REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC NO. 163 OF 2014

(FORMERLY ELC NO. 1330 OF 2014- NAIROBI)

MOHAMUD ILTARAKWA KOCHALE.....1ST PLAINTIFF

KOCHALE SOMO CHALE.....2ND PLAINTIFF

ISSA JITEWE GAMBARE.....3RD PLAINTIFF

DAVID TOMASOT ARAKHOLE.....4TH PLAINTIFF

WILLIAM LENGOYIAP.....5TH PLAINTIFF

SEKOTEY SEYE.....6TH PLAINTIFF

(suing on behalf of the residents of

Laisamis Constituency and

Karare Ward Marsabit County)

-VERSUS-

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

MARSABIT COUNTY GOVERNMENT.....2ND DEFENANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT

AARON ILTELE LESIANNTAM.....1ST INTERESTED PARTY

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

STEPHEN NAKENO.....3RD INTERESTED PARTY

JOB LMALSIAN LENGOYA.....4TH INTERESTED PARTY

DAIR LENTIPAN.....5TH INTERESTED PARTY

GITSON ENERGY LIMITED .....6TH INTENDED INTERESTED PARTY

RULING

A. Background & Introduction

1. The Plaintiffs instituted a representative suit as residents of pastoralists communities in Marsabit

County vide a Plaint dated 14/10/2014 against the Defendants seeking Orders THAT;

a. **Cancellation/revocation of the title comprising of the suit property and in particular IR No. 6395/1(LR 28031) and I.R No.6396/1(LR No. 28031/2) hereinafter referred to as the suit land.**

b. **Nullification of the Wind Power Project.**

c. **Costs of this suit herein.**

d. **Any such other or further relief as this Honourable court may deem fit to grant.**

2. In the main, it was the Plaintiffs' case that the suit properties namely **IR No. 6395/1(LR 28031) and I.R No.6396/1(LR No. 28031/2)** were illegally and unprocedurally set apart in favour of the 1st Defendant contrary to the Trust Land Act and the repealed Constitution. That the suit land was central to their survival and livelihood as it is their cultural, ancestral and grazing land held under an intergenerational trust for future generations. Moreover, that the cultural rites such as Galgulame ceremonies are performed in Serima Village, an area that is now alienated to the 1st Defendant.

3. Denying the claim, the 1st Defendant refuted the allegations of statutory breaches levelled against it by the Plaintiffs and put them to strict proof. It also denied that their acquisition of the land has caused any economic and social hardship to the Plaintiffs. That in any event the property is not fenced off and so is accessible for use by the communities. Further that no claim of compensation was made to the Council by the communities because they recognized that their usage of the land would not be interfered with.

4. The 2nd Defendant maintained that the process of alienation of the suit land was lawful and complied with the relevant laws. It contended that the suit land predominantly and culturally belonged to the Rendille community. That the

other communities enjoyed user and access rights. It affirmed that though the Plaintiffs are members of the Rendille community that reside in the Laisamis constituency, being nomadic in nature, they were not present in Serima and Loiyangalani at the time the suit land was set apart.

5. The 3rd and 4th Defendants denied that the Plaintiffs are residents of the Laisamis Constituency, where the suit land is situated. They reaffirmed that the suit land was set apart in compliance of the law. That the subdivision and change of user also complied with the law and denied any impropriety on their part. They insisted that the 1st Defendant's title is lawful and unimpeachable.
6. The 5th Defendant denied the claims of the Plaintiffs entirely and was emphatic that the suit land was alienated, subdivided and changed user according to the Trust Land Act and the constitution. That Proper public participation was carried out as required.
7. The general position taken by the Interested Parties was that the 1st Defendant's power project was beneficial to the immediate community and it was initiated after requisite public participation.
8. Upon hearing the rival parties, analyzing and considering the evidence before it, this Honorable Court on 19/10/2021 entered Judgment in the following terms;

    a. A declaration be and is hereby made that the setting apart of the suit properties was irregular, unlawful and unconstitutional.

    b. The titles issued to the 1st Defendant are irregular and unlawful and this court declares that they should be cancelled but the 2nd, 3rd, 4th and 5th defendants are granted one year to strictly comply with the existing law on setting apart failing which the impugned titles will stand cancelled and the suit land shall revert to the community.

    c. The prayer by the Plaintiffs for nullification of the Wind Power Project is hereby denied.

d. Having found that this suit constitutes Public Interest Litigation, all parties will bear their own costs.

9. Aggrieved by those Orders, the 1st Defendant has filed the instant Motion, the subject of this Ruling. **B. The 1st Defendant's Application dated 4/4/2022**

10. The 1st Defendant's Motion is dated 4/4/2022 filed pursuant to Order 50 rule 6 & Order 51 rule 1 CPR,

Sections 1A, 3, 3A, 80, and 95 CPA & Articles 23 (3), 40 and 50 CoK craving for Orders THAT; **a. Spent.**

b. Spent.

c. This Honorable Court be pleased to review its Judgment/Decree delivered on 19/10/2021 and all and/or any consequential Orders therein as to extend the period of 1 year granted to the 2nd, 3rd, 4th and 5th Defendants in the Judgement to a period in line with the expert testimony to be adduced before the Court and based on the Court's opinion as to the appropriate timeline to comply with existing laws on setting apart of the suit properties known as LR 28031/1 measuring approximately 40,000 acres and LR 28031/2 measuring approximately 110,000 acres both situated in Loiyangalani, South Horr, Marsabit County.

d. This Honorable Court be pleased to review the Judgement/Decree of this Honorable Court delivered on 19/10/2021 and all/or any consequential orders therein as to issue directions/orders in the form of a structural interdict for any of the Defendants after every 12 months cycle or such other period as the Court may deem appropriate in order to report to Court on the progress of compliance with the existing laws relating to the setting apart of the suit properties known as LR 28031/1 measuring approximately 40,000 acres and LR 28031/2

measuring approximately 110,000 acres both situated in Loiyangalani, South Horr, Marsabit County.

e. **This Honorable Court be pleased to order that further and/or additional evidence be adduced in the form of expert testimony on the process of setting apart of the suit properties known as LR 28031/1 measuring approximately 40,000 acres and LR 28031/2 measuring approximately 110,000 acres both situated in Loiyangalani, South Horr, Marsabit County.**

f. **The Honorable Court be pleased to issue such further Orders as it may deem fit, appropriate and expedient to grant in the circumstances of this matter for purposes of compliance with its Judgement/Decree or other just consideration.**

g. **The costs of this Application be awarded to the 1st Defendant.**

11. The Application is premised on the grounds on the face of it *inter alia* that;

a. Should the Application be disallowed, the 1st Defendant stands to lose billions of shillings in irreparable losses and damage and the larger public gains in the Lake Turkana Wind Power Project (the Project).

b. No action has been taken by any of the Defendants to comply with existing law and regularizing the titles with the risk that the suit properties shall revert to the community.

c. Under the Community Land Act (CLA), the 2nd – 5th Defendants have no legal authority to undertake the regularization process since the responsibility lies with the community

d. This Court did not consider the procedures of land conversion under the Constitution of Kenya, the CLA and the Community Land Regulations (CLR) at the time of the Judgment and no evidence thereon was led by the parties.

e. Any purported steps by the 2nd – 5th defendants to initiate the conversion of the land into private land stand to be challenged in law. Further that only the community members are entitled under the CLA to commence the conversion process and so far none had initiated the same.

f. The Court did not have the benefit of receiving evidence and submissions on the application of, practices and procedures under the CLA for it to appreciate the complexity, intricate and lengthy procedures involved.

g. There was no provision of a mechanism for an oversight process for implementation of the Orders made.

h. The Judgment and Orders decreed are not specific, clear, effective and not sufficiently directed to the relevant entities or communities with power to act.

i. The period of one year to regularize the titles is inadequate and insufficient.

j. The risk of irreparable losses running into billions of shillings and the loss of electrical power to the national grid and loss to the public.

k. There are sufficient reasons for review of the decree under Order 45 CPR.

12. Additionally, the Motion is backed by the Supporting Affidavits of even date of **Philipus Leferink**, the 1st Defendant's CEO and **Dr. Winfred Mwangi**, an expert in land matters.

13. Echoing the grounds in the Motion, **Mr. Philipus Leferink** notably deponed that it is the 1st Defendant that mainly stands to suffer immense loss and damage in the event that the Judgment is not implemented as directed. That in light of its provision of an estimated 17% of power to KPLC and the national grid, cancellation of its title deed would lead to drastic catastrophic

outcome for both the 1st Defendant and Kenyan public. He further avowed that upon delivery of the impugned Judgment annexed as *PL-1*, the 1st Defendant enlisted the expert opinion of Dr. Winfred Mwangi to ascertain compliance of the Orders therein. The 1st defendant says that upon considering and evaluating the expert advice received, it was apparent that setting apart and regularization of the assailed titles could not be legally concluded within one year. That the 1st Defendant is apprehensive that any purported initiation or implementation by the 2nd – 5th Defendants of a process of conversion to comply with this Court's Orders would stand to be impugned in future for being contra-statute. That in any event the Hon Court did not mandate the 2nd – 5th Defendants to undertake the processes required to ensure compliance with current law and there are no specific roles if any relating to the Defendants to effect the Orders.

14. In similar fashion, **Dr. Winfred Mwangi** a Doctor of Philosophy in Land Economics outlined her vast qualifications and experience in land administration, management and policy development as contained in copies of her CV and certificates marked *WM-1*. Against that background, she averred that she was commissioned by the 1st Defendant to provide a Report dated 23/3/2022 annexed as *WM-2*, on the practical procedures to implement the Court Orders on regularizing the setting apart of the suit land. That the existing laws include the Constitution of Kenya, Community Land Act 2016, the Community Land Regulations of 2017, the Physical and Land Use Planning Act 2019, the Land Adjudication Act, the Survey Act, the Land Act and the Land Registration Act. She reiterated that the regularization process would entail intricate procedures involving the affected communities by way of public participation, county and national governments and their respective organs which cannot be done within one year. To that end, she swore that the 2nd – 5th Defendants have no role in initiating the process of conversion as set

out under the CLA, that being a preserve of the of relevant community members and not the 2nd Defendant.

C. The Responses

15. The Plaintiffs opposed the Application vide their Replying Affidavit and Grounds of Opposition both dated 3/10/2022 and the Preliminary Objection dated 22/11/2022. However, the said pleadings were struck out by this Court in its Ruling delivered on 16/1/2023 having been filed out of time and without requisite leave of Court.
16. The 2nd Defendant did not participate in this Motion.
17. The 3rd and 4th Defendants through the Honorable AG support the Motion vide the Supporting Affidavit sworn on 26/9/2022 of **Mr. Robert Simiyu**, the Assistant Director Land Administration at the Ministry of Lands. His averments were a replica of Mr. Philippus Leferink and Dr. Winfred Mwangi. That by virtue of his qualifications, expertise and attendant duties, he's well versed with the provisions of the Community Land Act and Community Land Act Regulations and the Cabinet Secretary (as national govt) role in the legal implementation thereof to wit establish Community Land Registration Units; assign community Land Registrars; initiate civic education; induction of Community Land Management Committees; issue notice of demarcation; appoint adjudication officers among others. Conversely the County government roles *inter alia* include to hold in trust all unregistered community land; ensure compliance of transactions touching on unregistered community land under the CLA; release compensation funds under the compulsory acquisition of unregistered community land and approve physical developments for community land. that in the end the time frame of one year is impractical to implement the Court orders of 19/10/2021 hence the need for this Honorable Court's intervention by allowing the instant Application.

D. The Written Submissions

18. On 25/7/2022 directions were taken to canvass the Application by way of written submissions.

19. The 3rd, 4th and 5th Defendants as well as the Interested Parties associate themselves with the 1st Defendant's submissions below. The Interested Parties also through the firm of Kiprop & Co.

    Advocates filed a List of Authorities in support of the 1st defendant's case dated 13/10/2022.

20. The 1st defendant filed two sets of submissions dated 30/5/2022 and 21/9/2022.

21. In the preliminary submissions, the 1st Defendant submitted that it is the likely party to suffer should the titles be cancelled. It submitted on two issues, firstly that it is necessary for this Honourable Court to stay or suspend the judgement/ decree to prevent the further dissipation of the 1-year period granted for compliance with the existing law in relation to the 1st defendant's titles. Secondly that this Honourable Court has the inherent and statutory jurisdiction to issue a stay or suspension of the implementation, application and/or execution of the Judgement.

22. Further that the apparent inaction of the relevant parties in complying with the Judgement threatens the very existence of the Lake Turkana Wind Power Project should the titles to the suit stand cancelled. That it would cause enormous and irreparable losses to the 1st defendant/applicant who have developed, financed, built and is currently operating a 310 MW wind project at a cost of approximately EUR 623 million or KSH. 80.99 billion. Additionally, that the wind project is a Government of Kenya Vision 2030 project that generates clean, renewable and low-cost wind energy for distribution by the Kenya Power and Lighting Company (KPLC)

23. In support of the suspension of the running of the 1-year period the 1st defendant submitted that by ordering of a stay or suspension of the application, implementation and/ or execution of the 1-year timeline will meet the ends of justice and will prevent the abuse of the court process. It avers that

the importance of a stay of the 1-year regularization period will enable this esteemed Court to consider the expert evidence before it by Dr. Winfred Mwangi and a Land Administration and Management Expert.

24. Further, it adduced several grounds in support of the suspension of the running of the 1-year period noting that the initiative to commence the setting apart process under existing laws lies with the relevant community which must register themselves as a legal entity then initiate and drive the process. That the 2nd, 3rd, 4th, or 5th Defendants have no role as far as the initiation of compliance with the existing laws on setting part is concerned. Additionally, that it is practically impossible to comply with the complex, intricate and lengthy procedure of setting apart under existing laws within the 1-year timeline provided in the Judgment.

25. In the second set of submissions, the 1st Defendant highlighted the applicable land laws, procedure and consequences of the application of the Judgement, namely; Constitution of Kenya, Community Land Act 2016, the Community Land Regulations of 2017, the Physical and Land Use Planning Act 2019, the Land Adjudication Act, the Survey Act, the Land Act and the Land Registration Act.

26. It contended that the process of setting apart referred to in the Judgment and Decree of this Honourable Court aforesaid was previously set out in the provisions of Article 117 of repealed Constitution and Section 13 of the Trust Land Act (Cap 290) (now repealed), hence this Honourable Court did not, in the course of the proceedings, have the benefit of receiving evidence and submissions from the parties regarding the application of, and practices and procedures under the Community Land Act, the Regulations made thereunder and other relevant legislation. That consequently they sought the expert opinion of Dr. Winfred Mwangi, an expert in land administration management and policy development, land information systems and housing policy studies. The 1st defendant beseeched this Honourable court to consider

the expert report marked as WM-2. That ultimately the conclusions by Dr. Winfred Mwangi have not been challenged in any way by any of the Respondents or Interested parties, hence invited this Honourable Court to find that the conclusions set out in her report are convincing and credible.

27. The 1st defendant drew two issues for determination namely:

    a) **Review of the Judgement dated 19/10/2021**

    b) **Structural interdict.**

28. On review of the impugned judgement dated, the 1st defendant submitted that this Honorable Court has unfettered discretionary powers to review its judgement, decree and/or order. Reference was made to Order 45 of the Civil Procedure Rules 2010, Section 3A and 80 of the Civil Procedure Act and several case laws, namely; ***Sadar Mohamed vs. Charan Singh, (1959) EA 1 793, Wangechi Kimita & Another vs. Mutahi Wakabiru CA No. 80 of 1985 (unreported) and Commissioner of Domestic Taxes vs. W.E.C Lines (K) Limited (Tax Appeal E084 of 2020).***

29. The 1st defendant submitted that the aforementioned authorities are directly applicable to the facts of the instant suit and therefore enabling this Honorable Court with the jurisdiction to grant the orders sought herein. That the instant Application was filed expeditiously and without any undue delay following the delivery of the judgement dated 19/10/2021. It also averred upon filing their application, no response has been made to challenge the reliefs sought, hence it prays that this Honorable Court reviews the Judgement/ Decree and all/or any consequential Orders therein as to extend the period of 1-year granted to the 2nd, 3rd, 4th and 5th defendants in the judgement.

30. On the issue of whether this Honourable Court has the jurisdiction to issue a remedy in the form and nature of a structural interdict, the 1st Defendant emphasized that it is apprehensive of the lengthy process required to undertake and complete the regularization of the titles to the suit properties in

strict compliance with existing laws. It submits that a structural interdict is an order which empowers the court to control compliance with its orders and has the following characteristics:

a) Its purpose is neither deterrence nor compensation. Rather, it is intended to eliminate systemic violations existing especially in institutional or organizational settings;

b) Its focus is future behaviour rather than compensation for past wrongs;

c) it is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered; and

d) Its prominent feature is the creation of a complex ongoing regime of performance which is made possible by the court's retention of jurisdiction and sometimes by its active participation in the implementation of the order.

31. From the foregoing it urged the Honourable Court to consider the Expert Report of Dr. Winfred

Mwangi and take into account the following models of structural interdicts;

a) The bargaining model, where parties negotiate regarding the appropriate remedy;

b) The legislative/administrative hearing model, which allows for public hearings and direct informal participation by interested parties who may not have originally been party to the litigation;

c) The expert remedial formulation model, where experts are given a mandate to develop a remedial plan;

d) The report back to court model, which requires the respondent to provide the court with a
plan on how he or she intends to remedy the violation, which the court then approves when it is satisfied; and

e) The consensual remedial formulation model, where parties engage with each other by exchanging views and raising concerns with a view to

settling on a suitable remedy. The input of other stakeholders may also form part of the process.

32. The 1st Defendant also relied on Section 13(7) of the Environment and Land Court Act, 2011 and submitted that the circumstances of this case render it fit and just for this Honourable Court to fashion an appropriate structural interdict to ensure compliance with the judgement. It defined structural interdict as an order which empowers the court to control compliance with its orders and in their case, the judgement. Reliance was placed on inter alia the case of ***Republic vs. Council of Legal Education & Anor Ex-Parte Mount Kenya University (2016) Eklr, Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others (2014) eKLR and Mohamed Ali Baadi & Others vs. AG and 11other (2018) eKLR.***

33. It urged this Honourable Court to consider combining the expert remedial formulation model and the report back to court model for purposes of fashioning a suitable structural interdict. It made reliance on inter alia the case of ***Kenton on Sea Ratepayers Association and others v Ndlambe Local Municipality [2016] ZAECGHC 45; 2017 (2) SA 86 (ECG), Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC), Toussaint v Canada, United Nations Human Rights Committee, CCPR/C/123/D/2348/2014, Molina-Thiessen v Guatemala and the New York University Law Review.***

34. Flowing from above, the 1st Defendant invites this Honourable Court to fashion appropriate directions in the nature and form of granting an appropriate and sufficient time frame to the parties in accordance with the report of Dr. Winfred Mwangi and structural interdicts to carefully guide the relevant stakeholders in compliance with the existing law on conversion.

35. In conclusion, it maintained that it would be in the interest of fairness and justice that this Honorable Court exercises its discretion to save the Project, subject to the relevant laws on setting apart of community land being complied with and to take into account the monumental investment i E. **ANALYSIS AND DETERMINATION.**

36. Having read and considered the application, the affidavit evidence, the written submissions and all the materials placed before us the following issues commend themselves for determination;

    a. Whether the Applicant is entitled to orders for review
    b. Whether the 1st Defendant has made out a case for the issuance of orders in form of a structural interdict against any of the Defendants.
    c. Whether the 1st Defendant is entitled to the orders to adduce additional evidence in form of expert testimony on the process of the setting apart.
    d. Who meets the costs of the application?

37. I find it worthwhile to recap the background of the dispute before the court.

38. On 19th October 2021, this Honourable Court delivered its judgment in this matter and ordered, inter alia, that the setting apart of the suit properties was irregular, unlawful and unconstitutional. Thus, the titles issues to the 1st Defendant should be cancelled.

39. Consequently, the 2nd to 5th Defendants were granted a period of 1 year from the date of the judgment to strictly comply with the existing law on setting apart failing which the impugned titles would stand cancelled and the suit properties would revert to the community.

40. It is the 1st Defendant's claim that its titles to the suit properties stand to be cancelled leading to the permanent and irreparable loss of billions of shillings invested in a critical project of strategic importance. Further, the country at large stands to suffer the loss and waste of invaluable investment as Lake Turkana Wind Power Project is a critical source of Kenya's low-cost renewable energy.

41. Notably, since the delivery of the judgment, there has been no visible or tangible action in complying with the existing law on setting apart. Thus, leaving the 1st Defendant under real threat that the titles to the suit properties will stand cancelled.

42. This Honourable Court provided for a limited period of 1 year for undertaking the procedure of setting apart the impugned land.

43. It is against this backdrop that the 1st Defendant, filed an application vide a notice of motion dated 4th April 2022.

a. Whether the Applicant is entitled to orders for review.

44. It is common ground that this Court has the power of review, such power is exercised under the auspices of the provisions set out under Section 80 of the Civil Procedure Rules and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Thus, it is essential to review the guidelines provided under these provisions of the law. Section 80 of the Civil Procedure Act (Cap.21) Laws of Kenya provides as follows:

> "Any person who considers himself aggrieved: -
>
> (a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

10. Order 45 rule 1 of the Civil Procedure Rules, 2010 sets out the rules for the review of a judgement. It provides as follows:

> "45 (1) Any person considering himself aggrieved; -
>
> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order is hereby allowed, and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."

11. It is apparent Section 80 gives the power of review while Order 45 outlines the rules. The rules act as a restriction on the grounds available to a party seeking review. They also outline the scope of review and jurisdiction of the court. This has been set out by our courts as established jurisprudence in **Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR** where it was held: -

> **"Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."**

12. The High Court in **Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA**

793 held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

14. On review based on the grounds of sufficient reasons the court concurs with the superior courts decision that sufficient reasons need not be analogous to the ground of discovery of **new and important matter** or evidence or **mistake or error apparent on the face of the record.** In the case of **Wangechi Kimita v Wakibiru Mutahi [1985] eKLR** the Court was emphatic that;

> "I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the order: see *Sadar Mohamed v Charan Singh* (1959) EA 793".

45. The above decision remains sound as can be seen in the case of **official Receiver and Liquidator v Freight Forwarders Kenya Limited [2000] eKLR** where the court referred to the decision in **Wangechi Kimita** and held as follows;

"On the authority of Wangechi Kimita and Another v Mutahi Wakibiru, (1980-88) 1 KAR

> 977 the words "or any other sufficient reason" in Order XLIV rule 1(1) of the Civil Procedure Rules need not be analogous with the other two alternatives this order in view of section 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya which confers an unfettered right to apply for a review. Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice "be limited to the discovery

of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record."

46. The genesis of any court in exercising its power of review begins by an applicant demonstrating the following; Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made; some mistake or error apparent on the face of the record or for any **other sufficient reason;** the error or omission must be self-apparent and should not require debate to be established. In any of the grounds the application has to be made without unreasonable delay.

47. The Applicant has urged the application on grounds that the time frame of one year granted by the court to enable the 2nd – 5th Defendants to strictly comply with the existing laws on setting apart is not only inadequate but insufficient. It was the view of the 1st Defendant that according to the expert opinion dated the 23/3/2022 received through Dr Winfred Njeri Mwangi, the process will take 5-7 years to complete.

48. That none of the 2nd – 5th Defendants have the power, mandate and the role under the Community Land Act to initiate the process of regularization of the titles and in the event that they attempt to do so they stand to be impugned in the future as being contrary to law leading to unending litigation.

49. The Court was informed that under the new Community Land Act, it is only the community with interests in the land that is mandated to initiate the process of conversion and transfer of the suit land to the 1st Defendant.

50. It has also been advanced by the Applicant that it stands to suffer billions of shillings in irreparable losses, a position that was pointed out by the applicant when the court delivered its judgment on 19th October 2021.

51. In answer to the grounds set out above, we will now set out the process of conversion as enacted in the CLA. The 1st stage mandates the **Chief Land**

Registrar (the 3rd Defendant) under Section 9 thereof to appoint the **Community Land Registrar (CLR)** who superintends the process of registration of the community as a corporate legal entity under Section 7 of the CLA.

52. The 2nd stage is the registration of the community claiming an interest in or right over community land into a **corporate body**. The CLR shall by notice in at least one newspaper of nationwide circulation and a radio station of nationwide coverage, invite all members of the community with some communal interest to a public meeting for the purpose of electing the members of the **Community Land Management Committee (CLMC).** The notice shall also be given to the **National County Administrators and County Government administrators** in the area where the community land is located. The CLR is at liberty to use all available means of communication including electronic media to reach the members.

53. In the 3rd stage the community elects between 7-15 members from among themselves to be members of the CLMC. CMLC is tasked with the role of; preparation of a comprehensive register of communal interest holders; come up with the name of the community; submit the name, register of members minutes of the meeting and rules and regulations of the committee to the CLR for registration. Its functions are explicitly set out under S15 of the CLA.

54. The 4th stage is the adjudication of the community land. The **Cabinet Secretary** in consultation with the respective **County Governments** develops and publishes in the gazette a comprehensive adjudication programme for the purposes of registration of community land. It is the duty of the CS to ensure that the process of documenting mapping and development of the inventory of the community land shall be **transparent, cost effective and participatory**. For ease of access by members of the community, the inventory of community land may be accessed by county governments.

55. The 5th stage is the survey stage where the CS shall issue a 60day public notice of intention to survey demarcate and register the land. The notice shall contain the name of the community and description of the land to be adjudicated. All interested persons with overriding interests or any claim on the land are invited to lodge them. Area(s) of land reserved for communal use are specified.

56. In the 6th stage the CS shall cause the land to be adequately surveyed. Such survey shall exclude all parcels already in use for public purposes and adjudicated private land.

57. In the 7th stage the cadastral map of the land is produced and presented to the Registrar for registration.

58. The Act further provides that there shall be maintained for each registration unit a community land register in accordance with Section 8 of the Land Registration Act in which a cadastral map showing the extent of the community land and identified areas of common interests; name of the registered community; a register of members of the registered community which shall be updated annually, the user of the land; such particulars of the members of the registered community as the Registrar may determine and any other requirement under the Act.

59. All registration of instruments with respect to disposal of rights or interests in community land shall be in accordance with the CLA or any other written law.

60. Until a community land has been registered under the CLA, it remains unregistered community land and shall be subject to the Act be held in trust by the County Governments on behalf of the communities pursuant to Art 63 of the COK. This point is further amplified under section 6 of the CLA where it provides that County Governments shall hold in trust all unregistered community land on behalf of the communities for which it is held. Equally the County Government is a trustee for all monies payable as compensation for compulsory acquisition of any unregistered community land. This underscores the centrality of the county Government as a fiduciary trustee for the

community. However, upon registration of the land the respective registered community assumes management and administrative functions thereof and the trustee role of the county Government in relation to the land ceases.

61. It is trite that community land may be converted to public by compulsory acquisition, transfer or surrender. Under S21 of CLA the process of conversion of registered community land into any other category of land shall require the approval of two thirds of the community assembly in a special meeting convened for that purpose.

62. On the ground that the judgment did not provide any roles and obligations of the 2nd, 3rd, 4th and 5th

Defendants, the 3rd Defendant, the Attorney General in its supporting affidavit sworn on 26th November 2022, outlines the role of each party in the process of conversion of community land to private land. It commences with the distinct role of the Cabinet Secretary of the Ministry of Lands to establish community land registration units, designate community land registrars, cause preparation of inventory of unregistered community land and group representative, induct Community Land Management Committees, the Community land registrar, the county government, issue notice of demarcation, appoint adjudication officers and dispute resolution committees.

63. Surprisingly, the deponent, Robert Simiyu after outlining the role of each party in the compulsory acquisition process goes ahead to state that all Defendants in this case have no role to play. We have already sufficiently demonstrated that the roles of the 2nd, 3rd, 4th and 5th Defendants are provided under the community land act.

64. The court therefore finds the position taken by the Defendants and the IPs that they have no power, role and or mandate to play in the setting apart of the titles under the new law incorrect and doubtful.

There was no evidence led to show that the 4th Defendant has designated the community Land Registrar. There is also no evidence that the community has

been incorporated as a corporate entity under section 7 of the Act. The CLMC is yet to be incorporated. There is also no evidence to show that the Cabinet Secretary has taken steps to develop and publish a comprehensive adjudication programme.

65. Even if the court was to agree (which we do not agree) with the 1st Defendant that the defendants have no role to play, then the application for extension of time would not serve any useful purposes in the circumstances because they would still be unable to act for lack of alleged capacity.

66. As discussed in the background of the application, the judgement of this court was rendered on the 19/4/2021 and one year lapsed on the 18/10/2022. As at the time of writing this ruling, one year and 4 months later, no action has been taken to initiate the process by any of the defendants and no good reason has been given for such inaction and or failure to initiate the process. Absolutely none of the parties has taken any action towards complying with the judgment. Other than the 1st Defendant obtaining an expert opinion on the conversion process, it has not reached out nor has it placed evidence before this court of its intention to reach out to the 2nd, 3rd, 4th and 5th Defendants with a view to complying with the judgement.

67. The court would have taken a different position had the process begun and the issue would then be the scope of the extension of time which in this case is inapplicable.

68. It is trite that a good and sufficient explanation opens the flow of discretion in favour of an applicant. In this case the court notes that no action has been taken for over one year since the delivery of the judgment. It is the view of the court that the 1st Defendant has not proffered a good reason(s) as to why the period provided gratuitously by the court was not adequate to carry out the process of regularization.

69. The Applicant asserts as one of the grounds, that the court in delivering its judgment was not aware of the "complex, intricate and lengthy procedure" on

the process of conversion of community land to private land. The court considered the procedure and it is imperative to note that the one year granted was an amnesty to regularize the process. Moreover, it is neither a ground for review that the court proceeded on an incorrect interpretation of the law or none of it and reached an erroneous outcome

of law.

70. We hold that the information contained in the expert report of Dr. Winfred Mwangi, titled "the Regularization of Titles – LR No.s 28031/1 & LR No.s 28031/2 – Marsabit County," is not a new and important matter or evidence which was not within the knowledge of the Applicant or could not be produced before the judgment and decree of this honourable court was passed. The Applicant has not provided a concrete foundation and given reasons in support that the new information only came to their knowledge after the judgment and decree of this court had been issued. Further the Act has given some timelines in which the CS is expected to survey demarcate and register community land interalia. Given the background the court in giving one year to regularize the process was quite generous.

71. For the above reasons, in our considered view extension of time will not serve any purpose as the parties, by their conduct, appear unwilling to commence the process of conversion of the land.

72. In the end we hold that the Applicant has failed to establish grounds for orders of review. Consequently, we decline the invitation to review our decision, as the grounds cited do not fit within the ambit specified in Order 45 Rule 1.

b. Whether the 1st Defendant has made out a case for the grant of a structural interdict.

73. The court has considered the material and submissions on record on this issue. The 1st Defendant submitted that the court did not provide for an oversight mechanism to supervise the implementation of the order for regularization of the setting apart of the suit properties. It was further submitted that the court

did not give a clear, specific and effective order directed to the relevant parties, entities and communities to facilitate the process of regularization.

74. In view of the court's holding on the issue of review and extension of time, it is strictly not necessary to determine the issue of whether or not the 1st Defendant is entitled to a structural interdict. However, the court shall consider the same on merit because it is doubtful if the 1st Defendant would be entitled to a structural interdict in the circumstance of this case.

75. So, what is the nature of a structural interdict and what is its purpose? The High Court of Kenya considered this remedy in the case of **R vs Council of Legal Education & Another ex-parte Mount Kenya University [2016] eKLR**. In the said case, Odunga J (as he then was) held as follows; ***"144. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. In the first instance the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Secondly, the court mandates government compliance with constitutional responsibilities. The third stage is that the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached.***

Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders..."

76. Similarly, in the case of **Kenton on Sea Ratepayers Association & 2 Others vs Ndlambe Local Municipality and 48 Others [2016] ZAECGHC 45;2017 (2) SA 86 (ECG)** the High Court of South Africa considered the remedy of structural interdicts as follows;

> ***"95. In LAWSA volume 4: Para 59, it is pointed out that from mandatory interdicts which direct the repository of power to act in a particular way, and prohibitory interdicts, which prohibit the repository of power from acting in a particular way, the Constitutional Court has also held that a structural interdict may be an appropriate remedy when a breach of the Constitution has been alleged and proven.***
>
> **96.** ***As its name suggests, a structural interdict is one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the court on the extent to which it has complied with the court's***
>
> ***order. It thus involves the continued participation of the court in the implementation of its orders.***

> ***97. The Constitutional Court has shown itself willing to grant structural interdicts, in appropriate circumstances and in Head of Department, Mpumalanga Department of Education V Hoerskool Ermelo 2010 (2) SA 415 (CC), the court stated that a remedy in the form of a structural interdict or supervisory order may be very useful. This is because, the court stated further, it advances constitutional justice by ensuring that the parties themselves become part of the solution."***

77. It is evident from the material on record that the 1st Defendant had no counter-claim in the proceedings. There was no claim by the 1st Defendant that any of its fundamental rights had been violated and there was no finding or declaration by the court to that effect. There was even no order or direction for any state agency to take steps to vindicate any such rights. There was also no finding or holding by the court that any of the 1st Defendant's legal or constitutional rights had been violated.

78. Moreover, the court is of the opinion that the order made for regularization of the alienation of the suit properties was a **permissive** order which merely gave the Defendants an opportunity to do so if they so wished. It was not a mandatory or obligatory order which compelled the 2nd to 5th Defendants to comply therewith. Accordingly, the Defendants were at liberty to sit back and do nothing without violating the terms of the decree. As indicated before, non-action within one year would simply cause the suit properties to revert to the Plaintiffs' communities without violating the decree.

79. The court is thus of the opinion that the 1st Defendant has failed to satisfy the legal requirements for the grant of a structural interdict since there was no declaration of rights in its favour in the judgement dated 19.10.2021. On the contrary, the court had specifically held that 1st Defendant's acquisition of the suit properties was unlawful and unconstitutional. The court further held that

in the instance of the 1st Defendant, it could not enjoy constitutional protection by virtue of **Article 40 (6)** of the **Constitution of Kenya 2010.**

c. Whether the 1st Defendant should be allowed to tender additional evidence in the form of expert testimony.

80. In view of the court's holding that the 1st Defendant has failed to demonstrate a case for enlargement of time and for the grant of a structural interdict, the production of additional evidence shall not serve any useful purpose. Accordingly, the court is not inclined to grant the order for production of additional evidence.

81. The court notes that in its judgement delivered on 19th October, 2021 the prayer by the plaintiff for nullification of the 1st defendants project was denied.

Final orders for disposal;

82. Although costs of an action or proceeding are at the discretion of the court, the general principle is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap.21).** As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. The court has noted that the 1st Defendant's Application was not opposed. In the circumstances, the court is of the opinion that the appropriate order to make is that there shall be no order as to costs.

83. Final orders for disposal;

a. The application dated the 4th April, 2022 is devoid of merits.
b. It is hereby dismissed.
c. This being a public litigation dispute, we make no orders as to costs.

84. Orders accordingly.

Delivered in virtually and in open court at Isiolo this 22nd day of May, 2023 in the presence of; -

Court assistant: Balozi

Njoroge Regeru for the 1st defendant

Wairoto for the 1st defendant

Janet Kungu for the 3rd and 4th defendant

M/S Jackline Njuguna for the 5th defendant.

HON. JUSTICE PETER MUCHOKI NJOROGE – PRESIDING JUDGE

I certify that this is a true copy of the original
23/5/2023
MAGISTRATE ISIOLO

HON. JUSTICE YUVINALIS ANGIMA – JUDGE

DEPUTY - REGISTRAR
ENVIRONMENT & LAND
COURT (E.L.C) - ISIOLO

HON. LADY JUSTICE GRACE KEMEI - JUDGE