for the Rendile community in conducting the Galgulame ceremony. The ceremony was held at Serima in 1924 by Ilkilegu age group and in 1966 by the Ilkichilli age group and would have been held in 2008.

iv. The Plaintiffs were not compensated nor recognized as the original and true owners of the suit property.

v. No proper Environment and Social Impact assessment was conducted on the Project thereby exposing the lives of the Plaintiffs to vagaries of nature.

vi. The Project will lead to dereliction of the suit property to the detriment of the Plaintiffs.

85. The Plaintiffs proffer to Court that they recently discovered that it is a requirement under regional and international instruments to consult indigenous Communities and get their Free, Informed and Prior Consent before Commencement of any project on their land.

86. The Plaintiffs categorically state that the apposite Consent was never sought and this infraction amounted to a clear violation of the International Finance Corporation (IFC) Performance standards especially No. 7 on indigenous peoples and No. 8 on cultural Heritage.

87. The Plaintiffs assert that they have demonstrated that the Injunctive Orders sought are merited.

88. The Plaintiffs anchor their position in this application and in the suit on the basis that provisions of Section 117 of the defunct Constitution of Kenya, 1963 and provisions of Section 13 of the Trust Land Act were ignored during the setting apart of the apposite land.

89. Section 117 of the defunct Constitution reads as follows:-

(1) "Subject to this Section , an Act of Parliament may empower a County Council to set apart an area of Trust land vested in that county council for use and occupation (a) by a public body or authority for public purposes ;or

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

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

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

d) an Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

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

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

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

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

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

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

90. Section 117 of the defunct Constitution of Kenya deals with setting apart of Trust Land at the instance of a County Council.

91. Setting apart of Trust Land for purposes of Government is provided for by Section 118 of the defunct Constitution.

92. Section 117 of the defunct Constitution of Kenya has provision for Parliament to legislate for the procedure to govern the process of setting apart of trust land at the instance of County Councils.

93. I do note that the legislation which governs setting apart of land pre-dates, the defunct Constitution of Kenya, 1963. The Trust Land Act was promulgated in 1939. However, legal Notices numbers 625 of 1963 and 43 of 1968 made provisions for compensation where the setting apart is done Under Section 7 of the Act. Section 7 deals with setting apart of land under Section 118 of the defunct Constitution of Kenya. This is setting apart of land at the instance of the Government. It is pellucidly clear, therefore, that Section 7 of the Trust Land Act does not deal with setting apart of land Under Section 117 of the defunct Constitution of Kenya, I will leave this at that as a chance to contest disputed issues during the hearing of the main suit will be available to the parties.

94. Section 13 of the Trust Land Act provides the procedure to be followed before land is set apart by a County Council. The Procedure is as follows:-

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

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

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

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

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

96. It is, however, clear that where land is set apart in accordance with Section 117 of the defunct Constitution of Kenya, rights , interest or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under customary are recognized and although they are extinguished by the setting apart of the land in Question, prompt payment of full Compensation shall be paid to any resident who:-

(b) under the African customary law for the time being in force and applicable to the land was a resident.

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

97. It is pellucid that should the Court find that the applicants were residents of the disputed land, then they were entitled to prompt full compensation as provided for under the law.

98. This brings me now to the Scene Visit of the suit land by this Court's Deputy Registrar. The Visit was meant to allow the Court to establish the competing claims that: -

a) The applicants were denizens of the disputed land.

b) That the applicants were strangers to the suit land

99. The Deputy Registrar's Report is highly contested. Among other things, the Deputy Registrar reported that the land was situated in the middle of nowhere and that it had only one Manyatta. It noted that the 1st defendant had built a school for the local community and had dug several boreholes, among construction of other infrastructure. The report also said that upon completion of the Construction of the project, one of the buildings will be donated for a police post by the 1st defendant.

100. The Deputy Registrar's Report in its conclusion, said that there was no representative from the Plaintiffs' side. It stated that apart from the locals who work for the 1st defendant, there were no other members of the local community.

101. The Issue as to whether the Plaintiffs were excluded from participating in the site visit or if they refused to participate is one of the contested issues.

102. The Plaintiffs trashed the report. Among other things, they claimed that they were excluded from participation in the scene Visit. They took issue with the fact that one of the litigants, the 1st defendant, financed the Scene Visit. They asserted that the residents of the suit land were pastoralists who were peripatetic and moved to other places in accordance with demand for pasture. The plaintiffs asserted that what they were mainly challenging was the procedure used to set apart the disputed land.

103. The parties' assertions with respect to the Question if or not the plaintiffs were residents of the disputed land are diametrically opposed. The effect is that there is in existence veritably disputed facts.

104. Regarding the process used to set apart the disputed land, the plaintiffs assert that the process was procedurally and legally irregular. The respondents and the Interested Parties, however, assert that the setting apart of the land in question was procedural and had legal integrity. Here again, I find that there is a plethora of disputed facts.

105. I do not need to reinvent the wheel. The Court of Appeal in the Case of Mbutia Versus Jimba Credit Corporation [1988] KLR 1, eruditely elucidated the approach which Courts should adopt when handling interlocutory applications. Justice Platt, JA, opined as follows:-

“The correct approach in dealing with an application for an injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each sides propositions”.

106. I do not wish to make a determination on disputed facts and issues.

107. With the finding I have made that there are many disputed facts, in this application, I decline to grant the Orders of Injunction sought by the plaintiffs in this application.

108. I do note that on several occasions, the parties had intimated to Court that they were willing to settle the entire suit by negotiated Consent. The parties are encouraged to explore an out of Court settlement notwithstanding that what is challenged is the process leading to the setting apart of the apposite land. In any case, they had told the Court earlier on that they were exploring an out of Court settlement.

109. Parties should be bound by their pleadings. On 5/11/2014, Mr. Abdi Hassan, Counsel for the 2nd respondent told the Court that the challenged project would utilize only 87.5 acres. He also told the Court that access to Lake Turkana or to the site would not be blocked. This position was confirmed by Mrs. Abdallah who was representing the 1st respondent. I will hold the 1st and 2nd Respondents to their undertaking that only 87.5. acres will be utilized by the project pending the hearing and determination of this suit.

110. I also hold the 1st and 2nd defendants to their undertaking that access to Lake Turkana and to the suit land will not be blocked.

111. It is important that this suit be heard and determined expeditiously. As there are political overtones evinced by this suit, I deem it necessary to give the County Assembly of Marsabit a chance to help in resolving this matter. This I will do in obedience to Section 59 (c) of the Civil Procedure Act which provides as follows:-

“59C Other alternative resolution methods

(1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, Order.”

112. In the Circumstances, it is ordered as follows:-

(1) The Injunctive Orders sought by the Plaintiffs are not granted.

(2) This matter is referred to a panel to be constituted by the County Assembly of Marsabit, and which panel should not include any of the litigants, for a possible resolution of the issues in question with a view to reaching an out of Court Settlement.

(3) The Panel should consist of members of the County Assembly who may co-opt other members and the panel should handle the matter and file a report to Court within 90 days of today.

(4) The Executive Officer of this Court, in the absence of this Court's Deputy Registrar, who is on official duty outside this station, to transmit this decision to the Clerk, Marsabit County Assembly who will facilitate implementation of the orders contained herein.

(5) Should the alternative dispute resolution process envisaged herein not succeed, the suit will be set down for hearing expeditiously.

(6) In the meantime, the plaintiffs are ordered to comply with order 11, of the Civil Procedure Rules, within 30 days of this Ruling.

(7) The Respondents and the Interested Parties should comply with Order 11, of the Civil Procedure Rules, within 30 days after they receive the Plaintiffs' compliance documents.

(8) Pending hearing and determination of this suit the 1st and 2nd Respondents should confine their activities to the 87.5 acres they undertook to utilize.

(9) As already undertaken by the 1st and 2nd respondents, access to Lake Turkana and to the disputed land will not be blocked to the applicants.

(10) Costs will be in the cause and will be decided at the conclusion of the suit when it will be determined if or not this suit has public litigation concerns.

(11) Directions on 15th March, 2017.

113. It is so ordered .

DELIVERED IN OPEN COURT AT MERU THIS 9TH DAY OF NOVEMBER, 2016 IN THE PRESENCE OF:

C.A: Daniel/James

Miss Hashi for Plaintiffs/Applicants

Abdi Hassan for 2nd Defendant

Kiongo for 3rd, 4th and 5th Respondents

Kiprop for Interested Parties

James Wairoto and Wetangula for 1st Defendant.

P. M. NJOROGE

JUDGE