

Renewable energy mega projects in sub-Saharan Africa: Exploring the relationship between deliberative democracy and mitigation of conflict over land

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### Abstract

This research explores the relationship between multi-stakeholder collaboration and preemptively mitigating conflict in the context of an apparent new ‘scramble’ for cooperative development and aid initiatives on African land. Specifically, land acquisition in the context of renewable energy is explored within Sub-Saharan Africa (SSA). The guiding research question was, “What is the role of consociational democracy in mitigating conflict and maximizing the positive impacts of renewable energy mega projects in fragile and conflict-affected contexts?” Literature ranging from SSA development trends to issues around land tenure was reviewed, as well as a review of the original qualitative field research and community interviews conducted by the author in August of 2017 at the selected case study site, the Lake Turkana Wind Power Project (LTWPP) in Marsabit County, Kenya. Participants in the research were selected due either to their knowledge of or personal affiliation with the project. Results of the study demonstrated there was a notable relationship between sustained inclusive partnerships throughout the lifespan of this mega project and reducing the degree of conflict over land and resources, at least in the case of this renewable energy power plant. This research may be used as a stepping-off point for further research around ‘green’ mega projects in the context of cooperative development in the developing world.

## INTRODUCTION

A decade since the development effectiveness principles (DEPs) were created, modern geopolitical alliances have committed to leveraging both their current and prospective development and aid agendas toward developing countries either in the name of sustainability, like the United Nations (UN) Sustainable Development Goals (SDGs), the 2021 Leaders Summit on Climate <sup>1</sup>, or the recent COP 26 <sup>2</sup> in Glasgow, or simply in the name of promoting growth like the United States-Mexico-Canada Agreement <sup>3</sup> or China's Belt-and-Road Initiative<sup>4</sup>. The primary objectives of the former type were and still are focused on reducing carbon emissions, protecting or salvaging biodiversity, low-carbon investment vehicles, renewables, and access to universal electrification and healthcare. Yet 'green'-oriented or not, these promises of job creation and climate mitigation rarely consider the spatial requirements to keep them. A wealth of prior research has shown that many of the pursuant contracts, particularly in extractives, can involve predatory methods of gaining access to space without inclusive partnerships or adequate and equally weighted community deliberation (if any), especially in fragile and conflict-affected states like those within Sub-Saharan Africa (SSA) <sup>5-9</sup>. In other cases, development consortia may gain access to space with assistance from local government through favorable interpretation of local land tenure and force communities off of their land through involuntary resettlement mechanisms<sup>10</sup>. Perhaps unsurprisingly, armed conflict, narcotics trade, poaching, slash-and-burn agriculture, economic marginalization, job loss, and varying degrees of economic volatility are a few of the symptoms to be expected <sup>11</sup>.

Continental Africa's population is expected to reach nearly 2.5 billion by the year 2050 <sup>12</sup>, up to 56 per cent of the population living in urban areas by the same year <sup>13</sup>. In the next fifteen years, the UN projects that youth will account for nearly 42 per cent of Africa's total population, nearly doubling by 2055<sup>14</sup>, suggesting that a growing and job-seeking population will demand far more electricity, water, infrastructure, and transportation, where the aforementioned aid agendas seek to ensure these demands are met with both expediency and climate consideration. Yet SSA has a long history of violent conflict surrounding land space transformation, extractives, corruption, and false promises around development projects. Drivers of conflict in SSA even in the 'green' space have primarily been thanks to predatory resource grabbing <sup>15</sup>, top-down spatial decision-making <sup>16</sup>, or involuntary resettlement without compensation<sup>17</sup>. These symptoms of development-as-usual further manifest in tandem with climate-related catastrophe like drought<sup>18</sup>, flood<sup>19</sup>, invasive species<sup>20</sup>, and the spread of disease<sup>21</sup>, which make the continent's share of impoverished subsistence living spatially unsustainable, and can force rival groups to migrate into proximity with one another thanks to climate factors<sup>22</sup>. When contrasting these criteria for conflict against green Covid-19 recovery or otherwise aid-related capital infusions from international donors and partners via the SDGs, COPs, or other green development agreements, it's vital to ensure that aid and aid effectiveness are executed and benchmarked by means which promote and adequately involve local peacebuilding techniques, contextually appropriate feedback mechanisms, and preemptive conflict mitigation<sup>11</sup>.

To the continent's advantage, Africa has a wealth of untapped resources for renewables-centric aid programs <sup>23</sup>. By the end of 2015, total installed solar PV capacity in Africa exceeded 1,300MW, with 14 more GW planned for installation, over 2,400MW of wind was installed by the end of 2014, with another 21GW in the planning stages by the year 2020, 17GW of power generation were in their discussion stages for hydroelectric power as of 2015, and over 600MW of geothermal power was already being produced in the prior year. This is a considerable investment into utility and small-scale renewables alike across the continent, and the installed capacity of renewables is only expected to grow in Africa over the next fifteen years <sup>24</sup>.

According to the Africa-EU Energy Partnership status report of 2016, the two continents will continue to promote the development of renewables in Africa with the addition of 10GW of hydropower, 5GW of wind power, 500MW of all types of solar, and energy efficiency improvements through this partnership program<sup>25</sup>.

## **Constraints on Development Effectiveness**

Many freshly independent African states in the mid 20<sup>th</sup> century were left with economic indices largely centered around resource exports <sup>26</sup>, a legacy left by European feudalism and capitalism emphasizing exploitation and necessarily productive land. The colonial tenure systems put in place pre- and post-independence may no longer have any modern-day applicability, yet today highly favor public and private interest in land development at the expense of what some might call ‘unproductive’ habitants and their property rights<sup>27</sup>. At its inception, colonial land use planning had little consideration for human development, seen as a hindrance to resource extraction<sup>28</sup> or agricultural production<sup>29</sup>, unsurprisingly stoking social division between rural and urban African communities <sup>30</sup>. Yet the evolution of exercising individual and private property rights was spurred by the growth of commercial agriculture and extractives, when according to an antiquated view of blank spaces on maps, land became more valuable and more “productive”<sup>31</sup>.

Limited financial options in the new states often led to an inevitable path dependency of resource exports, the greatest demands for which initially came from Europe, the very imperialist powers which had only just withdrawn<sup>32</sup>. Path-dependent decolonization in part contributed to the volatility expressed in African commodities markets today, where wild swings in the global market could send several African economies spiraling<sup>33</sup>, such as the financial crisis of the late 2000s or the Covid-19 pandemic<sup>34</sup>. As a consequence, aid packages and foreign direct investment (FDI) may not solve the diversification problem or even address this issue directly without inclusive partnerships, as a wealth of financial and conflict-related data in the past three decades will suggest<sup>35</sup>. To this day, for example, The Colonial Pact pertaining to CFA countries (drafted after de-colonization) still states that French companies receive priority for government contracts being awarded for developmental projects in the CFA states, and priority in rejecting resource flow from West Africa to France before trade is allowed to be opened up to the rest of the world. This is a prime example of what does not work within development cooperation, where foreign powers often determine the trading success of resources coming out of Africa, or their failure <sup>32</sup>. Inclusive aid partnerships in economic portfolio diversification, by contrast, would reduce the volatility of African markets in the global economy, relying on more than just resource exports and instead putting more emphasis on diversification initiatives into sectors like banking, technology, and communications.

A dominant constraint to aid effectiveness identified throughout the course this research is a frequent lack of multi-stakeholder collaboration (MSC) and consociational democratic process around renewable energy mega project roll-outs in SSA, a violation of DEP #3 and a driver of conflict which could slow the progress of low-carbon leap-frogging on the continent and increase conflict over land use and tenure. The research also finds poorly specified obligations placed on developers and local government regarding local communities for consultation or negotiation, especially when communal land tenure held in trust is transferred without adequate consultation or consent for development projects. In certain countries, Africa’s land becoming the easiest for foreign states to gain access to, “the large-scale acquisition of land in developing, economically

and politically weak countries through FDI by powerful, developed, economically robust nations” obstructs aid effectiveness via land grabbing<sup>36</sup>.

Literature surrounding the effectiveness of development cooperation suggests the main reasons that these types of transactions occur in SSA include a lack of solid land tenure systems and protocols, as well as a lack of proper documentation, legal transparency, and enforcement<sup>36,37</sup>. The argument for outright privatization can carry the advantage of land productivity, yet can also marginalize the land-poor who cannot afford to purchase, lease, or otherwise title land in their name. Contrastingly, outright nationalizing land within a given SSA state may unintentionally set well-intentioned development cooperatives on a path toward a ‘tragedy of the commons’ outcome<sup>38</sup>, in which common resources are ultimately over-exploited by their users acting in their own self-interest. And, while development aid initiatives centered around renewables have the potential to promote cooperative development and facilitate innovation, a lack of adherence to any one of the DEPS risks the industry as a whole losing its moral high ground as a clean and ‘green’ investment vehicle, and the energy revolution currently taking place against the previous 150 years of industrialism-as-usual could be futile.

Interpretable and flexible SSA land tenure can put communities at risk of marginalization in mega project development, particularly for those without official documentation or who reside on community or trust land held by the government on their behalf<sup>39</sup>. At the extreme, compulsory land acquisition, though often cited as being due to a series of complex narrative and propaganda tactics to justify these enforced seizures, is actually more deeply rooted in the fundamental yet highly interpretable land laws governing tenure in many Sub-Saharan states, even for development aid purposes<sup>40</sup>. The term ‘green grabbing,’ for example, or the appropriation of land and resources for environmental ends, is appropriate when significant plots of land are acquired to serve as environmental ends such as to “alleviate pressure on forests”<sup>41</sup>. Greenwashing of this type under the guise of cooperative development aid can be used to make aid agendas and corporate sustainability departments look more environmentally friendly<sup>42</sup> by purportedly offsetting carbon emissions “over there,” implementing renewables projects, conservation initiatives, or other eco-friendly marketing ploys<sup>38,43-47</sup>.

## **Research Framework and Methodology**

This research aimed to explore one of the more dominant catalysts of conflicts around mega project development and land tenure: a lack of employment of DEP #3, inclusive partnerships, which necessitates consociational, democratic, MSC. Examining this relationship will hopefully contribute to the literature on the subject, in titrating out what works and does not work in development aid and development co-operation in fragile and conflict-affected contexts. The benefactors of this research include bilateral development aid organizations, as well as communities, energy consortiums, and government bodies of various jurisdictional authority.

Employing Maxwell’s methodology toward qualitative research design<sup>48(p33)</sup>, there are four pillars with which the theoretical framework was constructed for this research: experiential knowledge, existing theory, exploratory research, and modeling. For research on the topic of land conflict and decentralized renewable energy for a growing and urbanizing SSA population, the theoretical lens of consociational democracy was chosen, which is both a theory and a practice. In consociational democracy, political, developmental, and conflict resolution decisions are made by combining a series of opinions, goals, perspectives, and insight from varied levels of stakeholders ranging from community members, public sector representatives, and private sector representatives<sup>49</sup>. More complex dynamics may be involved in such delicate topics, however the broader sense of the theory was primarily relied upon for analysis. Though there are many lenses

through which to view preemptive conflict mitigation (such as alternative forms of communication, planning and anticipating, or research), consociational democratic theory was applied to this study due to its applicability to mega projects in the world of development aid across industries of multiple types and scales.

## **Research Question**

What is the role of consociational democracy in mitigating conflict and maximizing the positive impacts of renewable energy mega projects in fragile and conflict-affected contexts?

## **Design, Methodology and Methods**

The Lake Turkana Wind Power Project (LTWPP) was selected as a case study for this research due to the international attention it has gained as the largest wind project in Africa, as well as its emblematic role as a comprehensive curriculum for what works and does not work in development aid and development co-operation in fragile and conflict-affected contexts. The study involved examining the multidimensional relationships between developers, local communities, and local and national government, as well as a myriad of more minor stakeholders, like environmental groups. Reportedly, the LTWPP and its stakeholders experienced a degree of conflict surrounding varying interests, actions, resources, and power, believed by a handful of media sources to be at least partially driven by a lack of proper community engagement sufficient to develop an inclusive partnership upon which the success of the project would be predicated. This study accordingly aimed to gather insight as to how future projects might be more successful in reducing conflicts of similar types, scales, and contexts preemptively.

Robert Yin's "Case Study Research Design and Methods"<sup>50</sup> and Kenneth's structural model of analyzing conflict<sup>51</sup> were the two dominant guidelines by which this study's methods were developed. Primary and secondary literature were sourced using online academic literature databases, while grey literature and independent news sites were gathered using specific internet searches into non-academic sites (i.e. the LTWP Ltd. website). In the literature review, conflict theory was explored in the context of the exclusion of adequate MSC in Africa's renewable energy landscape, examined through the theoretical framework of consociational democracy. Then, a review of the original qualitative field research that was conducted in both Nairobi and at the project site in August of 2017 in Marsabit County, Kenya, was performed. In the primary data collection, interviews were conducted with community members, NGO members, a Turkana County liaison officer, and a social impact consultant via Skype. The site visit was made possible with the help of an NGO called, "Friends of Lake Turkana." Post-visit analysis has continued via literature review since the field research was conducted to assess the remaining degree of conflict, the status of the land, and ongoing community grievances. Though the field research was made possible with an NGO that works closely with community members in the Turkana Basin, bias was reduced ahead of time by devising research interview questions prior to making the connection with Friends of Lake Turkana. The interviewees' answers to the research questions were cross-referenced with other data during analysis. Community members were selected for interviews as their perspectives appear to have been the least documented among the literature surrounding the project. Each interview varied in length, ranging from 15 minutes to 70 minutes each. Interview questions were based around communication and social impacts, varying only slightly depending on interviewee (for example, the social impact consultant was not asked about how they personally experienced the construction process of the project). The

interviews in their full transcription are not available for the purposes of this conference, to protect the identities of the research participants. Finally, analysis was conducted through a combination of structural and process models, which identified and analyzed different components separately, but also served to provide a chronological narrative to greater understand the driving factors behind the reported conflict surrounding the LTWPP. Triangulation of results were then compiled thematically, to cross-reference various testimonies of interviewees.

The population of the town of Loiyangalani is roughly 1,000 people, along the shores of Lake Turkana in Northern Kenya, near the border with Ethiopia. The demographic representation in this area largely consist of pastoralists, since agriculture is difficult in such a dry climate, and Lake Turkana itself is largely alkaline. Many of the people in the region are nomadic, meaning that they only occupy the Lake Turkana Basin area for certain months of the year. Sarima, a nearby village, is the site where the wind project had reportedly had the greatest impact, at least at the beginning of the project's construction. Thus, from these two populations, participants were selected largely based on availability and language ability. When the field research was conducted, seven research participants (six of them community members) agreed to speak to me regarding the project. Access to community research participants was gained through the help of a local NGO, "Friends of Lake Turkana," which had close ties with the Loiyangalani and Sarima communities. Acquiring participants willing to speak to me, as well as mobility around the area (there are no paved roads), limited the number of research participants that were able to participate in the interview process.

When in the field, members of "Friends of Lake Turkana" would reach out to community members in the area with a phone call, then transport me to each person willing to speak to me. Sitting down at an informal setting (in a person's home, for example), each interviewee consented to their interview by signing an interview consent form, which was explained in detail in English (or translated verbally between English and Swahili with the assistance of one of the participants) to them prior to their signing. Participants were informed that they were not to be paid, that they were allowed to not answer a question if they so chose, that they may leave the interview at any time for any reason, and that they could remain anonymous if they wished. After describing each part of the consent form, the form was handed to them for their own reading and review before signing. A voice recorder was used to record our interviews, to not slow down the process by having to transcribe responses on the spot, and allow for more free-flowing conversation. After leaving the Turkana Basin area, the voice recordings were listened to once more, and transcribed. For the protection of the community members which agreed to speak to me, their identities have been kept anonymous. Throughout the analysis process, relevant excerpts which emerged from the interviews were selected to be added to the Results section.

## **Positionality and Limitations**

I entered into this research project, which includes the review of primary data collection in 2017, with my own personal multitude of assumptions, biases, and viewpoints. As an academic, I consistently do my best to minimize these and distance myself from subjectivity as much as possible. When the research began, I was largely restricted to what documents I could gain access to surrounding the LTWPP since the original site visit in 2017, as traveling to Kenya during the Covid-19 pandemic presents its own set of safety concerns on top of potential political turmoil experienced in the last two years<sup>52</sup>. In 2017, I happened to travel to Kenya two months

before the 2017 presidential elections, when people in the country may have been experiencing more political tension than usual. Additionally, as a white American traveling to northern Kenya, my options were limited in the people who were willing to speak to me. At the time, I also traveled on a smaller than desirable budget, as the finances for the research were crowdfunded from an online platform by family and friends.

Time was also a constraint. The Lake Turkana visit took four days, and the scope of this research conducted in a single year, whereas it may take several years to fully understand the anthropological dynamics of the Turkana Basin and its development. Language barriers from community members participating in interviews in English, one interview translated from Swahili to English, and the cultural dimensions that impacted motivation or willingness to speak with me should also be considered. LTWP Ltd., the consortium officed in Nairobi charged with administrating the LTWPP, was also unavailable for interviews when in Kenya, and unable to communicate via e-mail regarding land access due to the ongoing court case. Some community members from certain groups may or may not have wished to publicly share their perspectives, even if anonymous, whereas other group members may have wished to voice their perspectives more keenly. Temporal limitations considered, the interviews which I could gain were insightful and powerful, and critical to contributing to this research.

## **RESULTS**

The Lake Turkana Wind Power Project is a 310MW wind on the shores of Lake Turkana, in Marsabit County, Northwestern Kenya, online and connected to the national grid in 2019.



*Lake Turkana Wind Power Project, Loiyangalani, Kenya. Photo: Henry Mooney (2017)*

According to the LTWP Ltd. website<sup>53</sup>, at the time of the site visit in 2017, the stakeholders involved included:

1. Project (Construction) Partners -
  - **Vestas** – Engineering, Procurement, and Construction of the wind turbines.
  - **RXPE Group** – Technical assistance.
  - **Siemens France** – Electrical substation equipment.
    1. Partnering with DAHER, which is supporting Siemens in the LTWP project.
  - **Southern Engineering Company Ltd (SECO)** - provides energy performance certificates (EPC). Also SECO's contribution to the project is the village and workshop –the housing units and facilities to house personnel for the construction.
    1. An EPC gives a property an energy efficiency rating from A (most efficient) to G (least efficient) and is valid for 10 years.
  - **Civicon Limited** - fixing/building the roads so that the turbines can be brought in more easily<sup>54</sup>.
2. Equity Partners:
  - **KP&P Africa B.V.** (Netherlands) partnered with Aldwych International (England)
  - **Investment Fund for Developing Countries** (Denmark)
  - **Vestas Eastern Africa Limited** (Denmark)
  - **Finnish Fund for Industrial Cooperation Ltd** (Finland)
  - **KLP Norfund Investments AS** (Norway)
3. Winds of Change Foundation (NGO)
4. Community Members in the Turkana Basin, more specifically Loiyangalani, Sarima, and South Horr



5. Local Government (Marsabit County and Loiyangalani), and National Government
6. Land Owners
7. Resettlement social consultants.

LTWP Ltd. is registered in Nairobi, Kenya, but was financed and constructed in part by partners from other countries.

## **Findings on Land Tenure**

Over 150,000 acres of land was leased by LTWP Ltd. by 2017, and the village of Sarima resettled, to make way for an upgraded road and 365 wind turbines. In 2014, residents of the Laisamis Constituency and Karare Ward filed a lawsuit against the Kenyan Government and the consortium of project partners for illegal land acquisition. They claim that there was no public consultation before the land was given away to the consortium, which violates the aforementioned Kenyan Constitution, as well as the Trust Land Act.

The LTWPP was later commissioned by President Uhuru Kenyatta in July of 2019<sup>55</sup>. In October 2021, the High Court in Meru nullified LTWP's title deeds for the land upon which the project sits, saying it was acquired irregularly. Judges of Meru's High Court claim the Constitution was not followed during the initial land allocation, and have given the Marsabit County government, the Attorney-General, the Chief Land Registrar and the National Land Commission one year to properly establish tenure to the land through correct processing by adhering more closely to constitutional law. In the event of non-execution, the title deeds to the land will automatically be cancelled and the land will revert to the community<sup>56</sup>.

Voller et. al<sup>15</sup> explain:

*“Trust land or communal land is a territory in possession of a community, instead of an individual or company. Trust land or communal land (after the Constitution in 2010) is managed by the government under a National Land Commissioner. It is the responsibility of the commissioner to manage public land on behalf of the national and county governments and make sure that the procedure and manner of setting aside land for investment should respect mechanisms of benefit sharing with local communities”*

According to the revised Trust Land Act of 2012, Article 8 Section (1) notes that: “Where land is set apart under section 7 of this Act, full compensation shall be promptly paid by the Government to any resident of the area of land set apart...”<sup>57</sup>. In the old version, revised as of 2009, Article 13 Section (2)(b) notes: “the [Divisional Land Board] 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;” whereas Article 13 Section (2)(c) declares: “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;”<sup>58</sup>.

The Danwatch report explains that in a voting process for setting land apart, “a simple majority of the council could approve the setting apart if the Divisional Board supported it, but a

three-quarters majority was needed if the Board opposed it. Either majority had to be calculated with respect to the total number of elected council members, not simply those present at the time of the vote”<sup>15</sup>. Additionally, as for the transfer of land ownership, the issue of illegal land acquisition went to court. According to community members, “there was no public consultation, no notice given of the proposal for setting apart, and no compensation for lost land or alternative settlement was offered.” Back in 2006, before the project started, the land now in question was then considered trust land, which as explained above is land held on behalf of the communities who may lack robust financial reserves or legal documentation. The Turkana Basin has been home to nomadic pastoralists for thousands of years, and use the land for sustenance, grazing, and cultural or spiritual purposes. However, the consortium of project partners question the original owners of the land in the Resettlement Action Plan they drafted in 2014<sup>15</sup>, where they make mention that “nomadic pastoralist have customary rights of use to land pastures, however, have no recognizable legal right or claim to the land other than use and are therefore not eligible for land compensation”<sup>59</sup>.

Yet according to IFC Performance Standard 5 Section (17), “Displaced persons may be classified as persons (i) who have formal legal rights to the land or assets they occupy or use; (ii) who do not have formal legal rights to land or assets, but have a claim to land that is recognized or recognizable under national law;<sup>19</sup> or (iii) who have no recognizable legal right or claim to the land or assets they occupy or use. The census will establish the status of the displaced persons”<sup>60</sup>. An interviewed law student in the Danwatch report, Liz Alden Wily, states, “The Constitution in force at the time was clear that this land is owned by the people although held in trust for them by the County Council. The new Constitution is even clearer: this land is community property”<sup>15,61</sup>.

## Findings on Consultation

Definitions of what constitutes ‘consultation’ are ambiguous in development guideline literatures. The focus of this research was to explore the relationship between inclusive partnerships and preemptively reducing conflict around development aid and cooperative development in renewable energy mega projects in SSA, through a theoretical lens of consociational democracy. LTWP Ltd. drafted a document reporting their social and environmental impacts, in 2009. There is a 2011 addendum, but it contains minimal additional material, and predominantly focuses on the environmental impacts of the project. The consortium reports community consultations with communities in the proximity of the wind power station in their original 2009 Environmental and Social Impact Study Report. These communities include, “*the Yammo Manyatta Community (Turkana), Nakuame Kwi Manyatta (Turkana), Kiwanja Ndege Manyatta (Samburu and Rendille) and El Molo Community (originally from Komote Laiyeni Village) that are likely to be affected in one way or another by the project. In this regard key informant interviews and the focal group discussions were held with the youth, women and men groups to be served by the project*”<sup>62</sup>.

In Section 6.3 of the report, LTWP reports that, “*Generally speaking, the local population is very positive about the project and they welcome its installation in the project area. Indeed the people feel that the project is an event that will solve their many challenging problems, including their ‘relief dependency syndrome’*” and that “*all the stakeholders interviewed in the project area welcomed the proposed project*”<sup>62</sup>. Lawyers acting on behalf of community members, like Amina Hashi, claim that there was no legal divisional land board ever set. Instead, “The only meetings held was attended by town dwellers and fishermen from one area (Loiyangalani), and did not involve the pastoralist community and the project therefore

lacks public participation in its establishment. 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”<sup>15</sup>.

The Kenyan government claims that a “town council committee” and a divisional land board can be viewed as synonymous in this case, but Hashi is inclined to disagree. Hashi continues, “The trust land act make no mention of the “town planning committee” as a substitute of the “divisional land board.” Instead the trust land Act makes it a mandatory requirement for the establishment of the Divisional land board in accordance with its section 5”. According to Lake Turkana Wind Power project, there has been numerous public consultations. The first official consultation allegedly took place 15th November 2007, a year after the land lease application was sent to the county council”<sup>15</sup>. According to plaintiffs in the report, “LTWP held meaningless self-promotion meetings, where no information was given, the few critical voices were ignored, and the people who were invited to attend the meetings were approached in advance”<sup>15</sup>.

## Findings on Resettlement

At times, as in the case of the LTWPP, certain groups may be relocated (temporarily or permanently) so that the project may be constructed with a reduced degree of social impact on the communities. The requirements for resettlement are written into several international development guidelines, including those by which LTWP Ltd. asserts to have abided.

To start, LTWP Ltd.<sup>63</sup> first lists key definitions of components of the resettlement process:

- **Involuntary resettlement:** Both to physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or access to assets that leads to loss of income sources or means of livelihood) as a result of project. Resettlement is involuntary when it occurs without the informed consent of the displaced persons or if they give their consent without having the power to refuse resettlement.
- **Entitled persons:** Those persons, either female or male head of households, as the case may be, prior to the COD, losing assets or access to and use of resources leading to physically or economically as a direct result of the Project. They are entitled to compensation and/or other forms of assistance whether they have or do not have formal legal rights to occupy the land and or other assets at the time of the census\ COD, but who have claim to such legal rights by virtue of occupation or use of those assets and identified in LTWPs entitlement matrix.

In the LTWP Ltd. resettlement policy framework, they state that “Currently, there is no requirement for land acquisition or resettlement at the wind farm site... the Environmental and Social Impact Assessment (ESIA) for the wind farm identified the potential loss of grazing land as a key concern. To accommodate this, the wind farm area will not be fenced off (apart from the on- site switchyard and individual transformers for safety reasons)” <sup>64(p11)</sup>. However, in the Danwatch report, the data gathered in this study’s qualitative research, and photos online, there are clear instances of fences.

Section 6.1 of the resettlement policy framework elaborates that for each step of the process of resettlement, IFC performance standard 5 will be followed to meet proper compensation guidelines <sup>65</sup>, yet the Danwatch reports and attorneys acting on the communities’

behalf report little to no compensation. Danwatch cites IFC Standard 5, which states “the client will offer them a choice of options for adequate housing with security of tenure so that they can resettle legally without having to face the risk of forced eviction. Where these displaced persons own and occupy structures, the client will compensate them for the loss of assets other than land, such as dwellings and other improvements to the land, at full replacement cost, provided that these persons have been occupying the project area prior to the cut-off date for eligibility”<sup>60</sup>.

The findings of the site visit and interviews conducted in Loiyangalani and Sarima somewhat align with the findings of the Danwatch report. Interviews indicated that many of the original people of Sarima Village had been relocated to Loiyangalani with funding to construct their own new homes, and others had stayed in Sarima.

## **Findings on Violence and Conflict**

Conflict already exists in the Turkana Basin area with regard to water resource use and cattle theft between pastoralist communities. Now, those rivalries have been stoked further with each community claiming that the others have received preferential treatment in receiving employment associated with the LTWPP. Turkana and Samburu are two examples of communities which have begun more violently attacking one another as a result<sup>15</sup>.

Journalists with Danwatch conducted 24 interviews with ethnic groups in Sarima Gatab, Loiyangalani, Kargi and Marsabit. Most communities showed positive feedback for the wind farm itself, but many claim there were no public consultations prior to construction back when the land was acquired in 2007. This very issue has been taken to court, the ongoing lawsuit of which is provided by Danwatch<sup>15</sup>. As a result of a large influx of people unfruitfully seeking employment and electricity services in the area, a multitude of negative social externalities have been felt in the proximity of the wind farm that did not previously exist. After the resettlement of Sarima, prostitution, violence and alcoholism have now surfaced in their community due to a lack of expected jobs paralleled with a large input of new people<sup>15</sup>.

Below are excerpts from community testimonials gathered from the research interviews which were conducted in 2017, which at the time accounted for some violence and conflict in the region.

*Anonymous 1: “The land in question where the wind power project is now used to be the land that used to sustain our locals during the dry spell. It’s a place where the grass was there throughout the year. What the land issue has also brought now is a conflict of interest, because all the communities, the nine communities that live around the area, the Turkana, the Samburu, the El Molo, the Rendile, they have all been moved out of the land to pave way for the wind power project. Meaning those people who used to live there with their livestock have been forced to encroach their neighbors, and that is causing now more conflict, because everybody now tells them “you’ve sold your land, why are you here now? You gave out your land for the wind power project, with your animals, sell your animals and go and work for wind power.” That’s what they’re telling people now. We have had conflict as we’ve never had before because grass and water traditionally people shared. But when wind power took the land, other communities, communities that had been evicted and communities that had never benefited. Those who seeded their land to the wind power*

*project are labeled as traitors. "You sold your land, what do you want to come and do now? Sell your animals. Go and work for wind power."*

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*Anonymous 5: "People are still there, they are fighting, they do not want to get out of there. They are saying, 'this is our land, we are not going anywhere. Now you're picking us from where we used to live, why are you taking us?' ...The Samburu and the Turkanas, they fight like hell."*

.....

*Anonymous 5: "Yeah, the case is in court. Because the people, they have stole the land from the community. We do not get any revenue from there, and it's a million and million, this is a clean green project, a very clean thing, clean energy. So people, animals are not feeding there, people are suffering, the trees, the beautiful part of it, the trees, you come up this road, all the trees on your left, it's dead. People they put the speed limit at 40 kilometer per hour. Now the big trucks are passing there, now the trees are dying. You can see, you can go and take pictures. I do not know, a person who can see the environment, you go and see. When you go to Marsabit, on your left, all those trees are dead, and that was a very green place. The trees are dead. The dust have already suffocated the stomas, you know the leaves? It's already covered, they're dead."*

.....

*Anonymous 2: I remember in 2012 we had issues with Lake Turkana, we wrote them a letter, me and a friend of mine called \*\*\*\*\*, we wrote a letter to ask them to come and meet us and update us on activities of Lake Turkana Wind Power. That's in 2012, so we wrote a letter to the Wind Power, and we got signatures from the community to sign and deliver the letter to show that this letter is a voice from the community. So I took the letter myself to Nairobi to the office in Nairobi, and another to the MP's office, a copy... We sent some copies to the Marsabit County council and all that, but I remember when I went to the area MP, we deposited the letter and left, but they were saying "who are you guys? What kind of mandate do you guys have to write such a letter?" They just downplaying you, you know the whole thing is, "who are you, who do you represent?" That is the leaders, the political leaders, who are saying "who do you represent?"*

**Intvr: That was the MP who said that?**

*Anonymous 2: "Yeah the Wind Power guys, but after some time, we collaborated with Friends of Lake Turkana and we wrote another letter to World Bank to ask for community participation, and also to address community concerns about the project, and that worked out. The letter, the World Bank, because these guys were still looking for money, so we wrote a letter there. And it came back to them, and they were very furious, and they came very fast to Loiyangalani to have a meeting with us. They were complaining, 'Who are you guys? Why did you write the letter? That's*

wrong. You could have talked to us.’ – ‘We wrote you a letter but you ignored us. So, you have to come and do a meeting with us in Loiyangalani.’ So they were forced to come and have a meeting with us in Loiyangalani.”

.....

**Intvr: So you were not allowed to treat community members?**

Anonymous 5: “Yeah I was not allowed, until I talked to another guy. I said, ‘this is unfair, I have to leave here, because if my people is not being treated, you found these people here, you need to help them. Treatment is a basic human right. Health. So if you do not treat these people, I better get out of here, because the next minute they want to shoot me.’ Around this place everybody has a gun”

**Intvr: Shoot you?**

Anonymous 5: “Yeah, they say that “if you’re not going to treat us, that means you’re siding with these guys, these guys are always blocking the roads,” it’s just something very bad.”

.....

Anonymous 4: “The land now, the land that’s supposed to take. So what we are crying, our cries, the people who are living there, they’re now here. Most of them had to leave other lives. They’re very desperate. Most of the ladies who are there, they’re now harlots. They go to the bar, because they do not have a job. They were living peacefully in that place. They come here, most of them do not know the life of the town. They see us as a town. So they started to go to people, you see? “Please give me money.” People do not even help them. They even do not have a family in this place. Most of them are just in town here. They happen to... if you happen to go here in the club, you will find ladies. But also the ladies, let me say quite a lot of them, they are from Sarima. When they came here they do not have something to rely on. So what are they supposed to do? They’re supposed to satisfy their livelihood. “Let me look for other means of getting something to eat.” And, we blame the wind power, because they just forget about those people.”

## **DISCUSSION**

LTWP Ltd.’s resettlement action plan (RAP) states that “under the previous designation 'Trust Land' it was managed under the District administration for an on behalf of the community. Consequently, nomadic pastoralist have customary rights of use to land pastures, however have no recognizable legal right or claim to the land other than use and are therefore not eligible for land compensation. There are no land tenure issues for the nomadic communities as LTWP has accepted the cultural ‘right of use’ tenure for grazing livestock and traversing LTWP’s land”<sup>63</sup>. However, in the lawsuit against LTWP Ltd., community members would argue that they were not adequately communicated to regarding the full nature of the land acquisition taking place, or loss of land access for their pastoral livelihoods. Some argue that the land was acquired illegally.

With regard to tenure, incomplete or interpretable land tenure laws are often to blame around confusion around ownership, tenure, usage, and rights, especially with a lack of formal documentation or identification in community members with more traditional livelihoods <sup>66,67</sup>. With community trust land held on behalf of over a thousand community members, many of which do indeed lack formal identification, it would be unsurprising to learn that the land for the LTWPP was indeed acquired from a more favorable interpretation of the land laws governing Kenya's territory that benefitted both national government and the developer consortium. This carries implications for future projects, particularly with community engagement, and making land laws more transparent, redundant, and specific.

The research findings indicate that consultation was too temporary, and from a community perspective insufficient to reduce conflict around the LTWPP. To begin, the definitions of what constitutes "consultation" are unclear in the LTWPP ESIA, RAP, and the IFC/EIB/AfDB standards. What counts as consultation may vary from institution to institution, with minimal agreed upon definitions and specified processes. Additionally, LTWP Ltd. stated that they would consult the community surrounding resettlement, but the EIB standards they assert to have followed outline that the consultation is in fact the duty of the state. Here again is confusion in the objectives and duties of different stakeholders.

Additionally, some stakeholder meetings were largely with local organizations like the Kenya Wildlife Service or the National Environmental Management Authority, separate from community members <sup>62(p28)</sup>. This means that the consortium held different meetings with different stakeholders, which could potentially indicate the communication of different information to different stakeholders involved in the project, as it is possible for certain stakeholders (like developer consortiums or government) to withhold information in these meetings. This may also apply if different meetings are held without all stakeholder groups represented. It is then crucial for collaborative and inclusive partnership in decision-making that all parties be present at meetings to ensure transparency and consistency in information sharing, as well as conduct meaningful debate.

Whether or not consultation stopped regarding the LTWPP is not fully known. Community perspectives indicate that consultation ceased after some time, and also disappear in the synthesized timeline of the LTWPP (kept anonymous for the protection of the participants). Again, the inability to interview LTWP Ltd., as well as the inability to travel back to Kenya in 2021 or 2022 due to Covid-19 concerns was a limitation of this study. Regardless, on consultation, the findings demonstrate the significance of meaningful, collaborative deliberation in decision-making processes around renewable energy mega projects for conflict reduction, both prior to and throughout a project's lifespan.

With regard to electricity access in the local communities, "many members of local community will not afford the power (power will be sold at commercial rates)... institutions, including the schools, hospitals, government offices, tourist facilities, hotels, shops and some private homes will benefit from the power connection" <sup>62(p87)</sup>. What this indicates is that communities in Marsabit County themselves will not directly benefit from electricity generation to great ends, and electricity access within community members will not occur to result in employment increases locally. However, existing firms in the area that can already afford to purchase the electricity at commercial rates will benefit. This is another reason why one participant argued it would be a good idea to subsidize the electricity access in Loiyangalani.

IFC Performance Standard 5 states: "Compensation standards will be transparent and applied consistently to all communities and persons affected by the displacement" <sup>60</sup>. However, according to community interviews, the consortium did not compensate all persons affected, such as those without land rights and not recognized as indigenous. With regard to IFC

Performance Standards 5 and 7, certain protocols were not followed, namely around compensation. LTWP Ltd. states in their RAP that a number of people did not qualify for compensation because they did not have legal rights to the land, it was trust land being held for them. However, the IFC Performance standards that LTWP Ltd. asserts to have been following state that one is legally obligated to compensate people even if the land is held in their name.

Consociational democracy was chosen as a theoretical framework because of its wide applicability across the type or size of what a mega project may be, who is involved, or over what time period. Inclusive partnerships and an adherence to DEP #3 has been shown to significantly reduce conflict around projects like the LTWPP (as demonstrated in the Introduction and suggested in interviews with community members). This concept is important to understand why the research problem is happening in this manner. The findings uncovered in the research indicate a failure for all stakeholders involved in the LTWPP to engage in an effective and inclusive decision-making process prior to and throughout the project's lifespan. Some interviewees approved of the initial consultations, but report a dissipation of sufficient engagement over time. The disparity between testimonies of a limited number of community members makes it difficult to triangulate the exact source of conflict, but it is clear that transparent deliberation between all stakeholders is a key component. The very fact that community members in the Danwatch report, the primary data gathered in the field, and the developers in the consortium are asserting very different experiences with the quantity and quality of negotiations that took place, and the fact that conflict has arisen as a result, demonstrates that the process itself was insufficient to preemptively mitigate conflict. The important take-away from the findings indicate that not only are inclusive partnerships which emphasize MSC imperative prior to a project's inception, but throughout the entire life cycle of the mega project. Documentation and reports from the developers on social and environmental impact assessments are in abundance. What lacks from a well-rounded empirical standpoint is further reliable documentation of the accounts of community members in and around Marsabit county. This is the gap that this research in this paper attempted to partially fill. It appears as though the largest source of conflict has arisen from community perceptions of a promised local development boost from the consortium, leading to an influx of people into the area too large to be sustained. This has led to community members seeking other, sometimes illegal means of making ends meet, like prostitution or drug distribution.

## CONCLUSION

Disputes happen in all social relationships and groups, yet conflicts are more fundamentally against human needs and cannot be bargained or compromised<sup>68</sup>. Conflict theory would have been a useful lens through which to view community engagement on part of LTWP Ltd., or perhaps for future research on similar projects. In the case study of the LTWPP, we see an apparent lack of DEP #3, inclusive partnerships, and ample collaboration in the decision-making process of land tenure transfer, local development requirements, and spatial transformation within Marsabit County, Kenya, from the major stakeholders involved. Conflict as a complex system makes it difficult to identify exactly *what* specific factors contributed to conflict escalation, as they cannot exist in isolation, as well as *when* the conflict began. There is already armed conflict in the Turkana region between pastoralists<sup>69</sup>, expected to be escalated with the damming of the Omo River Valley in Ethiopia<sup>70</sup> as well as climate related factors. These conflict drivers could both be exaggerated by a larger influx of marginalized community members. Though reportedly consulted, the impression is given that a shortage of participatory



democracy took place with regard to concrete decision-making around the wind power project, rendering this particular development initiative less effective than it could have been. Furthermore, the gravity of Meru's High Court nullification of LTWP's title deeds for the land carries its own mix of combinatorically uncertain outcomes with respect to measuring the success of development effectiveness principles over time for this project, should the consortium fail to properly establish tenure to the land by the end of 2022.

Since private interests cannot by themselves prevent conflict from arising in communities in or around which they operate when attempting to implement development aid programs, it is becoming increasingly popular for private interests operating abroad to include 'safe communities' into their vision, alongside the DEPs, by identifying potential conflict drivers and working with communities to mediate them ahead of time. Unearthed in the research, simply gaining a social license to operate may not be enough to ensure the reduction of conflict over a project's lifetime, and may increase the level of risk associated with investing in their project in fragile and conflict-affected contexts. One insight gained from this research is that one means by which companies and bilateral development aid agencies may actively work toward risk and conflict reduction in their project vision is to not only include community members not only in consultations, but decision-making processes. This ensures both that communities feel their voices are heard and also allows all parties to react less defensively in future negotiations<sup>71</sup>.

With spatial transformation that results in involuntary relocation, the likelihood of conflict is also increased due to increasing the proximity of potentially rivalrous groups of people, as well as not properly mitigating the effects of climate change. Any clash that would already exist from driving enemy clans together would also be exacerbated by warmer years as a result of climate change due to resource competition, as we have seen from the drought and pastoral conflict in the Turkana Basin. Climate-change induced conflict is likely to increase in the near future, and Burke et. al. in Adano & Duadi (2012) cite that "a 1 °C increase in temperature is likely to result in a remarkable 49 per cent increase in the incidence of civil war in SSA"<sup>72</sup>. Here again the issue of the transformation of space and allocation of land is critical for conflict reduction in advance surrounding aid programs.

Some but not all of the risks associated with conflict from large-scale renewable energy projects are prostitution, drugs, migration away/displacement of indigenous peoples, armed inter-community conflict, drought/starvation, which we have seen in the greater LTWPP area. African states that are becoming a part of the ongoing renewable energy revolution worldwide, but are still in their growing/stabilizing phases post-independence, could be more at risk for compulsory land acquisition as investment risk into that country decreases. The research suggests that preemptive conflict reduction and local conflict mitigation strategies like DEP #3, MSC and fundamental democratic deliberation be employed in such projects, as well as be sustained throughout the project's life, as part of a mix of preemptive conflict reduction strategies.

Literature on the new scramble for African land in the interest of mega 'green' development projects has thus far placed more emphasis on agriculture or forestry, but less has been discussed regarding renewable energy outside of bioenergy feedstock plantations<sup>73</sup>. This research intended to bring together fragments of global trends in renewable energy development and land transformation, 'green grabbing,' conflict theory, the DEPS, consociational democratic process and MSC, potential negative impacts from large-scale development projects, and the colonial history of Africa's land laws and economic frameworks, in order to examine what works and what does not in development aid and development co-operation in fragile and conflict-affected contexts.

DEP #3 necessitates not only consultation, but collaborative decision-making in large scale renewable energy cooperative development projects is made evident by the research.

Renewable energy, viewed as a ‘clean’ investment vehicle, has a certain moral high ground that may be lost if land acquisition for its projects occur in the same manner that larger projects in Africa’s colonial past were (or certain modern-day extractive activities are) conducted. The lessons learned from the research also apply for development aid programs more broadly in other sectors and spatial-intensive industries. The vast spaces of ‘unproductive’ land, statewide economic invariability in resource export reliance, abundance of renewable resources, and drive toward meeting global sustainability agendas make many African states particularly vulnerable to having territorial statutes interpreted in the interest of private interests. However, perhaps a lasting take-away is that it is not too late to effectively implement inclusive partnerships and consociational democratic process in existing development aid programs, to ensure their success, reduce conflict, and promote cooperation on developing renewable in the developing world.

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# Appendix: LTWPP Lawsuit (Filed 2014)

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
FILE NUMBER OF 2014  
EAST LAKES

MOHAMMUD ULTAARAWA KOCHALE ..... 1<sup>st</sup> PLAINTIFF  
KOCHALE SOMOJALE ..... 2<sup>nd</sup> PLAINTIFF  
ISSA JITWE CABABARE ..... 3<sup>rd</sup> PLAINTIFF  
DAVID TAMASOT AKAHOLE ..... 4<sup>th</sup> PLAINTIFF  
WILLIAM LENOGYIAP ..... 5<sup>th</sup> PLAINTIFF  
SEKOTY SEYE ..... 6<sup>th</sup> PLAINTIFF  
*(Suing on behalf of the residents of Laisamis constituency and Karere 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 literacy levels. Their address of service for purposes of this suit shall be c/o Sigam, Bity & Co. Advocates, Prudential Assurance, Building 4<sup>th</sup> Floor, Wilbera 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 law policies in Kenya and is a successor to the Defunct Ministry of Lands.

1

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 office).

**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 Karere Ward part of which is all the 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 arid/semi-arid areas as Laisamis constituency and Karere 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 Flou, 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 Galgalame. 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.

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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 enclosed 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, ICJPR, ICESCR, ILO Convention 169 on Indigenous And Tribal People, IPC 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 true owners of the Suit Property which forms part of Laissamis Constituency and Kerere Ward.

#### Plaintiff 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 Loyngalham 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 1<sup>st</sup> 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 Loyngalham. 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 Laissamis 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 interference 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 29<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 implied 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 Plaintiffs' case that the 1<sup>st</sup> Defendant failed to obtain this consent and has subsequently and illegally sub-divided the Suit Property into LR No. 6395/1 (LR No. 28031) comprising of 16,600 Hectares and LR No. 6396/1 (LR 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 Allocation 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 bescon 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 25<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 consisting 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 (Lolyogalant) 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 of 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 13<sup>th</sup> 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 Plaintiff's 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 Plaintiff 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 Advocate 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 life and survival of their livestock and livelihood.
  - ii. The path used by the Plaintiffs as a camel corridor to access Lake Turkana with their livestock has been subverted 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, Serina around the eastern shores of Lake Turkana is an important cultural site for the Rendille community in conducting the Galgalame ceremony. The ceremony was held at Serina around 1924 by Illegu 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 deterioration of the Suit Property to the detriment of the Plaintiffs.
- 35. The Plaintiffs have now discovered that it 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 L.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:**  
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**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

Source: Danwatch (2016)