

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ELC NUMBER        OF 2014  
"FAST TRACK"

MOHAMUD ILTARAKWA KOCHALE.....1<sup>ST</sup> PLAINTIFF  
KOCHALE SOMO JALE.....2<sup>ND</sup> PLAINTIFF  
ISSA JITEWE GAMBARE.....3<sup>RD</sup> PLAINTIFF  
DAVID TAMASOT ARAKHOLE.....4<sup>TH</sup> PLAINTIFF  
WILLIAM LENGUYIAP.....5<sup>TH</sup> PLAINTIFF  
SEKOTEY SEYE.....6<sup>TH</sup> PLAINTIFF  
(Suing on behalf of the residents of Laisamis constituency and Karare Ward of Marsabit County)

VERSUS

LAKE TURKANA WIND POWER LTD .....1<sup>ST</sup> DEFENDANT  
MARSABIT COUNTY GOVERNMENT.....2<sup>ND</sup> DEFENDANT  
THE ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT  
CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT

PLAINT

1. The Plaintiffs are community members and residents of Marsabit County. The communities comprising of the Plaintiffs (*and who are mostly pastoralists*) are the Rendille, Samburu, El Molo and Turkana with a high illiteracy levels. Their address of service for purposes of this suit shall be c/o Sagana, Biriq & Co. Advocates, Prudential Assurance, Building 4<sup>th</sup> Floor, Wabera Street, and P.O Box 51100-00100, Nairobi.
2. The 1<sup>st</sup> Defendant is a limited liability company, incorporated under the Companies Act Cap 486 Laws of Kenya and is carrying on business within the Republic of Kenya.
3. The 2<sup>nd</sup> Defendant is a County Government established under article 176 of the Constitution and is a successor to the defunct County Council of Marsabit pursuant to the provisions of the County Governments Act No. 17 of 2012.
4. The 3<sup>rd</sup> Defendant is the Attorney General of the Republic of Kenya and is sued in this matter on behalf of the Ministry of Land, Housing and Urban Development, a government department, tasked with the mandate of formulating and implementing land laws policies in Kenya and is a successor to the Defunct Ministry of Lands.

5. The 4<sup>th</sup> Defendant is a public officer, appointed by the Public Service Commission under section 12 of the Land Registration Act, 2012 and is tasked with the mandate of overseeing the process of registration of land within the Republic of Kenya.
6. The 5<sup>th</sup> Defendant is a Constitutional Commission established under Article 67 of the Constitution of Kenya 2010 and is tasked with (*among other roles*) the mandate of managing and administering unregistered trust Land and unregistered Community Land on behalf of the County Government (Service of Summons upon the Defendants to be effected through the Plaintiffs' Advocates offices).

#### Background Information on the Plaintiffs

7. The Plaintiffs are nomadic pastoralists who have since time immemorial been the legitimate owners and occupants of Laisamis Constituency and Karare Ward part of which is all that pieces of land known as Land Reference Number 28031/1 and Land Reference 28031/2, cumulatively, measuring 150,000 acres, which land is situate in Marsabit County in the Republic of Kenya (the Suit Property). The land comprising of the Suit Property is used by the Plaintiffs as their ancestral land for seasonal and cyclic use for their livelihoods, cultural, ceremonial and spiritual purposes.
8. During dry season, the Plaintiffs move freely from one section of their ancestral land to another including the Suit Property, in search of water and pasture for their livestock within the expansive area comprising such areas as Laisamis constituency and Karare Ward in the vast Marsabit County.
9. During dry spell and periodic droughts, the Plaintiffs move in line with the traditional existing grazing plan to a rangeland known as Serima area in Loiyangalani District (*which is between South Horr, Mount Kulal and South of Lake Turkana and situate on the Suit Property*) where their animals get pasture. In addition to this, Serima area is used by the Plaintiffs as a traditional site for performing a rite of passage ceremony and for confirmation of the warriors one year after circumcision in a ceremony known as Galgulame. This is a very important cultural activity which takes place every fourteen (14) years and accordingly, is of great significance to the community. The first ceremony took place in the year 1924 followed by another in the year 1966. The other one would have been held in 2008 had there been no induced cycle of hostility among communities.
10. The Suit Property is held by the Plaintiffs as an ancestral, cultural and grazing land for themselves and in trust for their future generations under an elaborate traditional customary land tenure system that includes a grazing plan that facilitates the movement of livestock freely and in a cyclic manner. The Suit Property is also utilized by the Plaintiffs as a camel corridor to access Lake Turkana waters.

11. The Plaintiffs interests in the Suit Property is (*among other interests*) ancestral and is a cultural grazing land which dates back to the year 1920. These interests are anchored under the provisions of Articles 40, 63, 69 and 71 of the Constitution of Kenya 2010. The Plaintiffs have not ceded their rights or interests to a third party under any arrangement whatsoever.
12. The Plaintiffs', being the indigenous occupants of the Suit Property and a section of Marsabit County are entitled to protection accorded to indigenous inhabitants under the Banjul Charter, ICCPR, ICESCR, ILO Convention 169 on Indigenous And Tribal People, IFC performance standards (standard 1 as read together with standard 7 on indigenous people).
13. The Suit Property was, until its impugned allocation and subsequent registration in favour of the 1<sup>st</sup> Defendant, a Trust Land within the meaning of section 117 of the repealed Constitution of Kenya and the Trust Land Act. The Plaintiffs' case is premised on the ground that the Suit Property (*which is nearly the size of Nairobi County*), being a Trust Land, was illegally and unprocedurally set apart in favour of the 1<sup>st</sup> Defendant without adhering to the dictates of section 13 of the Trust Land Act as well as section 117 of the repealed Constitution of Kenya. The Plaintiffs shall crave leave of the court to adduce relevant evidence in support of their case in this regard.
14. At all material times relevant to this Suit, the Plaintiffs were the indigenous and trues owners of the Suit Property which forms part of Laisamis Constituency and Karare Ward.

#### Plaintiffs' case

15. By a letter dated 20<sup>th</sup> November, 2006, the 1<sup>st</sup> Defendant made an application to the now defunct Marsabit County Council seeking permission to Lease an area of land equivalent to 10 by 15 Kilometers on an exclusive basis to enable them set up a wind power project (the Project). The same day (20<sup>th</sup> November, 2006) the 1<sup>st</sup> Defendant wrote a letter to the Clerk of Marsabit County Council seeking to lease 100,000 acres south of Loyangalani for a period of 99 years.
16. The Permanent Secretary in the Ministry of Energy wrote a letter dated 27<sup>th</sup> March, 2007 in which it directed Marsabit County Council to give to the 1<sup>st</sup> Defendants "necessary assistance" to enable them acquire 100,000 acres in Marsabit County for a period of 27 years.
17. The 1<sup>st</sup> Respondent wrote to the Clerk, Marsabit County Council on 3<sup>rd</sup> April 2007, requesting for 150,000 acres of land and an area of 12km by 12km thereby varying his earlier request of 27<sup>th</sup> March 2007. This despite the fact that the 1<sup>st</sup> Defendant had initially requested for 100,000 acres for the Project. This divergence in seeking additional land is a clear indication that the 1<sup>st</sup> Defendant acted in bad faith and with a hidden intention of disenfranchising the Plaintiffs community of an additional 50,000 acres.

18. The Marsabit County Council Town Planning Committee met to discuss the request and approved it on 13<sup>th</sup> August 2007 which was later adopted by the full council meeting of 16<sup>th</sup> August 2007.
19. Lease agreement between 1st Respondent and Marsabit County Council was done on 9<sup>th</sup> October 2007. Its states clearly that the setting apart of the suit property has to be in accordance with TLA requirements. The Plaintiffs shall crave leave of the Court to take into consideration the fact that the said lease has only one signature for each party and does not bear the official seal of the County Council of Marsabit.
20. The Commissioner of Lands caused to be published Gazette Notice Number 340 of 2008 dated 17<sup>th</sup> January, 2008 stating that the Suit Property had been duly set apart in favour of the 1<sup>st</sup> Defendant for purposes of wind power project. It is instructive to note from the outset that during this period, Kenya was experiencing political instability which had been occasioned by the 2007/2008 post-election violence, thereby making it inconceivable for the Plaintiffs to access the said Kenya Gazette.
21. By a letter dated 26<sup>th</sup> November, 2008 from the Office of the Deputy Prime Minister and the Minister for Local Government and addressed to the Commissioner of Lands, the Permanent Secretary in the office of the Deputy Prime Minister directed the Commissioner of Lands to issue a 33 year lease to the 1<sup>st</sup> Defendant at Loiyangalani. This clearly varies from the earlier directive issued vide a letter dated 27<sup>th</sup> March, 2007 by the Permanent Secretary in the Ministry of Energy effecting a 27 year lease period in favour of the 1<sup>st</sup> Defendant. This variance shows the extent of nonchalant behavior and depicts the manner in which community land was being mismanaged. The Plaintiffs shall crave leave of the court to rely on section 117 of the Repealed constitution and section 13 of the TLA in regard to their contention that the office of the defunct Deputy Prime Minister and that of the Permanent Secretary in the Ministry of Energy was not one of the offices contemplated under section 13 of the TLA in respect of the process of setting apart a Trust Land.
22. By a letter dated 2<sup>nd</sup> March 2009 the Laisamis Constituency MP, Hon. Joseph Lekuton impressed upon the Minister for Lands to issue title deed for the suit property to the 1<sup>st</sup> Respondent. The Plaintiffs shall crave leave of the court to infer political interfere in the impugned process of setting apart the Suit Property suffice to say that the County Council of Marsabit did not require outside from the political leadership to effect its decision.
23. The 1<sup>st</sup> Defendant was subsequently issued with a Letter of Allotment dated 18<sup>th</sup> March, 2009 (Letter of Allotment) in respect of L.R No. 28031 measuring 60,705 hectares. Clause 8 of the Letter of Allotment prohibited the 1<sup>st</sup> Defendant from sub-dividing the Suit Property without consent from the County Council and Commissioner of Lands. Clause 9 prohibited the 1<sup>st</sup> Defendant from (among other things) selling, subletting or transferring the Suit Property without the written consent of the County Council and Commissioner of Lands.

24. By a letter dated 25<sup>th</sup> February, 2008 (*during the post-election violence*) the defunct County Council of Marsabit wrote a letter to the Commissioner of Lands in which it imputed that it had placed an advert in respect of the process of change of user of the Suit Property and that it had received no objection from the Plaintiffs. The Plaintiffs shall crave leave of the Court to demonstrate the fact that no evidence of the said advertisement had been produced to show that the Plaintiffs were informed of the impending change of user. It is also unclear how the County Council of Marsabit arrived at a conclusion that there was no objection from the Plaintiffs to the impugned change of user.
25. It is the Plaintiff's case that the 1<sup>st</sup> Defendant failed to obtain this consent and has subsequently and illegally sub-divided the Suit Property into I.R No. 6395/1 (L.R No. 28031) comprising of 16,600 Hectares and I.R No. 6396/1 (L.R No. 28031/2) comprising of 44,104 Hectares. The Suit Property has now been converted into a private land owned by the 1<sup>st</sup> Defendant. The process leading to the conversion of the Suit Property from a 33 year lease to a privately owned land is a mystery that the Plaintiffs are unable to comprehend. The Plaintiffs shall crave leave of the Court to refer to the letter dated 4<sup>th</sup> April, 2014 from the 1<sup>st</sup> Defendant's Advocates and the Letter of Allotment dated 18<sup>th</sup> March, 2009.
26. By a letter dated 2<sup>nd</sup> March 2009 the 1<sup>st</sup> Defendant requested for an extension of the lease area by an extra 75,000 acres to the south of suit property and proceeded to beacon the same without indicating its intended use. The Plaintiffs contend that the 1<sup>st</sup> Defendant has resorted to an expansionist tendency and is in the process of converting the land which was hitherto inhabited by the Plaintiffs into a private property for speculative purposes.

**Procedural lapse in the process of setting apart the Suit Property to the 1<sup>st</sup> Defendant**

27. The Plaintiffs contend that they were not notified of the process of setting apart the Suit Property to enable them participate actively in the said process as stipulated under section 13 of the Trust Land Act.
28. The Plaintiffs contend further that they learned about the impugned process on or about March, 2014 (*after its completion*) and immediately convened a meeting on 29<sup>th</sup> March, 2014 to deliberate on the matter. This meeting was attended by various elected leaders of the Marsabit County and the residents of Laisamis Constituency and Karare Ward. Among the elected leaders who attended this meeting were the Speaker of the County Assembly of Marsabit County Government, the residents of Laisamis Constituency and Karare Ward, Local administration chiefs of various locations in Marsabit County. The purpose of the meeting was to ascertain whether or not the process of setting apart had been carried out procedurally by the defunct county council prior to allocating the Suit Property to the 1<sup>st</sup> Defendant.

29. After this meeting, it emerged that that none of Plaintiffs had been consulted in respect of the Project contrary to the express and mandatory provisions of section 13 of the Trust Land Act.
30. Without prejudice to the generalities of the foregoing, the Plaintiffs contend that the alleged meetings that the 1<sup>st</sup> Defendant's advocates are alluding to in their letter dated 4<sup>th</sup> April, 2014 where members of the community comprising of the Plaintiffs were alleged to have been consulted were convened by the 1<sup>st</sup> Defendant and not the Divisional Land Board as required by the TLA. This meeting neither declared the size of land required for the project nor did it inform the community of the loss of access to their land, but instead concentrated on the benefits to the community. The impugned meeting was attended by town dwellers and fishermen from one area (Loiyangalani) and did not involve the pastoralist community thus falling short of the requisite inclusiveness of public participation in the establishment of the said project. It was in this regard private in nature, clandestinely convened and attended by a few, self-centered and compromised elected representatives, town dwellers and fishermen from one area.
31. It is the Plaintiffs case that the clear and express Procedure stipulated under Section 13 of the Trust Land Act Chapter 288 (TLA) for setting apart Trust Land were not adhered to the letter or at all.

Particulars of Breach of Statutory provision

32. The Plaintiffs shall crave leave of the court to demonstrate that there was a procedural lapse in the manner in which the Suit Land was awarded to the 1<sup>st</sup> Defendant, namely;
- i. There was no public consultation, no notice of the proposal for setting apart given, no reservations from the residents of Laisamis Constituency and Karare Ward recorded and no compensation or alternative settlement was offered to the Plaintiffs thus making the entire process of setting apart illegal, unprocedural and in total disregard to the provisions of the Constitution and the Trust Land Act.
  - ii. The Plaintiffs were not notified of the intended process of setting apart the Suit Property as stipulated under section 13 of the TLA.
  - iii. There was no Divisional Board constituted as per section 13 (2) of the Trust Land Act. The Plaintiffs contend that there was no such meeting. Further, the documentation in the possession of the 2<sup>nd</sup> Defendant records as evidence of such a purported meeting with the Plaintiffs is a Town Planning Committee Meeting sitting at the administrative headquarters, and held on the 13th August, 2013. It purports to, that the discussion relating to the process of setting apart was unanimously approved however, It does not make reference to the recommendation of the Divisional Board pursuant to Section 13(2)(c) of the TLA.

- iv. No proposal to set apart the Suit Land was ever presented to the Plaintiffs by the County Council of Marsabit nor were the Plaintiffs informed of the day and time of the purported meeting of the Divisional Board, at which the said proposal would be discussed so that they can raise their recommendation prior to the resolution for Setting Apart being reached.
  - v. The Divisional Board (which the Plaintiffs contend was non-existent at the time of the impugned process of setting apart) failed to hear and record in writing the representations of all the supposed persons concerned who supposedly were present at the meeting to submit to the county council its written recommendation concerning the proposal to set apart land, together with a record of representations made at the meeting.
  - vi. The Plaintiff contends that purported full council meeting held of 16th August 2007 to ratify the Town Planning Committee Meeting lacked Quorum.
  - vii. No compensation or assessment of damages was ever made to the Plaintiffs of the county council, a fact which flies in the face of the express provisions of sections 8 as read together with Section 9 and 10 of the Trust Land Act and section 117 of the repealed Constitution.
  - viii. The 1<sup>st</sup> Defendant carried out a self-serving Environmental and Social Impact assessment of the Project without involving the Plaintiffs and without evaluating the possible negative impact of the Project on the health and wellbeing of the local community.
33. Without prejudice to the Plaintiffs' assertion that the Suit Property was illegally set apart, out of the 150,000 acres illegally set apart to the 1<sup>st</sup> Defendant, only 40,000 acres will be utilized for the Project. The 1<sup>st</sup> Defendant has not explained the purpose for which the remaining 110,000 acres will be utilized. The Plaintiffs shall crave leave of the court to rely on the 1<sup>st</sup> Defendant's Disclosure Document dated October 2011 and the letter dated 4<sup>th</sup> April, 2014 from the 1<sup>st</sup> Defendant's Advocates to prove that no more than 40,000 acres of the Suit Property is sufficient for the impugned Project.
34. This illegal process of setting apart the Suit Land has occasioned and will continue to occasion economic and social challenges and hardships to the Plaintiffs.

**Particulars of Economic and social hardships**

- i. The Plaintiffs' land having been illegally and unprocedurally set apart in favor of the 1<sup>st</sup> Defendant leaves them without access to an important seasonal pasture land and accordingly shall jeopardize their pastoralist way of live and survival of their livestock and livelihood.
- ii. The path used by the Plaintiffs as a camel corridor to access Lake Turkana with their livestock has been subsumed and taken over by the 1<sup>st</sup> Defendant.

- iii. The cultural activities performed by the Plaintiffs' on the Suit Property have been rendered impossible owing to this impugned process of setting apart. The heart of the wind farm, Serima area and the eastern shores of Lake Turkana is an important cultural site for the Rendille community in conducting the Galgulame ceremony. The ceremony was held at Serima area in 1924 by Ilkilegu age group and in 1966 by the Ilkichilli age group and would have been held in 2008.
  - iv. The Plaintiffs were not compensated nor recognized as the original and true owners of the Suit Property.
  - v. No proper Environmental and Social Impact assessment was conducted on the Project thereby exposing the lives of the Plaintiffs to vagaries of nature.
  - vi. The Project will lead to dereliction of the Suit Property to the detriment of the Plaintiffs.
35. The Plaintiffs have now discovered that it is a requirement under regional and international instruments to consult indigenous communities and get their Free, Informed and Prior Consent before commencing any project on their Land. This consent was never sought thus a clear violation of the International Finance Corporation (IFC) Performance Standards especially No.7 on indigenous Peoples and No.8 on Cultural Heritage. The Plaintiffs' shall at the earliest opportunity move the court to issue an interim order of injunction to halt this Project until the germane issues raised herein are heard and determined.
36. Despite demand and notice of intention to sue, the Plaintiffs' avers that the Defendants have ignored the demands making recourse to this court an absolute necessity.
37. The Cause of action arose in Marsabit but the Defendants and the Plaintiffs herein are in Nairobi and as such this honorable court has the requisite jurisdiction to deal with this matter.
38. There is no other pending suit and there have been no previous proceedings in any court between the Plaintiffs' and the Defendants over the subject matter of this case.

**REASONS WHEREFORE** the Plaintiffs' prays for judgment against the Defendants for:

- a) Cancellation/Revocation of the title comprising of the Suit Property and in particular IR No. 6395/1 (L.R 28031) and I. R No. 6396/1 (L.R 28031/2);
- 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.

DATED at NAIROBI this ..... day of ..... 2014.

**SAGANA, BIRIQ & COMPANY**  
**ADVOCATES FOR THE PLAINTIFFS**

**Drawn and Filed By:**

Sagana, Birig & Co.

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Nairobi.

**To be served upon:**

1. Lake Turkana Wind Power Project
2. Marsabit County Government
3. The Attorney General
4. Chief Land Registrar
5. The National Land Commission