



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 47 OF 2014

BETWEEN

GITSON ENERGY LIMITED.....APPELLANT

AND

HON. FRANCIS CHACHU GANYA.....1ST RESPONDENT

CHRIS GUYO HUKA

(CHAIRMAN BUBISA COMMUNITY.....2ND RESPONDENT

DALACHA ELEMA (COMMUNITY MEMBER

BUBISA COMMUNITY.....3RD RESPONDENT

HAJIDIBA BORU (COMMUNITY MEMBER

BUBISA COMMUNITY.....4TH RESPONDENT

COL. JABA JALDESA (COMMUNITY MEMBER

BUBISA COMMUNITY.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

COMMISSIONER OF LANDS.....7TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi – Milimani (Odunga, J.) delivered on 23rd April, 2013

in

H.C. Misc. Application No. 374 of 2012)

JUDGMENT OF GITHINJI, JA

[1] This is an appeal from the judgment of the High Court (**Odunga, J.**) allowing the respondents' application for judicial review and granting an order of certiorari against the Commissioner of Lands (**Commissioner**). The order of certiorari quashed the decision of the Commissioner expressed in **Gazette Notice No. 13135** dated 11th September 2012, concerning the setting apart of 60,705 hectares of land situated in Bubisa Location of County Council of Marsabit for the purpose of Gitson Energy.

[2] The Gazette Notice No. 13135 dated 11th September, 2012 published on 21st September 2012, was partly in the following terms:

“THE TRUST LAND ACT (CAP 288)

SETTING APART LAND

NOTICE is given that the land described on the schedule thereto has been duly set apart in accordance of the provisions of Part IV of the Trust Land Act for the purpose specified in the said schedule.

SCHEDULE

Place	-		Bubisa
Purpose	-	Gitson	Energy
Area	- 60,705.0 hectares approximately”		

The appeal essentially raises the question of the conflict of administration of Trust Land under the repealed Constitution and trust and community land under the Constitution of Kenya, 2010 (current Constitution).

[3] The application for judicial review was made by five applicants. The first applicant was **Hon. Francis Chachu Ganya** – a member of parliament of North Horr Constituency. The 2nd applicant **Chris Guyo Huka** was described as the Chairman of Bubisa Community, while the other three applicants were described as Bubisa Community members. The County Council of Marsabit was not a party but its successor, County Government of Marsabit, on application, and, with the consent of the appellant was joined in this appeal as an interested party.

The application for judicial review was supported by a statutory statement, supporting affidavit, and several documents. The Commissioner filed a replying affidavit sworn by **Silas Kiogora Mburugu** - the Principal Land Administration Officer. Although **Gitson Energy Limited (Gitson Energy)** was not named as an interested party, one **Michael Muchemi Ndiritu** – the Managing Director, filed a replying affidavit and annexed numerous documents opposing the application.

The application was supported by several grounds, the main three being:

(i) That the 1st applicant as a Member of Parliament and the people of North Horr constituency were not consulted in the decision leading to the allocation, excision and setting apart of the land described in the Gazette Notice.

(ii) The Commissioner of Lands usurped the powers donated to National Land Commission by section 5(2)(c) of the National Land Commission Act, 2012 and his action is contrary to Trust Land Act and Transition to Devolved Government Act.

(iii) The decision of the Commissioner of Lands is contrary to section 35 of the Transition to

Devolved Government Act which bars any state organ, public office, public entity and local authority from transferring land.

[4] The appellant's case as disclosed by Michael Ndiritu's replying affidavit and annexed documents was briefly as follows:

In or about the year 2004, Gitson Energy inquired from Kenya Electricity Generating Company (**KenGen**) whether it would be willing to co-operate in exploration and exploitation of potential wind energy. KenGen communicated its willingness to co-operate with Gitson by a letter dated 7th January 2005. The Ministry of Energy also confirmed that it was aware of Gitson's wind power project and indicated that the power generated by the project would be purchased by the Kenya Power and Lighting Company Limited on agreed terms. The project was also endorsed by the relevant organ of United Nations Development Programme and which promised to support the feasibility study. Thereafter, Gitson Energy embarked on an extensive and intensive feasibility studies to establish the viability of the project which ultimately proved successful. The Ministry of Energy informed Gitson that it was its duty to secure land rights at the proposed site. By a letter dated 13th February 2008, the District Officer, Turbi Division requested the Town Clerk of Marsabit County Council to consider setting apart land for the project. Gitson paid Kshs. 60,000 as application fees. After several meetings between Gitson Energy, local community leaders, the community and the provincial administration, the Finance, Staff and General Purposes Committee of the County Council of Marsabit (**Council**) at its special meeting held on 8th July 2010 at 11.05 a.m. unanimously resolved, *inter alia*, to set apart 150,000 acres at Bubisa and to grant a lease to Gitson Energy subject to approval by Ministry of Local Government. The Council held a special full council meeting on the same day at 2.30 p.m. and adopted and approved the resolution of the Finance Staff and General purposes Committee. By a letter dated 30th August 2010, the clerk to the council applied to the Ministry of Local Government for approval to lease and to enter into a lease agreement to lease 150,000 acres to Gitson Energy for 33 years. The Ministry granted the approval and by a letter dated 2nd February 2012, requested the Commissioner to process the necessary documents. Gitson Energy maintained in the replying affidavit that it had complied with every law, regulations and approval procedure. Correspondence shows that Gitson Energy issued a cheque of Kshs. 500,000/- dated 1st November 2010 to the Council being payment for advance rent which payment was acknowledged by Council's lawyers.

[5] The Commissioner of Lands through the replying affidavit of Silas Kiogora Mburugu stated, amongst other things, that the Gazette Notice was issued pursuant to **section 53** of the **Trust Land Act** after being satisfied that the process of setting apart the disputed land had been complied with and his role was limited to issuing the Gazette Notice and title documents, and did not go to the process of setting apart the land.

However, by a letter dated 4th October 2012, the Commissioner, following complaint by the 1st applicant, suspended any documentation "until the community and investor had engaged meaningfully".

[6] The first ground of the application, that is, that, the 1st applicant and the Bubisa Community was not consulted on the project was hotly contested. That ground impugned the process of setting apart land leading to approval by full council and the issuance of Gazette Notice by the Commissioner. The respondents and the interested party in their counsel's written submissions contend that the appeal should be dismissed for the reason, *inter alia*, that the appellant and the 6th and 7th respondents did not follow the required legal procedure for setting apart the land. They refer to absence of minutes of Divisional Land Board as evidence that no meeting of Divisional Land Board was held as required by **section 13(2)(c)** of **Trust Land Act (TLA)**.

[7] However, it is clear that the application for judicial review did not seek an order of certiorari to quash the decision of the council made on 8th July 2010 setting apart the land. The application expressly targeted the decision of the Commissioner of Lands contained in the Gazette Notice of 11th September, 2010. Moreover, the learned judge did not determine whether the legal process, particularly whether or

not there was public participation, was followed in arriving at his decision. He stated in part:

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

The learned Judge may have been right or wrong in so finding. However, there is no appeal specifically against that finding nor have the 1st to 5th respondents and the interested party filed, pursuant to rule 92 of Court of Appeal Rules, a notice of grounds for affirming the decision of the learned Judge on ground of failure by Council to comply with the statutory procedure. By parity of reasoning, the appellant's contention that the Gazette Notice was issued after statutory process prescribed by section 13(2) of TLA does not fall for consideration in this appeal.

[8] The order of certiorari was granted for two broad reasons. The first is that the action of the Commissioner of issuing the Gazette Notice setting apart land was in excess of his jurisdiction and/or *ultra vires* his powers as he had no authority to issue the impugned Gazette Notice. In so holding, the learned Judge relied on Article 67, 62(2) and 62(4) of the current Constitution.

He was of the view that since the **National Land Commission (Commission)** had already been established with power to manage and administer public land on behalf of National and County Government, and since public land vest in county government, the land in issue being public land held in trust for people resident in the County could not be disposed of or otherwise used except in terms of an Act of Parliament.

Further, the learned judge reasoned that since the power to publish a notice setting apart land is vested in the Council by **section 7(4)** of the TLA, the Commissioner acted without jurisdiction or in excess of jurisdiction when he issued the Gazette Notice.

The second reason for allowing the application was that the clear intention of the Gazette Notice was to lead to the transfer of the assets of the council which was prohibited by s. 35(1) of the **Transition To Devolved Government Act, 2012** for a period of three years after the first election under the Constitution from 9th March 2012 when the Act became operative.

[9] The order of prohibition was not granted for the reason that as the decision of the Commissioner setting apart land had been quashed, there was no longer any threat of an illegal action and the respondent, if it still intended to proceed with the project, would have to start the process afresh in accordance with the law.

[10] The appeal is based on ten substantive grounds which **Mr. Gachuhi**, the learned counsel for the appellant argued in clusters. The 1st, 2nd, 3rd, 4th and 5th respondents and the County Government of Marsabit, oppose the appeal while the 6th and 7th respondents support the appeal. The appeal raises three broad issues which counsel for 6th and 7th respondents has framed in the written submissions viz:

(i) Whether the setting apart of trust land was done in accordance with section 7 of the Trust Land Act (repealed).

(ii) Whether the Commissioner of Lands usurped the powers of the National Land Commission in issuing the Gazette Notice setting apart the suit land

(iii) Whether the suit land fell under section 35(1) of the Transition To Devolved Government Act.

I would respectively adopt the three broad issues.

[11] The 1st, 2nd, 3rd, 4th and 5th grounds of appeal which were argued together relate to the first issue. The appellant states in those grounds of appeal that the learned judge erred in law and in fact by holding - that the setting apart was done in accordance with section 7 of the TLA; in failing to consider that the setting apart was carried out in accordance with section 13 of TLA; in holding that the Gazette Notice was published pursuant to section 7 of TLA; in failing to appreciate that the land was set apart on 8th July 2010, upon full council approval under section 13 of TLA; in failing to appreciate that Gazette Notice is to be published after the council's approval, and in failing to appreciate that the Gazette Notice was a mere formality and a notice of approval of setting apart on 8th July 2010.

[12] The prevailing law at the material time relating to setting apart Trust land was the repealed Constitution which was repealed by the Constitution of Kenya, 2010 with effect from 27th August 2010 and the Trust Land Act. Section 115 (1) of the repealed Constitution vested all trust land in the county council within whose area of jurisdiction it was situated. Section 117(1) provided that an Act of Parliament may empower a county council to set apart an area of Trust land for use and occupation, *inter alia*, by any person for purpose which, in the opinion of the council, is likely to benefit the persons ordinarily resident in that area by reason of use or the revenue to be derived from the rent.

The marginal note to that section reads:

“setting apart of Trust land by County Councils.”

Section 118(1) provided for setting apart of Trust land for purposes of Government and stated:

“Where the President is satisfied that the use and occupation of an area of Trust Land is required for any of the purposes specified in sub-section (2), he may after consultation with the county council in which the land is vested, give written notice to that county council that the land is required to be set apart for use and occupation for those purposes; and the land shall then be set apart accordingly and there shall be vested in the Government of Kenya such estates, interests or rights in or over that land or any part of it as may be specified in the written notice.”

Part IV of the TLA deals with setting apart Trust land. Section 7(1) provides:

“Where written notice is given to Council, under subsection 118 of the Constitution; that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the Council shall give notice of the requirement and cause the notice to be published in the Gazette.”

Section 7(2) prescribes the conditions that the council may require the Government to fulfill before publishing the notice. Section 7(3) stipulates the matters that the notice should specify including the date of making application for compensation.

Section 7(4) stipulates that where compensation awarded as provided has been deposited as stipulated then, the;

“Council shall make and publish a notice setting the land apart”

On the other hand, Section 13 of the TLA deals with the setting apart of Trust land by Council under section 117(1) of the repealed Constitution. Section 2(a) – (d) prescribes the procedure to be followed.

Section 2(d) provides”

“the recommendation of 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 council except by a resolution passed by a majority of all the members of the council, provided that where the setting apart is

not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.”

Section 13(3) Provides:

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

Lastly, section 53 of the TLA provides:

“The Commissioner of Lands shall administer the Trust land of each council as agent of the Council, and for that purpose may –

(a) exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13(2) (d) of this Act; and

(b) execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient.” .

[13] The appellant contends that the proper provisions that governed the setting apart Trust land were section 117(1)(c) of the Constitution and section 13(3) of TLA and that section 7(1) of TLA provided for setting part Trust land at the instance of Government and that the learned Judge erroneously and without any basis relied on section 7 without considering the entirety of part IV.

The appellant’s counsel further submitted that contrary to the erroneous finding of the Judge, notification by council of setting apart – under section 13(3), was the final step and not the first step.

The 6th and 7th respondents support the appellant’s view as shown in the written submission prepared by **Schola Mbito**, the learned Senior State Counsel. The 1st – 5th respondents and the interested party support the finding of the learned judge and contend that the land was set apart under section 7 and further that the Commissioner had no power to exercise power conferred on the council under section 13(2) (d) of TLA.

[14] The provision of Section 117 and 118 of the repealed Constitution are clear and unambiguous. Section 117 authorised a Council to set apart Trust land under power conferred by an Act of Parliament for use and occupation specified therein. Section 13 of Part IV of TLA gives effect to section 117 of the repealed Constitution. The setting apart of Trust land has to be done in accordance with the statutory procedure stipulated in section 13(2) and where the council approves the proposal to set apart land then as provided in section 13(3) a notice of setting apart has to be published in the Gazette.

Section 53 of TLA gives power to the Commissioner to exercise any power conferred on the Council by the Act as agent of the Council except as provided by the proviso thereto, the Minister for Local Government terminates his power. But as section 53(a) provides, he cannot exercise power conferred to the council by section 13(2) (d) – that is to say, that, he has no power to consider the recommendation of Divisional Board and to approve the proposal to set apart land on behalf of the Council.

On the other hand, section 118 of repealed Constitution gave the President power, in essence to compulsorily acquire Trust land for public purposes by merely giving a notice to the council and upon such notice being given, the land was effectively set apart and vested in the Government. Section 7 of Part IV of TLA gave effect to section 118. Upon the Government fulfilling the conditions that the council may set, including the deposit of compensation required, the council was mandated to make and publish in the Gazette, a notice setting apart land so required by the Government.

[15] The history of the proposed project including the correspondence preceding the issuance of the

impugned Gazette Notice by the Commissioner, the tenor of the notices, leaves no doubt that Trust land was being set apart for use of Gitson Energy and not for the purposes of Government under S. 117 of the repealed Constitution and section 13 of TLA. By the time the Gazette Notice was issued the council had already, on 8th July 2010, approved the proposal to set apart land and the notice was issued by Commissioner as an agent of the council in compliance with section 13(3) and not in compliance with section 7(4) as found by the learned Judge. The finding of the learned Judge that the Gazette Notice should have been issued by the Council, was thus issued by a person not authorized to do so and therefore illegal, is patently erroneous. However, fundamental question is whether such notice could have been validly issued by the Commissioner in view of the current Constitution. That leads to the consideration of the second issue raised in the appeal.

[16] The second issue is raised by grounds 8, 9 and 10 of the appeal. It is contended that the learned judge erred in holding that the Commissioner acted *ultra vires*, that the judge failed to consider that section 53 of TLA which empowered the Commissioner to administer Trust land on behalf of the Council; that article 2(4) of the Sixth Schedule of the current Constitution suspended the application of section 62(2) of the Constitution until the National Land Commission was established and gave power to the Commissioner to publish the Gazette Notice, and, that the learned Judge failed to apply section 23(3) of the Interpretation and General Provisions Act.

The appellant's counsel submitted, amongst other things, that the power of the National Land Commission to administer public land under Article 62(2) was suspended by Article 2(4) of the Six Schedule of the Constitution until the Commission was established; that the Commission was gazetted on 20th February, 2013; that the effect of suspension was that the applicable law was section 13 of TLA which vested Trust Land in the Council and that Article 62 could not apply retrospectively to affect actions and rights vested prior to its commencement.

The learned counsel for the 6th and 7th respondents supported the submissions of the appellant despite his submission that the land was not public land under the current Constitution but Community Land under Article 63.

The 1st – 5th respondents and the interested party supported the application of Article 62 and the findings of the learned judge and contended that the Gazette Notice setting apart land was published after the promulgation of the new Constitution.

[17] It is common ground that the Commissioner issued the Gazette Notice setting apart Trust land on 11th September, 2012 which was published on 21st September, 2012 after the current Constitution has been operative with effect from 27th August 2010.

As explained by the affidavit of Silas Kiogora Mburugu filed in the High Court and as I have already found, the Gazette Notice was issued pursuant to the provisions of section 53 of the TLA. In the affidavit, Mr. Kiogora states that National Land Commission Act came into force on 2nd May 2012. The appellant's contention that the members and Chairman of the Commission were appointed on 20th February, 2013 is supported by Gazette Notice No. 2225 published on the same day. It is also correctly submitted by the appellant's counsel that Article 2(1) of the Sixth Schedule to the Constitution which contains the transitional and consequential provisions as read with Article 2(4) suspended Article 62(2) and (3) of the current Constitution until the National Land Commission is established, which means that public land was not vested in the Commission and the Commission could not administer public land on behalf of county government until it was established on 20th February, 2013.

[18] The provisions of the Constitution that the learned Judge relied on, and Article 2(1) and 2(4) of the Sixth Schedule on which the appellant's counsel relies, relate to "Public land". I would agree with the submissions of the counsel for the 6th and 7th respondents that the land in question was not Public land but "Community land" as defined in Article 63(2) of the current Constitution. The land which was being set apart was part of large tract of unregistered land used communally by the Bubisa Community as grazing land and which by virtue of Section 115(1) of the repealed Constitution, vested in Council for the

benefit of the community. It does not fall under the description of Public land in Article 62(1). The sheer size of the land set apart – 150,000 acres, is sufficient evidence that this was part of Trust land vested in county government, the successor of the Council or unregistered Community land. By Article 63(1), community land vests in and held by the respective communities and by Article 63(3) unregistered community land is held in trust by county governments on behalf of the community to which it is held.

Article 63(4) provides that community land shall not be disposed of or otherwise used except in terms of legislation and Article 63(5) empowers Parliament to enact legislation to give effect to the Article.

That legislation, the Community Land Act – No. 27 of 2016 was enacted and became effective on 21st September, 2016, over three years after the impugned judgment was delivered. The legislation was however enacted within the span of 5 years stipulated by the Fifth Schedule. A comparison of Article 62 and Article 63 shows as follows.

Like Public land, unregistered Community land and Trust Land is held by county government. But unlike Public land which vests in and is held by county government in trust for the people, registered community land is vested in and is held by the particular community.

Further, unlike Public land which is administered on behalf of the people by the National Land Commission, registered community land is administered by the particular community through a “Registered Community” as provided in section 15 of the Community Land Act.

[19] The Community Land Act expressly repealed the Trust Land Act (Section 45) but section 46 and the schedule to the Act contains the transition provisions. Section 46 provides:

“(1) unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall be deemed to have been acquired under the Act.

(2) Unless the contrary is specifically provided in this Act, or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer or otherwise execute a disposition in community land any such transaction shall be continued in accordance with the provisions of this Act.”

Section 46(a) provides, *inter alia*, that the provisions of that section are subject to provision of Article 63(4). And Section 2(1) of the Schedule to the Act provides:

“All rights, obligations and contracts which, immediately before the coming into operation of this Act were vested in or imposed on a former institution shall be deemed to be rights, obligations and contracts of the registered community.”

Lastly, section 8 of the Schedule provides:

“Nothing in this schedule shall be construed as giving exemption to the application of the provisions of Article 63(4) of the Constitution.”

[20] The functions of the National Land Commission are stipulated in Article 67(2) which provisions are replicated in section 5(2) of that Act. Article 67(3) provides that the commission may perform “***any other functions prescribed by national legislation***”. Pursuant to that Article, section 5(2) of the Act gave the Commission additional functions including power to manage and administer all unregistered Trust land and unregistered community land on behalf of the county governments [Section 5(2) (e)].

However, whereas the transitional provision in section 2(4) of the Sixth Schedule suspends the vesting of Public land in the Commission until the Commission is established, there is no identical provision suspending the vesting of Trust land and unregistered community land in the Commission until it is established.

[21] It follows from the foregoing that although the learned judge erred in law in describing the land in question as Public land and in applying the provisions of Article 62(2) his reasoning applies with equal force to the Trust and unregistered Community land. The powers of the Commission to act as agent of the county council in issuing a gazette notice pursuant to section 13(3) of TLA ceased when the National Land Commission was established on 2nd May 2012.

Furthermore, since the Constitution prohibited the disposal or use of community land except in terms of a legislation which was to be enacted and since the powers of the Commission were not suspended until it was established, it follows that the continuation of the process of setting apart Trust land by the Commission by issuing gazette notice before the envisaged legislation was enacted was not only *ultra vires* his powers, but also in contravention of the provisions of the Constitution. The Community Land Act is one of the legislations that was envisaged and the intent of Article 63(4) as now expressed by section 46(2) of that Act in relation to the facts of this case, is that the implementation of the approval of 8th July 2010 by former council to set apart land was to be continued in accordance with the new law. Contrary to the contention of the appellant's counsel, the accrued rights were not taken away. They have been preserved by S.46 of the Community Land Act.

[22] The third issue in the appeal relates to the interpretation of section 35(1) of Transition To Devolved Government Act which provides:

“A state organ, public office, public entity or local authority shall not transfer assets and liabilities during transition period.”

The transition period was defined as meaning ***“the period between commencement of this Act and the date of the first election under the Constitution”***. The Act commenced on 9th March, 2012. The Act has a lifespan of three years which has expired [Section 37(1)]. Its main purpose was to provide a framework for transition to County Government

The appellant avers in ground 7 of the appeal that the learned judge erred in applying the provisions of section 35 and in applying it retrospectively and also in failing to appreciate that the setting apart of Trust land was not a transfer of assets and liabilities.

It is submitted that the setting apart was done on 8th July 2010, which was outside the transition period and not on 21st September 2012 when the Gazette Notice was issued; that the learned judge did not deal with the issue of retrospectivity; that setting apart of land was not a transfer as it would result in a lease being issued which would be extinguished upon expiry of its term, and that section 35 did not apply as section 23 of the Interpretation and General provisions Act which provides that a repeal of a written law does not affect the rights acquired under the previous law.

The 6th and 7th respondents contend that section 35 did not apply as the land had been effectively set apart after a long journey which began in 2008. The 1st – 5th respondents and the interested party adopted the reasoning of the learned judge and submitted that the moratorium on transfer of assets applied as the Gazette Notice would lead to the transfer of the asset of the council.

[23] By section 117(2) of the repealed Constitution the setting apart of land by Council extinguished the rights, interest, or other benefits previously vested in the community as S.117(3) provided that the council could thereafter make grants or dispositions of any estate, interest or right to any person or authority for whose use and occupation it was set apart.

The Gazette Notice issued under section 13(3) of TLA of the repealed Constitution after the approval by council of the proposal to set apart land was the final step in the mandatory statutory process of setting apart Trust land. The implementation of the setting apart would follow by execution of lease and the grant of lease. The issuance of Gazette notice had legal consequences. By section 69 of the Interpretation and General Provisions Act and by section 85 of the Evidence Act, the copy of the notice published in the Gazette is *prima facie* evidence in all courts and for all purposes whatsoever of the making and tenor of

such notice. It is *prima facie* evidence that the council had legally set apart the specified Trust land for use and occupation of Gitson with the result that the previous rights of Bubisa community were extinguished from the date of the notice.

[24] The Gazette Notice was for all intents and purposes a transfer of the Trust land already set apart and thus contravened the moratorium. As I have already indicated, the realisation of rights accrued over community land under previous law could only have been continued under the new legislation. Hence the learned judge was correct in the manner he construed section 35(1).

[25] Regarding ground 11 of the appeal, the appellant states that the learned judge erred in holding that the setting apart process should begin afresh. It is true that the learned judge said that if the appellant intended to proceed with the project, it would have to start afresh in accordance with the law. However, that was said as a justification for declining to grant an order or prohibition. There are no such orders in the extracted decree. It is worthwhile to repeat that the application did not seek to quash the approval of setting apart by the council and that the learned judge only quashed the Gazette Notice and not the council's resolution. Obviously and as the law now states, the continuation of the process would have to be in accordance with the current law.

In conclusion, although a number of grounds of appeal have succeeded, the decision of the learned judge being a single whole, which is not severable, is upheld for reasons stated. However, as the appellant has partly succeeded and as the appeal involves the clarification of grey areas of the application of the current Constitution on a matter of general public interest, it is just that each party should bear its own costs of the appeal.

In the premises, I would on my part and for the reasons stated, dismiss the appeal with no orders as to costs.

As **Okwengu and Kantai, JJ.A** agree, the judgment of the Court is that the appeal is hereby dismissed.

As **Githinji and Okwengu, JJ.A** agree that there should be no order as to cost of the appeal, accordingly, every party to the appeal shall bear its own costs.

Dated and delivered at Nairobi this 24th day of February, 2017.

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR

JUDGMENT OF OKWENGU, J.A.

[1] The facts leading to this appeal have been adequately covered in the Judgment of my brother Judge, Kantai, J A, which I have had the opportunity to read in draft. I do not therefore find it necessary to restate the facts nor the arguments save to add that the litigation herein is an example of disputes arising from the transition to the Constitution of Kenya 2010 from the 1969 Constitution (**retired Constitution**), which transition has necessitated the enactment of several other statutes. Of importance herein is the Transition To Devolved Government Act 2012 that has provided a framework for the transition to

devolved government. It also provides policy and operational mechanism during the transition period for, *inter alia*, transfer of assets and liabilities from national to county government.

[2] The appeal is challenging the discretion of the learned judge in the High Court in granting orders of *certiorari*. As stated by Sir Clement De Lestang V.P in *Mbogo and Another v Shah [1968] 1EA 93*:

“It is well settled that this court will not interfere with the exercise of the discretion of an inferior court unless it is satisfied that the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

[3] The statement of Bosire JA in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 135* that:

“Judicial discretion has to be exercised on the basis of law and evidence”

is also instructive.

[4] The main issue raised in this appeal is whether the learned judge of the High Court misdirected himself on the applicable law, or failed to take into consideration matters that he should have taken into account, and consequently arrived at a wrong decision, in granting the orders of *certiorari* calling for and removing into the High Court for quashing, the decision of the Commissioner of Lands dated 11th September, 2012, concerning the setting apart of 60,705 hectares of land in Bubasi Location (herein referred to as **disputed land**), for the purpose of Gitson Energy. The disputed land is community land that was being held in trust by County Council of Marsabit (Council). The Council through **Gazette Notice No.13135** (Gazette Notice) signed by the Commissioner of Lands dated 11th September, 2012, and published on 21st September, 2012, had set apart the disputed land for use by **Gitson Energy Limited**, the appellant herein.

[5] In my view, the first issue that requires consideration is determination of the law and the procedure that was applicable at the material time in setting apart Trust land, and whether the Commissioner of Lands (7th respondent) or the Council, had jurisdiction to set apart the Trust land. The learned judge stated in part as follows:

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

35. Once the land is set apart and compensation awarded, section 7(4) of the Act requires the Council to publish in the Kenya Gazette a notice setting the land part. Whereas the Court cannot make a determination whether or not the notification of the intention to set apart the disputed land was made, the impugned Gazette notice, which states at the material part that “the land described on the schedule hereto has been set apart” on the face of it seems to have been issued by the Commissioner of Lands.”

[6] The learned judge has been faulted for applying **Section 118** of the retired Constitution and **Section 7** of the Trust Land Act (now repealed), it being contended that the relevant sections were in fact **Section 117(1)(c)** of the retired Constitution and **Section 13(3)** of the Trust Land Act. It is necessary to reproduce these provisions. **Section 117** of the retired Constitution states as follows:

“117(1) Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation-

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

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

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

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

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

(4)

(5)....”

[7] Section 118 of 1969 Constitution says as follows:

“118(1) Where the President is satisfied that the use and occupation of an area of Trust land is required for any of the purposes specified in subsection (2), he may, after consultation with the county council in which the land is vested, give written notice to that county council that the land is required to be set apart for use and occupation for those purposes; and the land shall then be set apart accordingly and there shall be vested in the Government of Kenya or in such other person or authority referred to in subsection (2) as may be specified in the written notice, such estates, interests or rights in or over that land or any part of it as may be specified in the written notice.

(2) The purposes for which Trust land may be set apart under this section are-

(a) the purposes of the Government of Kenya;

(b) the purposes of a body corporate established for public purposes by an Act of Parliament;

(c) the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the Government of Kenya;

(d) the purpose of the prospecting for or the extraction of minerals or mineral oils.

[8] A plain reading of the above provisions shows that Section 117 is the one that empowers a county council to set apart Trust land, while Section 118 empowers the Council to set apart Trust land at the request of the President. Secondly, while the purposes for which Trust land may be set apart in Section 117, includes use and occupation:

“by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the

revenue to be derived from rent in respect thereof.”

[9] **Section 118** of the retired Constitution provides for setting apart of Trust land for the purpose of use or occupation by the Government of Kenya, a statutory body, or a company in which the Government of Kenya holds shares. It does not provide for setting apart of Trust land for use by any other person unless it is for the purpose of prospecting or extraction of minerals or mineral oils.

[10] The Gazette Notice that was subject of the orders of certiorari stated as follows:

“GAZETTE NOTICE NO.13135

THE TRUST LAND ACT

(Cap 288)

SETTING APART OF LAND

Notice is given that the land described on the schedule hereto has been duly set apart in accordance with the provisions of Part IV of the Trust Land Act for the purposes specified in the said schedule.

SCHEDULE

Place – Bubisa

Purpose – Gitson Energy

Area – 60,705.0 hectares approximately.

.....

Signed

Commissioner of Lands.”

[11] It is clear on the face of the Gazette Notice that it is anchored on the Trust Land Act **Cap 288** (now repealed) **Chapter IV** that covers **Section 7 to 13**, which deals with setting apart of Trust land under **Section 117** and **118** of the retired Constitution. Given the above analysis of **Section 118** of the retired Constitution, the Council could not have acted under **Section 118** of the retired Constitution to set apart the disputed land which was Trust land for the appellant a private limited liability company that intended to use the land for wind power and not for purposes of prospecting or extracting minerals or mineral oil. Thus, the setting apart of the disputed land must have been done under **Section 117** of the retired Constitution.

[12] Further, the learned judge applied **Section 7** of the Trust Land Act that states as follows:

“7(1) Where written notice is given to a council, under subsection (1) of section 118 of the Constitution, that an area of Trust Land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette.

(2)...

(3) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District

Commissioner.

(4) Where the whole of the compensation awarded under section 9 of this Act to persons who have applied before the date specified in accordance with section 9 of this Act, the council shall make and publish in the Gazette a notice setting the land apart.

[13] **Section 7** of the Trust Land Act should be compared with **Section 13** of the same Act that states as follows:

“13(1) In pursuance of section 117(1) of the Constitution, a setting apart by council may set apart an area of Trust land vested in it for use and occupation-

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

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

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

(2)

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

(4)”

[14] Again, a plain reading of these provisions reveal that unlike **Section 13** that deals with a Council setting apart Trust land, **Section 7** relates to a situation where notice has been given to the Council under **Section 118** of the retired Constitution that an area of Trust land is required by the President to be set apart. **Section 7** is not dealing with a situation where the Council is the one setting apart the Trust land as appears to have been the position herein.

[15] Needless to state that the learned judge misdirected himself in applying **Section 118** of the retired Constitution and **Section 7** of the Trust Land Act, as the applicable sections were **Section 117** of the retired Constitution and **Section 13** of the Trust Land Act. The question is whether this misdirection affected the exercise of discretion by the learned judge resulting in a wrong decision.

[16] Based on his application of **Section 118** of the Constitution and **Section 7** of the Trust Land Act, the learned judge concluded that the publication of the Gazette Notice was the first step in the setting apart of the land. **Section 13(2)** of the Trust Land Act provides the procedure in setting apart land pursuant to **Section 117** of the Constitution as follows:

“(2) The Following procedure shall be followed before land is set apart under subsection (1) of this section:

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

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

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

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

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

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

[17] The publication of a Gazette Notice was a critical stage in the process of setting apart Trust land. It was actually the culmination of the process by the publication of the notice to inform all and sundry that the Trust land had been set apart and was therefore no longer available. **Section 13(2)** provided mandatory stages in the process that had to be followed before the publication of a Gazette Notice. Therefore, Gazette Notice was not the first step in setting apart Trust land as contended by the learned judge.

[18] The learned judge properly noted that **Section 13(2)(b)** of the Trust Land Act obligates the Council to facilitate public participation on any proposal to set apart land. The process provided in **Section 13(2)** is elaborate and encompasses a clear role for Divisional Land Boards (Divisional Board) that the Council is required to establish under **Section 5** of the Trust Land Act. The Divisional Board coordinates the public participation and makes recommendations to the Council regarding any proposal for setting apart Trust land. Finally the process provides for approval of the proposal for setting apart by a majority of all the members of the Council if the Divisional Board recommends it or where the Divisional Board does not recommend the setting apart, approval by three quarters of the members of the Council.

[19] In addressing public participation, the learned judge stated as follows:

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

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

[20] With the greatest respect, I find that the learned judge addressed public participation as a general application of the national values and principles of governance enunciated in the Constitution. The replying affidavit referred to by the learned judge, deposed to the involvement of the people generally. It did not refer to the structured public participation envisaged under **Section 13(2)** of the Trust Land Act. The participation envisaged was not just general public participation but structured participation involving the public directly, and indirectly through their representatives in sequential stages. Judicial review is concerned with the decision making process (*Republic vs Kenya Revenue Authority Ex parte Yaya Towers Ltd [2008] eKLR*). Therefore, the learned judge had to confirm that the structured participation that was part of the decision making process was followed, and this was not a merit review

but a review of the decision making process.

[21] The appellant argued that it was not open for the Court to address the issue of public participation, as there was no cross-appeal challenging the finding of the learned judge that public participation took place. In this regard, I wish to reiterate what this Court recently stated in *Mohammed Fugicha vs Methodist Church in Kenya (suing through its registered trustees) and 3 others* [2016] eKLR:

“As this is a first appeal, ... we proceed by way of a re-hearing, at the end of which we make our own independent conclusions of law and fact. We accord respect to the findings of the first instance Judge but will not hesitate to depart from those findings if the same are based on no evidence, are arrived at by way of a misapprehension of the evidence or the Judge misdirected himself in some material respect which renders the decision erroneous. Our latitude to depart is greater where, as here, the matter in the court below proceeded not on the basis of oral evidence, which would have given the learned Judge the clear advantage of hearing and observing witnesses as they testified, but by way of affidavits and submissions which are on record. This is the more so where the decision turns on, not so much the peculiarity of highly contested facts, but rather the interpretation of certain provisions of the Constitution.”

[22] That is to say that this being a first appeal, this Court has the mandate to consider all issues that arise during the rehearing. This includes the issue of public participation as part of the decision making process. Moreover, it would be remiss for this Court not to address the issue of public participation not just because it is a key constitutional value and principle of governance that the Court is required to promote, but also because the dispute herein involves alienation of land in Kenya, which, under **Article 61** of the Constitution belongs to the people of Kenya collectively as a nation, as communities and as individuals and therefore a matter of interest to all Kenyans.

[23] I have reconsidered the affidavit evidence that was before the learned judge and I have noted that no reference has been made to the Divisional Board. In other words, there was nothing placed before the learned judge to show any participation by the Divisional Board, or any facilitation of public participation as required under **Section 13(2)** of the Trust Land Act. Neither the meetings that were purportedly held with the public nor the minutes of the Council of 8th July, 2010, can suffice as no evidence of notification of the meetings to the public were exhibited nor were any recommendations or minutes of the Divisional Board or the minutes of the Council reflecting any resolution anchored on the recommendations of Divisional Board for setting apart the disputed land. The issue herein is not one of adequacy or inadequacy of public participation but compliance with the clearly provided decision making process for setting apart land that included structured participation. There being no evidence of compliance with **Section 13(2)** of the Trust Land Act, there was procedural impropriety in the decision making process that called for the Court’s intervention. To this extent, an order of *certiorari* was necessary to quash the Gazette Notice as the process leading to its issuance was flawed.

[24] The Commissioner of lands is the one who signed the Gazette Notice concerning the setting apart of the disputed land. Under **Section 53** of the Trust Land, Act the Commissioner of Lands is empowered to administer Trust land as an agent for the Council. However, **Section 53(a)** provides a restriction as follows:

“53. The Commissioner of Lands shall administer the Trust land of each council as agent for the council, and for that purpose may –

(a) exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13(2)(d) of this Act; and

(b) execute on behalf of the council such grants, leases, licences and other documents, relating to its Trust land as may be necessary or expedient:

Provided that –

(i) the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him.”

[25] **Section 13(d)** of the Trust land Act (see **paragraph 16**) is the one that requires the Council to consider the recommendation of the Divisional Board and make a resolution with regard to setting apart of trust land. This means that as long as the Council has considered the recommendation of the Divisional Board and made an appropriate resolution, it can delegate the issuance of a Gazette Notice to the Commissioner of Lands. It is evident that in regard to the disputed land the Council gave appropriate instructions to the Commissioner of Lands. To this extent, the signing of the Gazette Notice by the Commissioner was not *ultra vires per se* but the Gazette Notice is vitiated by the fact that there was impropriety in the process leading to the issuance of the Gazette Notice.

[26] There is a further issue that I need to address. This is whether in light of the Transition to Devolved Government Act (**No.1 of 2012**) the Council had the mandate to set apart the disputed land and to give authority to the Commissioner of Lands to issue the Gazette Notice. In this regard, **Section 35** of the Transition to

Devolved Government Act (**No.1 of 2012**) states as follows:

“35(1) A State organ, public office, public entity or local authority shall not transfer assets and liabilities during the transition period.

(2) Despite subsection (1), a State organ, public office, public entity or local authority shall-

(a) during Phase One, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation, the Ministry of Local government and the Ministry of Lands; or

(b) during Phase Two, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations; and

(c) transfer immovable property, with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations and lands.

(3) The Authority may, on its own motion or on a petition by any person, review or reverse any irregular transfer of assets or liabilities in contravention of subsection (1).

(4) Any transfer of assets or liabilities made in contravention of subsection (1) shall be invalid.”

[27] It was argued by the appellant that the moratorium restricting transfer of assets in **Section 35** of the Transition for Devolution Act did not apply to the transaction in issue since the setting apart of the disputed land took place on 8th July, 2010 when the Council resolved to set apart the disputed land, and not 21st September, when the Gazette Notice was issued; that the setting apart was therefore done before the transition period. Secondly, the Council having acted in accordance with the Trust Land Act, by virtue of **Section 7** of the Sixth Schedule to the Constitution of Kenya 2010, that statute remained in force and continued in force subject to being construed with adaptations and qualifications necessary to bring it into conformity with the Constitution.

[28] Further, the appellant argued that under **Section 18** of the Sixth Schedule to the Constitution of Kenya 2010, Local Authorities established under the Local Government Act immediately before the effective date continued to exist subject to any law that might be enacted until the first general elections after the enactment of the Constitution. This covered the Council since it was in existence before the promulgation of the Constitution and remained in existence until 13th March, 2013 when the results of the first General Election after the enactment of the Constitution were announced, and that therefore the

Council had the capacity to set apart the disputed land. Finally, it was argued that under **Section 23** of the Interpretation and General Provisions Act, and **Section 162(1)** of the Land Act 2012, **Section 35** of Transition to Devolved Government Act that placed a moratorium on transfer of assets could not apply to affect rights that had been acquired under the Trust Land Act and the retired Constitution.

[29] The 1st to 5th respondents and the interested parties countered the appellant's arguments by maintaining that the setting apart of the disputed land took place through the impugned Gazette Notice signed by the Commissioner of Lands and published on 21st September, 2012. This was supported by the letter from the Commissioner of Lands dated 12th October, 2012 indicating that he had suspended the process of transferring the disputed land, and further supported by the lease that the Council was trying to sign to transfer the disputed land to the appellant after the publication of the Gazette Notice. Further, it was argued that at the time of publication of the Gazette Notice to set apart the disputed land, the Transition to Devolved Government Act was already in operation; that the moratorium imposed by **Section 35(1)** of that Act was therefore applicable; that the intention of the Gazette Notice was to eventually lead to the transfer of the asset of the Council; and that this was prohibited under **Section 35** of the Transition To Devolved Government Act.

[30] In this regard, the learned judge rendered himself as follows:

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

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

35. Once the land is set apart and compensation awarded, section 7(4) of the Act requires the Council to publish in the Kenya Gazette a notice setting the land part. Whereas the Court cannot make a determination whether or not the notification of the intention to set apart the disputed land was made, the impugned Gazette notice, which states at the material part that “the land described on the schedule hereto has been set apart” on the face of it seems to have been issued by the Commissioner of Lands.

36. *In my view, it would be an illegality if the body that purports to exercise the powers by giving notice is not the one mandated by law to do so. Therefore the notice that was purportedly issued by the Commissioner of Lands was issued by a person not authorised to do so and to that extent the said notice was either issued without jurisdiction or in excess of jurisdiction.*

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

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

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

[31] The issue that arises is whether the setting apart of the Trust land was a disposition in land restricted by **Section 35(1)** of the Transition To Devolved Government Act. The moratorium in **Section 35(1)** deals with restriction of *inter alia* disposal of assets. The disputed land is community land that was lawfully held in trust by the Council on behalf of the community. Such land is within **Article 63(1)(d)(iii)** of the Constitution, and in accordance with **Section 13** of the Trust Land Act could be set apart for the purposes specified in that provision. Setting apart denotes that the land is reserved for a specific purpose and is no longer available for any other purpose. It is for this reason that once trust land is set apart any rights or benefits previously vested in a tribe, group or family under customary law is extinguished, and the county council may make a grant or disposition of any estate or right over the trust land to the person for whose use and occupation the land was set apart.

[32] As at the year 2008, the Council had the power under **Section 117** of the retired Constitution to set apart the disputed land subject to compliance with the provisions of **Section 13** of the Trust Land Act. It would appear that the process of setting apart the disputed land commenced in the year 2008, nonetheless, that process could only have been completed by compliance with **Section 13(2)** and **(3)** of the Trust Land Act. That is after the public participation, recommendation by the Divisional Board, the passing of appropriate resolutions by the Council and the publication of an appropriate Gazette Notice.

[33] Under **Section 53** of the Trust Land Act, the Council had the authority to delegate the publication of the Gazette Notice to the Commissioner of Lands. To this extent, the Gazette Notice signed by the Commissioner of Lands on 11th September, 2012, and published on 21st September 2012, was not *ultra vires* as the Commissioner had appropriate authority from the Council. Nonetheless, the Gazette Notice is vitiated by the fact that it was issued without the proper procedure having been followed.

[34] In Accordance with **Section 5(2)(e)** of the National Land Commission Act that came into effect on 2nd May, 2012, the management and administration of Trust land was entrusted to the National Land Commission on behalf of the County Government. It is worthy of note that in providing for the establishment of the National Land Commission, the Constitution only empowered that Commission at **Article 67(2)(a)** to manage and administer public land on behalf of national and county governments. It is the National Land Commission Act through **Section 5(2)(e)** that extended the mandate of that Commission to include to manage and administer all unregistered trust land and unregistered community land on behalf of County Government.

[35] *In the matter of the National Land Commission [2015] eKLR*, the Supreme Court in their advisory opinion observed as follows:

“226. Article 62(2) specifies the categories of public land that vest in county governments. And the NLC Act confers power upon the NLC to administer and manage public land that is vested in County Government. However, “community land”, as defined in Article 63(1), has its own place and system of governance; and the land referred to in Section 5 (2)(e) of the NLC Act, is “community land”, and not “public land”. These distinct definitions of “community land” and “public land”, as well as their applicable governance systems as provided in the Constitution, do not require any special professional input, as a basis for interpreting the provisions of Articles 62(2) and (3) and 67 (2) (a). The Commission has no special claim to the remit of administering or managing community land. From the historical background already set out, recognition of the special character of community land is essential, with attendant cautions in its management. In our opinion it is necessary for Parliament to make amendments to Section 5(2)(e) of the NLC Act, to bring it into line with the constitutional provisions we have cited.”

[36] **Section 5(2)(e)** of the National Land Commission Act has since been repealed by **Section 37** of Land Laws Amendment **Act No.28 of 2016**. In accordance with **Section 6** of the Community Land Act 2016 the position now is that the County Government in trust holds all unregistered community land for the community. I take the view that apart from the fact that the National Land Commission had not been properly constituted as at 21st September 2012 when the Gazette Notice was issued, **Section 5(2)(e)** of the National Land Commission Act was ultra vires the Constitution, and therefore the management of the disputed land and indeed all unregistered land for the Community still fell upon the Council. Be that as it may, the Gazette Notice signed by the Commissioner and published on 21st September 2012, setting apart the disputed land, was the penultimate stage in the process of transferring the disputed land to the appellant. Indeed, the Council had also prepared a lease in favour of the appellant for the disputed land. Therefore, the setting apart of the disputed land was a process in the disposal of the disputed land.

[37] The transition period in phase one referred to in **Section 35** of the Transition To Devolved Government Act is defined in **Section 2** of the same Act, as the period between the commencement of the Transition To Devolved Government **Act 2012** and the date of the first election under the Constitution. That is between 9th March, 2012 (commencement of the Act) and 4th March 2013 (first general election). This means that the Gazette Notice that was issued in September 2012 was within the Phase one period and was therefore under **Section 35** of the Transition to Devolved Government Act subject to the moratorium. However, **Section 35(2)** provided a window for a transfer to be made during this period provided that it is done with:

“the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation, the Ministry of Local Government and the Ministry of Lands.”

[38] This means, that within this transition period, the transfer of the assets of the Council could only be done with the approval of the Council in consultation with the National Treasury, the Commission on Revenue and the Ministry of Local Government. With due respect the exception in **Section 35(2)** appears to have escaped the attention of the learned judge.

[39] I concur with the appellant that the learned judge misdirected himself in applying **Section 118** of the retired Constitution and **Section 7** of the Trust Land Act. This misdirection affected the exercise of his discretion to the extent that he did not consider the proper procedure that was to be applied in setting apart the disputed land. Nevertheless, had the learned judge properly applied his mind to the correct provisions, he would have arrived at the conclusion that there was procedural impropriety that justified the issuance of the order of *certiorari*.

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

setting apart the disputed land in favor of the appellant was tainted, as the laid down procedure was not followed. In the final analysis, and for reasons that are stated herein, the order of *certiorari* quashing the Gazette Notice was proper. Accordingly, I would dismiss the appeal. In light of the public importance of the issues raised herein, I would order that each party should bear their own costs.

Dated and Delivered at Nairobi this 24th day of February, 2017.

H. M. OKWENGU

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JUDGE OF APPEAL

JUDGMENT OF KANTAL, J.A.

Leave having been granted by the High Court to commence judicial review proceedings, the 1st to 5th respondents (Hon. Francis Chachu Ganya, Chris Guyo Huka (the Chairman Busisa Community), Dalacha Elema (a member of Bubisa Community), Hajidiba Boru (also a member of the said community) and Col. Jaba Jaldesa (also a member), filed a Notice of Motion where it was prayed that:

“1. An order of certiorari to call and/or remove into the High Court and quash the decision of the Commissioner of Lands expressed in Gazette Notice No. 13135 dated 11th September, 2012 as concerns the setting aside of 60,705 hectares of land in Bubisa location for the purpose of Gitson Energy by the Commissioner of Lands;

2. An order of Prohibition to prohibit the Commissioner of Lands from proceeding, carrying on or undertaking the setting aside of 60,705 hectares of Land in Bubisa Location via Gazette Notice No. 13135 dated 11th September, 2012 intended for the purpose of Gitson Energy;

3. Costs of and incidental to the application be provided for; and

4. Such further and other reliefs that the Honourable Court may deem just and expedient to grant in the circumstances of this case.”

The Motion was against the Hon. Attorney General and the Commissioner of Lands (the 6th and 7th respondents). The appellant, Gibson Energy Limited, joined the proceedings along the way in the High Court while the County Government of Marsabit was allowed by an order of this court made on 25th January, 2015 to be enjoined as an interested party to the appeal.

In an affidavit in support of the Motion Hon. Francis Chachu Gunya, Member of Parliament for North Horr Constituency stated *inter alia* that the people of that constituency had not been consulted prior to the 7th respondents’ gazettement of excision of 60,705 hectares of land through Gazette Notice No. 13135 of 11th September, 2012 for the benefit of Gibson Energy Limited and that the 7th respondent had usurped powers that belonged to the National Land Commission. The deponent stated further that the decision of the 7th respondent was contrary to **Section 35 of the Transition to Devolved Government Act** which barred state organs, public officers, public utilities and local authorities from transferring land and that such action was invalid and contrary to law and:

“THAT the decision to ignore the law is illegal, arbitrary and unreasonable and not justifiable whatsoever in a just and democratic society and is therefore capricious.”

He went on to say that failure to adhere to the law by the 6th and 7th respondents constituted procedural and administrative failure which was amenable to judicial review and:

“8. THAT the law obligates the respondents to perform a function of public nature and the applicants have a legitimate expectation that the respondents will act in good faith and be just in implementing the law. The setting apart of trust land must be preceded by public participation and clear compensation arrangement with the affected parties;

9. THAT the actions of the respondents are illegal, null and void and contrary to the law and should be amenable to judicial review as it intends to set aside and alienate communal land totaling to 60,705 hectares to a private company without adhering to the Constitution and the law;

10. THAT the actions of the respondents are based on flagrant disregard of the law, bad faith, abuse of power and office which has caused grievous injury to the applicants as their grazing land is being excised for private purposes without compensation;

11. THAT the decision by respondents to disregard a high Constitutional and Statutory principle is contrary to the rule of law and due process and it is against public order, public policy and public morality and should be subject to judicial review as it is unfair, unreasonable, arbitrary and an affront to civilized behavior in the 21st Century and cannot be remedied by the purported letter marked as exhibit “FCGS” dated 4th October, 2012 by the Commissioner of Lands purporting to suspend any documentation relating to the said land;

12. THAT it is against the law for respondents to try to abrogate the existing law or bypass the path laid by the law and totally ignore the wishes of the local community and the 1st applicant as the Hon. Member of Parliament;

13.(a) THAT the decision by the respondents is not justifiable in a democratic society as it will adversely and irreversibly affect the communities’ environment and cultural lifestyles;

(b) THAT the allocation is likely to undermine the wishes of the people of North Horr and it is in the public interest, convenient and just to grant the orders;

14. THAT the respondents have a high constitutional and legal duty, mandate and obligation to follow the law while dealing with Community and Trust Land; and

15. THAT I verily believe that the interest of justice could be better served if the respondents are compelled to comply with the law and prohibited from indecision (sic) in implementing the law.”

Various documents were attached to that affidavit as part of the evidence of the matters complained of and I will revert to them later in this judgment.

In a replying affidavit on behalf of the 7th respondent, Silas Kiog’ora Mburugu, a Principal Land Administration Officer at the Ministry of Lands deponed among other things that the process of setting apart land is usually carried out by the County Council (today it would be County Government) of a particular area where the land sought to be set aside is situated. He stated further that an application having been made in the year 2008 by Gibson Energy Limited the then County Council of Marsabit commenced the process of setting apart of trust land held by itself on behalf of the local community and that upon completion of that process the Ministry of Local Government, then in charge of administrative functions of County Councils, requested the 7th respondent to process necessary documents. Further, that pursuant to **section 53 of the Trust Land Act** and being satisfied that due process had taken place, the 7th respondent issued the impugned gazette notice setting apart the trust land and that the 7th respondents role was limited to issuing that gazette notice and title that would follow and that the 7th respondent was not involved in the process of setting apart land. The deponent went on to say that it was within his knowledge that the National Land Commission established under the Constitution of Kenya, 2010 was to take office on 2nd May, 2012 and that all land issues particularly pertaining to management and administration of unregistered trust land and unregistered community land were to be performed by the said Commission but that because of a court challenge Commissioners had not taken office by the time the 7th respondent issued the impugned gazette notice. He further stated that in the absence of

Commissioners to the National Land Commission:

“ ... it is in public interest that the 2nd respondent has been executing these duties before the National Land Commission takes office to ensure smooth running of the institution.”

It was further deponed at paragraph 15 and 16 of the affidavit:

“15. THAT further to the foregoing and without prejudice, I am informed by the state counsel on record which advise I verily believe to be true that the order of prohibition cannot issue in the instant case as the setting apart has already been done and prohibition looks into the future;

16. THAT I am further advised by the counsel on record which advise I verily believe to be true that the ex parte applicant’s application is an abuse of the court process and does not warrant judicial review remedies as there are no competent respondents to ventilate on the issues raised since the orders should be directed to the body making the decision or carrying out the exercise.”

I will speak to the documents attached to that affidavit as part of the discussion I will have in this judgment.

Michael Muchemi Ndiritu, the Managing Director of Gibson Energy Limited swore a fairly lengthy affidavit in opposition to the petition. He stated that because his company was interested in investing in the clean energy sector it had approached the County Council of Marsabit in the year 2005 and engaged it for purposes of setting apart of land for the purposes of that project and that his company had complied with all laws and regulations and had obtained all approvals necessary for the process of setting apart land. As evidence he attached various letters and documents which I shall revert to hence. He deposed, also, that Hon. Francis Chachu Ganya, the area Member of Parliament, had been informed at all stages as negotiations went on between his company and the County Council and that he (the MP) attended some of the meetings. Mr. Ndiritu went on to enumerate the benefits that would accrue to the local community and the country at large if the project was implemented and accused the MP of frustrating the setting up of the project because he wanted to set up a similar project himself.

The 1st respondent swore a further supporting affidavit on 14th December, 2012 where he denied the various issues raised in the two replying affidavits of Mr. Mburugu and Mr. Ndiritu.

That was the material that was placed before G.V. Odunga, J, who after considering it and taking submissions delivered a judgment on 25th April, 2013 where the learned judge issued an order of certiorari calling for and/or removing to the High Court the decision of the 7th respondent expressed in Gazette Notice No. 13135 which decision was quashed by the learned judge. The learned judge further found that having quashed the 7th respondents decision it was not necessary to give an order of prohibition as Gibson Energy Limited was still at liberty to start the whole process of setting apart trust land afresh. These are the orders that have provoked this appeal by Gibson Energy Limited where 12 grounds of appeal are taken. The learned judge is said to have erred by holding that setting apart of land was done in accordance with **Section 7 of the Trust Land Act** and that he failed to appreciate that the section provided for setting apart of trust land at the instance of the government. The appellant says that the setting apart of land was done in accordance with **Section 13** of the said Act and faults the learned judge for holding that the gazette notice published on 21st September, 2012 was published under **Section 7** of the said Act. Further, that the learned judge erred by holding that the publication of the said notice was the first step of the setting apart of land and also erred by holding that such publication was to give notification of the intention to set apart the said property when, according to the appellant, the land had been set apart on 8th July, 2010.

The learned judge is also faulted for failing to appreciate that **Section 13(3)** of the said Act provides that a gazette notice is to be published after the County Council approves setting apart of trust land. The learned judge is also said to have wrongly applied **Article 62 of the Constitution of Kenya, 2010**, retrospectively when setting apart of trust land is said to have taken place before promulgation of that Constitution. Also, that the learned judge erred in applying **Section 35 of the Transition to Devolved Government Act**

retrospectively when the suit property had been set apart on 8th July, 2010 and further that the judge erred in failing to appreciate that the setting apart of land under the Trust Land Act was not a transfer of assets and liabilities. In ground 8 the learned judge is faulted for failing to apply **Section 23(3) of the Interpretation and General Provisions Act** and in the next ground the learned judge is faulted for holding that the 7th respondent acted ultra vires when he published the said gazette notice when **Section 53 of the Trust Land Act** gave the 7th respondent powers to administer lands on behalf of County Councils. Further, that the learned judge erred in failing to consider that **Article 2(4)** of the 6th Schedule of the Constitution suspended the application of **Article 62(2) of the Constitution** until the National Land Commission was established and that the learned judge erred in failing to appreciate that the said Commission was established on 20th February, 2013. The appellant also faults the learned judge for failing to find that the 7th respondent had power to publish the gazette notice of 21st September, 2012.

In the penultimate ground the appellant takes issue with the learned judge for ordering that the setting apart process of the suit property should begin afresh while in the last ground the learned judge is said not to have considered the submissions of the appellant and the 6th respondent.

This is a first appeal.

The learned judge considered the material before him, the facts and the law, and reached the determination that he did.

The principles upon which a Court of Appeal can interfere with the exercise of discretion of a trial judge are well settled. This Court must, to interfere, be satisfied that the judge has misdirected himself in some matter and has as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice – See, for enunciation of these principles, ***Mbogo & Another v Shah [1968] EA 93***; ***Ephantus Mwangi & Another v Wambugu [1983] 2KCA 100*** or ***Sumaur & Another v Ahed Industries Limited CA No. 203 of 2002 (vv)***.

But it is also true that a first appeal such as this one is in the nature of a retrial and it is the duty of this Court to reappraise the evidence and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court's decision could be supported – See ***Damiano Migwi v Timothy Maina Wairugi [2009] eKLR***. In the earlier oft cited case of ***Selle v Associated Motor Boat Company [1968] EA 123*** it was held:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or possibilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

Written submissions were filed on behalf of the appellant; the 1st to 5th respondents and interested party (the County Government of Marsabit) and separately on behalf of the 6th and 7th respondents.

When the appeal came up for hearing before us on 21st September, 2016 learned counsel Mr. P. M. Gachuhi appeared for the appellant while learned Senior Counsel Mr. O. Omogeni appeared for the 1st to 5th respondents and the interested party. The 6th and 7th respondents were represented by learned counsel Miss Wambui.

In a highlight of written submissions Mr. Gachuhi submitted that having identified Marsabit as the best area in the world where wind power could be harnessed the appellant engaged the then County Council of Marsabit in the year 2004 and held various meetings with the local community and its leaders and that the community consented to establishment of the project. Further that the area where the project was to be

undertaken was trust land under the then **Trust Land Act** and County Council of Marsabit was the local authority in charge of trust land and was legally authorized to set apart land for an intended purpose such as establishment of a wind power project envisaged by the appellant. The other authority that had power in law to set apart land under the said Act was the national government. According to learned counsel all processes envisaged in law under the said Act and the 1969 Constitution were followed and this having been done the County Council of Marsabit requested the 7th respondent to issue a gazette notice for setting apart of land and that this was done to give effect to approval given by the said Council. Further, that a 33 year lease was to be granted to the appellant on agreed terms but this was stopped by the High Court on application by the 1st to 5th respondents. Learned counsel reminded us that the Petition before the learned judge could only challenge the process followed in the setting apart of the land but could not challenge the merits as judicial review of administrative actions was not concerned with merits of decisions but only the process. Learned counsel faulted the learned judge for applying the provisions of **Section 7** of the said Act instead of **Section 13** and also for wrongly applying **Section 118 of the 1969 Constitution** instead of **Section 117**. Learned counsel also faulted the learned judge for applying the provisions of Section 35 of the **Transition to Devolved Government Act No. 1 of 2012** and for ignoring **Section 7 of the 6th Schedule of the Constitution of Kenya 2010** which, submitted counsel, had preserved laws that existed before the Constitution of Kenya, 2010.

In supporting the appeal Miss Wambui, learned counsel for the 6th and 7th respondents, submitted that the gazette notice issued by the 7th respondent was issued on behalf of the County Council of Marsabit and that was an end of the process of acquisition of land by the appellant issued after the 7th respondent was satisfied that due process had taken place under the law.

Learned counsel submitted that the learned judge was wrong in applying provisions of the Constitution of Kenya, 2010 to a process that had begun and been completed before provisions of that Constitution took place.

Mr. Omogeni, Senior Counsel, while reminding us of the emotive nature of land disputes in the Republic of Kenya, submitted that the people of Marsabit objected to setting apart of 150 000 acres of their land for a project to be undertaken by the appellant when those people had not been properly consulted as, according to learned counsel, consultative forums had not been completed by the time the 7th respondent issued the impugned gazette notice. Learned counsel submitted further that the 7th respondent acted ultra vires his powers in publishing the said gazette notice which notice, in any event, according to counsel, did not cite the particular section of the Trust Land Act it was issued under but cited a general provision. According to counsel, the gazette notice which was published when the Constitution of Kenya 2010 was operational could only be published by the National Land Commission established by **Article 67** of the Constitution. Counsel went on to submit that the draft lease drawn on behalf of the appellant and the County Council of Marsabit was irregular as it run contrary to the moratorium on transfer of land given by **Section 35 of the Transition to Devolved Government Act**. For all these the appeal should be dismissed.

In a brief reply Mr. Gachuhi submitted that the National Land Commission took office on 20th February, 2013 through Gazette Notice No. 2224 of that date and that in publishing the impugned gazette notice in September, 2012 the 7th respondent was entitled in law to do so. Learned counsel urged us to set aside orders of the High Court to enable the appellant to engage the relevant authorities to complete the process of setting apart of land and implement the project.

I have considered the record of appeal, various authorities cited, submissions by learned counsel and the law and I have taken the following view of the matter.

The 1st to 5th respondents approached the High Court in a petition for judicial review on their complaint that the then County Council of Marsabit had set apart 150 000 acres of land for the purpose of implementation of a wind power project by the appellant and that the people of Marsabit had not been consulted before that land was set aside.

The learned judge in the judgment appealed from in recognizing that judicial review proceedings do not

deal with the merits of the decision reached by the public officer but deal only with the decision making process cited this Court's judgment in *Municipal Council of Mombasa v Republic and Umoja Consultants Limited*, CA No. 185 of 2001 (UR) where it was held:

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

The learned judge held that the impugned gazette notice was issued under ***Section 7 of the Trust Land Act*** and that the 7th respondent had no authority to issue it. In any event, according to the learned judge, the gazette notice amounted to a transfer of land which the 7th respondent could not undertake in view of the moratorium created by ***Section 35 of the Transition to Devolved Government Act***.

What is the material that the learned judge used to reach his decision? There can be no doubt that the appellant and the County Council of Marsabit entered into discussions for purposes of setting apart land for establishment of a wind power project in the area where the said council had control under the then Local Government Act. In a letter dated 7th November, 2005 the Managing Director of Kenya Electricity Generating Company Limited addressed the appellant as follows:

“MANAGING DIRECTOR’S OFFICE

Our Ref: MD.026/EN/Ig

Date : 7th January, 2005

Mr. James Gitau,

CEO,

Gitson Inc.

4045 North Star 121

Irving, Texas 75038

UNITED STATES OF AMERICA

Dear James,

RE: WIND ENERGY

We thank you for your letter dated 15th November, 2004 which you had requested whether we would be willing to cooperate in exploration and exploitation of potential Wind Energy in Kenya.

We confirm that through the Draft National Energy Policy 2004, the country recognizes the need to develop wind as one of the clean renewable energies. The policy states in part “Electricity generation from wind is expected to play an important role in diversification of the Rural Electrification programme.”

The policy however, has identified the following as the barriers facing the wind technology:

- ***high capital costs, which makes it less attractive relative to diesel fired alternatives for***

- applications such as small scale commercial farming;*
- *lack of appropriate credit schemes and financing mechanisms;*
 - *lack of awareness of the economic opportunities offered by the technology;*
 - *inadequate data on wind regimes;*
 - *limited after sales service; and*
 - *lack of system standards.*

The challenge is to redress these barriers through introduction of an innovative financing mechanism to assist both developers and consumers of wind energy develop the technical capacity to, procure, and adapt wind technology for use in difference conditions.

The Ministry of Energy recently completed the National Wind Atlas which indicated some of the wind energy potential as Garissa, Lamu, Mandera and Marsabit.

The full potential of these centers need to be firmed up by further data acquisition which will firm up the wind regimes and form the basis for a full feasibility study.

KenGen is willing to cooperate with Gitson Inc. or any other party in trying to achieve this objective.

Yours faithfully,

EDWARD NJOROGE

MANAGING DIRECTOR.”

The Permanent Secretary, Ministry of Energy, in a letter dated 15th May, 2007 under the heading “**TO WHOM IT MAY CONCERN**” stated:

“The Ministry of Energy would like to indicate the awareness of setting up a Wind Power project by Gitson Energy Limited (K).

In addition to this, the power generated by this project will be purchased by the local utility, The Kenya Power and Lighting Company Limited (KPLC) on agreed terms which, inter alia, will include price, between the parties that will be covered in a long term Power Purchase Agreement (PPA).

Should the recipient of this letter require additional verification, please contact this office through the email address, fax and telephone numbers indicated above.

Yours sincerely

Patrick M. Nyoike, CBS

PERMANENT SECRETARY”

There are other letters some of which I will not cite here as I do not find it necessary to do so for purposes of this judgment. Let me instead examine minutes of various meetings that are on record and which the appellant relies on to show that there was adequate consultation with the people of Marsabit as required by the 1969 Constitution and the Trust Land Act but which process is challenged by the 1st to 5th respondents, and the County Government of Marsabit, who say that there was no consultation and that the process was therefore flawed.

In a "SPECIAL DEC MEETING" held at the District Commissioner, Marsabit office on 26th September, 2007 chaired by the District Officer, Central, Marsabit attended by various government officers and representatives of the appellant, the appellant's representatives reported that they intended to start a wind power project; that they had visited earlier in the year 2005; that the project would be a private/public partnership venture and outlined the various benefits that would accrue if the project was implemented. It was agreed, after discussions:

"(1) There was need for the community to be consulted and sensitized and fully involved in all the processes of the project development;

(2)"

Another meeting followed on 12th February, 2008 at Bubisa Trading Centre. Its agenda was: (1) development of the wind energy at Bubisa and (2) project approval. It was chaired by the District Officer, Turbi and the minutes were witnessed by the Chief, Bubisa Location and the councilor, Bubisa Ward. Apart from the District Officer, the councilor and a representative of the appellant there are 43 names of those who attended the meeting and the various designations of the attendees is given as 2 chiefs, 27 elders, 1 youth who took minutes and 13 women representatives. Minute 3/2/2008 of that meeting states:

"MIN. 3/2/2008 – PROJECT APPROVAL,

The community was given a chance to deliberate on the request put to them concerning the land issue. After a lengthy deliberation the community confirmed their agreement to support the project and assured Gitson Energy Ltd (K) of maximum support. On behalf of the community, the members present consented the company to come and invest in Bubisa;

Once assured of the grazing ground, the community allowed the Government to apportion space to the company to construct turbines. However, the community requested the formation of a working committee that will further bargain on behalf of the community on any aspect regarding the development of the project.

On behalf of the Government, the District Officer assured the community that such a committee was essential and it will be formed in due course. In addition, the community proposed signing of an agreement between the community and Gitson Energy Ltd (K) to legalize the partnership.

The meeting ended at 4.50 p.m. with the next one scheduled (sic) in April, 2008.

Minutes prepared by:

Galgallo Thalacha

Signed

S.S. Shaaban

D.O. TURBI

Witnessed by:

Mamo Wako

CHIEF BUBISA LOCATION

Cllr. Roba Elema

COUNCILLOR BUBISA WARD"

The 43 attendees did not append their signatures to the minutes.

A Works, Town Planning and Market Committee of the County Council of Marsabit met on 25th November, 2009 and it was resolved:

“Resolved:

- (i) That the Council through its Works, Town Planning Committee has agreed to lease 150,000 (one hundred fifty thousand) acres of land to Gitson Energy Ltd for construction of Wind Power plant;**
- (ii) The Gitson Energy Ltd and County Council of Marsabit should enter into lease agreement;**
- (iii) That the effective date of lease be stated in the agreement; and**
- (iv) That the investor should provide social responsibility to Bubisa Community.**

CERTIFIED

TRUE

COPY

COUNTY CLERK 30.8.2010”

A special Finance Staff and General Purpose Committee meeting of Marsabit County Council was held on 8th July, 2010 where various resolutions were made including the rent payable by the appellant for the land to be allocated; that the District Surveyor was instructed to set apart 150000 acres of land at Bubisa and that council lawyers be instructed to draw an appropriate lease. That meeting was followed later that afternoon by a special meeting of the Full Council where the minutes of the meeting held in the morning by the Special Finance and General Purpose Committee were adopted and approved.

By letter dated 30th August, 2010 the County Clerk of County Council of Marsabit sought ministerial approval to lease the land to the appellant. Ministerial approval was duly granted and the 7th respondent was instructed to act accordingly.

There is however on record yet another meeting held at Bubisa on 30th July, 2011. This was called “Community Meeting” and was attended by 167 people with another 9 sending apologies. One of the agenda items was given as “*brief update on the progress of the proposed wind energy project by Gitson Energy Company...*”. Many questions were asked by those present and it was agreed Min. 4/2001 as “**mandate and way forward**”:

“MIN. 4/2011: Mandate and Way Forward

At this point, the Team threw back the discussion to the Community who after deliberations commended the team for the work well done on their behalf and unanimously endorsed the team to proceed with the discussions. It was agreed that a committee to be formed on the ground comprising of people from Marsabit and Bubisa and that the two committee to coordinate their communications and update the community on the development.

The committee agreed to proceed with more information gathering and passing their concerns to the investor awaiting response.

However, the key message is that all discussions and agreements to be above board with constant update to the community through its leaders. On the overall, the community is supportive of the project as long as their concerns are addressed.”

The learned judge in the judgment appealed from found that the people of the affected area in Marsabit were not adequately consulted when the parcel of land comprising 150000 acres was set aside by the then County Council of Marsabit.

County Councils (now replaced by County Governments) were authorized by the 1969 Constitution and by the Trust Land Act to set apart land for certain purposes. The Constitution at **section 117** allowed a County Council to set apart land vested in it for use or occupation by a public body or authority for public purposes; or for prospecting for or extraction of minerals or mineral oils; or where the council formed an opinion that a prospective investor would benefit the residents of the area. The Constitution went on to make more provisions including the prompt payment of compensation to a resident affected by that setting apart of land.

Section 13 of the Trust Land Act (now repealed) on “setting apart by council” repeated the provision in the constitution and further provided at **sub-section (2) and (3)** an elaborate procedure as follows:

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

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

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

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

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

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

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

I agree with the learned judge that once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made can no longer be a subject of judicial review.

The elaborate procedure set out at **section 13 of the Trust Land Act** for setting apart land required a council to notify the relevant Divisional Board of the proposal to set apart land. That chairman was required to fix a day, not less than one and not more than three months from the date of notification when the Board would meet to consider the proposal and he was also to notify the council of the day and time of the meeting. Then would follow an important exercise on public participation - it was the duty of the council to notify the public of the day and time of the Divisional Board meeting at which the proposal to set apart land would be considered. The local residents had a right to attend that meeting and fully participate in it, and the Board was required to record in writing the representations of all persons concerned who were present at the meeting and thereafter forward its recommendations together with a record of the representations made in the meeting.

What do I have in the record before me on the important matter of public participation before the County

Council of Marsabit could set apart the relevant land as required by the then Constitution and the Trust Land Act? The only record of peoples' involvement is the meeting of 12th February, 2008 chaired by the District Officer, Turbi, and attended by the Chief, Bubisa location, the councilor of that area and 43 residents. It was agreed in that meeting, amongst other things, that "... a committee that will further bargain on behalf of the community on any aspect regarding the development of the project....." be formed.

There is nothing on record to show me that such a committee was formed. What followed were County Council of Marsabit meetings where the issue of setting apart of the land appears to have been put on the fast lane and approval sought and obtained through a letter by the office of the Deputy Prime Minister and Ministry of Local Government dated 2nd February 2012 where the 7th respondent was requested to process necessary documents for allocation of the subject land to the appellant. It is interesting to note, also, that, after the 1st respondent raised issues about the way the process of setting apart the subject land had been undertaken, the 7th respondent by the letter dated 4th October, 2012 stated, *inter alia*, that:

"Notwithstanding the foregoing and in view of your complaint that the community was not consulted, we wish to confirm that this office has not effected any documentation. The land therefore is still vested with the County Council of Marsabit.

In view of your assertion that the engagement between the community and the investor (Gitson Energy) collapsed or ceased to be meaningful, we wish to confirm that we have suspended any documentation until the community and the investor engage meaningfully and we are furnished with the agreement of engagement."

So the 7th respondent, who had authored and published the impugned gazette notice, was disowning the process that had led to the same.

Section 13 of the Trust Land Act, and indeed, the 1969 Constitution, required of the County Council of Marsabit to notify the chairman of the Divisional Board that there was a proposal to set apart land. I have not seen any evidence that this was done. The law further required of the chairman of that Board to fix a date and time when the proposal would be considered; notify the public accordingly, and, at the meeting attended by the public, record proceedings with comments by the public and forward the same to the council. There is no evidence that the public was involved at all and I am not satisfied that the meeting of 12th February 2008 attended by 43 people complied with the mandatory provisions of the then Constitution and the Trust Land Act on setting apart of trust land. Minutes of that meeting were not signed by those who attended and there is no formal meeting of the Divisional Board attended by the public to consider the proposal to set apart trust land as required in law. I agree with the learned judge that absent public participation, the process was flawed and could not hold.

In the persuasive case of ***Republic v Minister for Finance & Another*** ex-parte ***Anyang Nyongo & 2 Others***, [2007] eKLR, Nyamu, J (*as he then was*) held on the issue of public participation on issues affecting them:

"Good public administration requires a proper consideration of public interest.

There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People's participation will result in the advancement of the public interest."

The noble principles of public participation on matters affecting them have received statutory backing in the Fair Administrative Actions Act No. 4 of 2015 where at **section 5** it is provided:

"In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall:

- (a) issue a public notice of the proposed administrative action inviting public views in that regard;*
- (b) consider all views submitted in relation to the matter before taking the administrative action;*
- (c) consider all relevant and materials facts; and*
- (d) where the administrator proceeds to take the administrative action proposed in the notice:
 - (i) give reasons for the decision of administrative action as taken;*
 - (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and*
 - (iii) specify the manner and period within which the appeal shall be lodged.”**

I need not go on as I think I have said enough.

There was a clear procedure set out in law on how to set apart trust land. The then County Council of Marsabit flouted and ignored that process completely against the law and proceeded to set apart 150000 acres of trust land without consulting the residents of the affected area. Process not having been followed, I fully agree with the learned judge that the High Court was entitled to, as it did, issue appropriate orders to quash the gazette notice issued by the 7th respondent. Having taken this view of the matter I do not need to go into the other grounds of appeal at all.

I would dismiss the appeal and award costs to the respondents and to the interested party, the County Government of Marsabit.

Dated and delivered at Nairobi this 24th day of February, 2017.

S. ole KANTAI

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JUDGE OF APPEAL