IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)
AT ARUSHA

MISC. CIVIL CAUSE NO. 18 OF 2023

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS MISCELLANEOUS PROVISIONS) ACT, CAP 310, AS AMENDED IN 2019

AND

IN THE MATTER OF AN APPLICATION TO CHALLENGE THE PROMULGATION OF THE WILDLIFE CONSERVATION (POLOLETI GAME RESERVE) (DECLARATION) ORDER, G.N N0. 604 OF 2022

BETWEEN

LATANG'AMWAKI NDWATI ..... 1ST APPLICANT

EZEKIEL SUMARE KUMARI ..... 2ND APPLICANT

KILEO MBIRIKA ..... 3RD APPLICANT

NAMURU KITUPEI ..... 4TH APPLICANT

PHILEMON NGURUMAI ..... 5TH APPLICANT

NOKOREN TAOYIA ..... 6TH APPLICANT

METIAN TIKWA SEPENA ..... 7TH APPLICANT

SAITOTI PARMWAT ..... 8TH APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

RULING

20th August & 24th October, 2024

MWASEBA, J.

This is a judicial review application for the orders of *certiorari* and *prohibition*, preferred by the applicants herein under the provisions of section 2(3) of the Judicature and Application of Laws Act, Cap. 358 [R.E 2002], section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 [R.E 2019] (hereinafter Cap. 310), and Rule 8(1)(a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014. In the chamber summons, the applicants are basically moving the court to grant the following reliefs:

a) That, this Honourable Court be pleased to call for and examine the legality of **Tangazo la Kuanzisha Pori la Akiba Pololeti, 2022 (Pololeti Game Reserve Declaration Order, GN No. 604 of 2022) (GN No. 604 of 2022)**;

b) That, this Honourable Court be pleased to issue an order for *certiorari,* to quash and declare **Tangazo la Kuanzisha Pori la Akiba Pololeti, 2022 (Pololeti Game Reserve Declaration Order, GN No. 604 of 2022) (GN No. 604 of 2022)** to have been promulgated wrongly on grounds of

illegality, irrationality, unreasonableness, violation of principle of natural justice and procedural impropriety.

c) That, this Honourable Court be pleased to grant an order prohibiting the respondent from unlawfully removing the applicants from the demarcated area constituting Pololeti Game Reserve, and any other order the court shall deem just and equitable to grant.

The application is supported by the applicants' joint statement coupled with eight separate affidavits of each applicant. According to paragraph 6 of the statement, the application is hinged on the following grounds:

a) That, the President acted in excess of powers in promulgation of Tangazo la Kuanzisha Pori la Akiba Pololeti, 2022 (Pololeti Game Reserve Declaration Order, GN No. 604 of 2022) as she had no power in law or otherwise to declare any land without consultation as a Game Reserve;

b) That, the President acted against the rules of natural justice, by proceeding to declare the Pololeti Game Reserve without making consultation with the villagers who are affected by the order;

c) That, the President acted irrationally by taking the land which has been in occupation and used for sustainable activities of the

inhabitants, used as homes, pasture land, cultural and spiritual sites, without consultation or compensation for impacted persons;

d) That, the President acted in fettered discretion in that they had already made the decision to take the land as they had started erecting beacons on the land well before the declaration of the area to be a Game Controlled Area, a fact which made them fail to exercise the discretion;

e) That, the decision to promulgate the Pololeti Game Reserve was *malafide* as the President used irrelevant consideration namely, that the area used is to be used as a water catchment area and as breeding area for animals for Serengeti National Park;

f) That, the decision leading to the promulgation of the Wildlife Conservation (Pololeti Game Reserve) Declaration Order 2022 was made arbitrarily and law-fare preceded its promulgation, communities displaced and evicted, cattle owners have been fined and livestock killed by gunfire all of which are arbitrary acts done by officials of the Government of Tanzania;

g) That, the decision to promulgate the Wildlife Conservation (Pololeti Game Reserve) Declaration Order 2022, was made with ill motive and collateral purposes in that it was stated that the population in

the area and livestock had increased thereby destroying the ecosystem a fact which is not true;

h) That, the decision to promulgate the Wildlife Conservation (Pololeti Game Reserve) Declaration Order 2022, was made by colourable exercise of power which was motivated by entirely extraneous and collateral matters not related to the exercise;

i) That, the decision to promulgate the Wildlife Conservation (Pololeti Game Reserve) Declaration Order 2022, was made against the legitimate expectation of the inhabitants of the 14 villages for reasons that all along have been under the protection of the law which allowed them to stay in the area provided they manage and conserve the ecosystem, which they have been doing all along; and

j) That the decision to promulgate the Wildlife Conservation (Pololeti game Reserve) Declaration Order 2022, was against the doctrine of proportionality in that the acts of the respondent were and are more drastic than is necessary for attaining the desired result, in that the respondent could have used the least restrictive alternative.

According to the applicants' affidavits in support of the application, the promulgation of Tangazo la Kuanzisha Pori la Akiba Pololeti 2022

(Pololeti Game Reserve Declaration Order, GN No. 604 of 2022) (hereinafter "GN No. 604 of 2022)", impacted 14 villages covering 1502 square kilometres in Loliondo and Sale divisions of Ngorongoro District. However, in each of the applicant's affidavit, they pointed out a total of 16 villages whose land was subject to the declaration. The following villages were referred to in each affidavit: Ololosokwan, Kirtalo, Oloipiri, Lopolun, Orkuyainie, Oldonyowas, Loosaito, Arash, Ormanie, Oloiswashi, Enkobereti, Olalaa, Kipambi, Mbuken, Piyaya and Malambo villages. According to the affidavits in support of the application, the applicants are among the indigenous people of the villages whose land has been acquired by the President, forming the promulgated Pololeti Game Reserve.

They further deposed that the affected villages were lawfully registered and were allocated land. It was the applicants' further deposition that the President's decision to promulgate the Pololeti Game Reserve deprived them of their lands, which they occupied and used as homesteads, ancestral territory, pasture land, cultural and spiritual sites. They further deposed that the promulgation of GN No. 604 of 2022 was illegal as local authorities and Indigenous of the impacted villages were not consulted, which amounts to a breach of the rules of natural justice. On a similar account, they associated the exercise with harassment of

the community members, intimidation and open gunfire as it was carried out forcefully by the army, police and game wardens who were deployed to demarcate the intended area.

Conversely, the respondent contested the application by filing a statement in reply, which was sworn by Mr. Emmanuel Daniel Pius, Wildlife Conservation Officer from the Ministry of Natural Resources and Tourism. In the reply statement, the respondent countered the grounds upon which the application is pegged, disputing every allegation by the applicants and putting them into strict proof. In essence, the respondent found the allegations trivial, without any justification on the account that Pololeti Game Reserve was upgraded from the existed Loliondo Game Controlled Area, which was established in 1951 through the Fauna Conservation Ordinance. The respondent further accounted that Loliondo Game Controlled Area continued to be protected vide the defunct Wildlife Conservation Act No. 12 of 1974, the Wildlife Conservation Act, No. 5 of 2009 and Wildlife Conservation (Game Controlled Areas) Order of 1974, GN No. 269 of 1974.

According to the respondent, the Loliondo Game Controlled Area had an area measuring 4000 square kilometres. Out of the whole area covering Loliondo Game Controlled Area, it was resized to 1502 square kilometres, which was renamed as Pololeti Game Controlled Area, vide

GN No. 421 of 2022, which was upgraded by the President forming the impugned Pololeti Game Reserve through GN No. 604 of 2022. It was further contended by the respondent that out of the 4000 square kilometres, which were initially identified as Loliondo Game Controlled Area, the remaining 2498 square kilometres were left for other community use, forming part of the 14 villages complained by the applicants that they were displaced by the new Pololeti Game Reserve. According to the respondent, the motive towards the establishment of the Pololeti Game Reserve was triggered by the increase of human population pressure within the conserved area, creating resource use competition. The move aimed at protecting and ensuring the sustainability of the Masai Mara-Serengeti ecosystem. The respondent further argued that the decision to establish the Pololeti Game Reserve was consultative, hence valid and in compliance with the law.

Mr. Emmanuel Daniel Pius also deponed eight separate counter affidavits, contesting each of the applicants' affidavits. The counter affidavits aimed at controverting each fact and allegation raised by the applicants in their respective affidavits.

The applicants also filed a reply to the counter affidavit, challenging the counter affidavits of the respondent. Along the reply to counter affidavits, there was also filed supplementary affidavits by

James Moringe, Edward Maura, Damian Rago Laizer, Daniel Ngoitiko, Joel Resson, Kijoolu Kakiya, Mathew Siloma, Rokoine Moti Laizer, Sein Lekeni, Shutuk Kitamwas, Simon Nairiamu, Simon Saitoti and Sunguyo Olenguiny the ward councillors of various wards in Ngorongoro District. There were also supplementary affidavits of Isaya Munyere, James Taki, John Sang'eu, Linyor Kirinya, Michael Lopuru, Mipuki Lemberwa, Parmaary Merika, Parmitoro Mbotoony, Pemba Kipkan, Simon Elikana and Yohana Togore, village leaders and members of various Villages General Assembly and Council, within Ngorongoro District. The deponents of the supplementary affidavits challenged the promulgation of the Pololeti Game Reserve on the basis that they were not consulted whilst they were affected as their land was subject to the promulgated GN No. 604 of 2022. The basis of their affidavits is that they were never consulted at the time the Pololeti Game Reserve was established.

At the hearing of this matter, the applicants were well represented by a team of learned advocates led by Mr. Mpale Mpoki, assisted by Messrs Joseph Moses Oleshangay, Jebra Kambole, Jeremia Mtobesya, Yonas Masiaya, Denis Moses, John Lairumbe and Joseph Melau, learned advocates. The respondent, on the other hand, was represented by Ms. Jacqueline Kinyasi, learned State Attorney. It was resolved that the case be disposed of through filing of written submissions. With due respect, I

commend the learned minds for their well-researched and detailed submissions which has really made determination of this matter painless.

The learned advocates for the applicants prefaced their submission by highlighting powers of this court in judicial review proceedings. They submitted that in judicial review proceedings, the court partakes to supervise the authority so that it does not abuse its powers by ensuring that an individual receives just and fair treatment. To substantiate their submission on the role of the court in judicial review proceedings, the learned advocates referred the following foreign decisions: **Chief Constable of North Wales Police v. Evans** (1982) 1 WLR 1155, **Minerva Mills Ltd v. Union of India** (1980) 3 SCC 625 at page 677-678, **P. Sambamurthy v. Union of India** (1987) 1 SCC 124 and **Maneka Gandhi v. Union of India AIR** 1978 SC 597.

Submitting in support of grounds 6(a) and (b) in support of the application, the learned counsel for the applicants averred that the President acted in excess of the powers for failure to consult as required by law. They accounted that in terms of section 14(1) of the Wildlife Conservation Act, Cap. 283 [R.E 2022] (hereinafter WCA), it is mandatory for the President to consult relevant local authorities before declaring an area a Game Reserve. Since the WCA does not define what

local authorities mean, recourse is made to section 3 of the Local Government (District Authorities) Act 1982 (hereinafter LGDAA), which defines Local Government Authority to mean District Authority or Urban Authority. District Authority is defined to mean District Council, Township Authority, Village Council or Kitongoji. In view of the above provision, it was upon the respondent to demonstrate whether the aforementioned local authorities were consulted. Referring to specific paragraphs in the affidavits and reply to counter affidavits, counsel for the applicants seriously contended that there was no consultation prior to the promulgation of the Pololeti Game Reserve.

The learned advocates for the applicants faulted the letters attached to the counter affidavits stating that they do not demonstrate that the applicants were consulted. The minutes indicate that the agenda of Pololeti Game Reserve was just introduced, but no discussion or resolution was passed by the attendees. They referred to the minutes dated 04/07/2022 wherein members were just informed about the intention to upgrade Pori la Akiba Pololeti to Pololeti Game Reserve, but the attendees were not afforded the opportunity to opine. Similarly, in the meetings of the District Council, which convened on 20/09/2022 and 24/09/2022, nothing related to the promulgation was discussed.

Alternatively, they referred to section 35(1) of the LGDAA, which defines the composition of the District Council to include members elected from each ward in the area of the District Council. According to the learned advocates for the applicants, eight councillors from the affected wards and 14 villages were not present in the meeting because all were arrested and charged with murder. Since the councillors from the affected wards and villages were not present, the applicants were denied the constitutional right to participate in decisions which had an adverse impact on their lives. Whether there was consultation during the declaring of the said land Game Controlled Area, vide GN No. 421 of 2022, this court, in the case of **Ndalamia Partareto Taiwap & 4 Others v. Minister for Natural Resources and Tourism & Another**, Misc. Civil Cause No. 21 of 2022 (unreported) held that there was no consultation. The learned advocates for the applicants doubted the authenticity of the minutes of the meetings, relying on the supplementary affidavits, stressing that there was no consultation.

According to the learned counsel for the applicants, consultation is not merely a procedural formality but a Constitutional right, referring to Article 21(2) of the URT Constitution. To further underscore the significance of consultation, they referred to the decision of the Supreme Court of Kenya in Consolidated Petitions 11 & 13 of 2021 between **The**

Honourable Attorney General and 2 Others v. David Ndii & 79 Others. They further referred to the case of **Mayor and Corporation of Port Louis v. The Honourable AG** (1964) AC, which emphasised the requirement to consult. They urged the court to find that since there was no evidence to substantiate that there was consultation prior to the establishment of Pololeti Game Reserve, the process should be declared a nullity.

Submitting on ground 6(c), the learned advocates for the applicants submitted that the decision of the President to declare Pololeti Game Reserve is irrational because, **first**, it was made without the authority of the law. The learned advocates for the applicants were of the view that since there was no consultation, the declaration was not based on the law. **Second,** there is enough evidence to prove that the land belonged to the villages. Hence, the respondent had no mandate to dispossess the land without compensating the affected villages. Compensation is derived from Article 24 of the URT Constitution, they added. **Third**, the respondent did not give reasons for promulgating the challenged declaration. They maintained that GN No. 604 of 2022 does not contain reasons for its establishment. In their considered view, the reasons featured in the GN are vague, which is as good as no reasons advanced.

Fourth, the promulgation of GN No. 604 of 2022 was not based on any evidence. They accounted that there was no scientific evidence to justify the action taken. **Fifth,** the decision is irrational as it was based on extraneous consideration since there was no reason advanced. It was their submission that had the respondent considered people's lives, their houses, livestock, human existence, cultural sites, burial areas and general life, the respondent could not have arrived at the decision she made as it relates to taking villagers' land and affecting human existence.

Sixth, that the challenged decision is outrageous in its defiance of logic or accepted norms of moral standard that no sensible person, on the given facts and circumstances, could arrive at such a decision. To bolster their position, they referred to the decision of this court in **E 933 CPL Philmatus Fredrick v. Inspector General of Police and Another,** Misc. Civil Cause No. 3 of 2019 (unreported). **Seventh,** according to the applicants' advocates, the decision to promulgate GN No. 604 of 2022 is so unreasonable in the sense that it was done in bad faith. They insisted that the respondent failed to consider crucial matters such as applicants' right to own land, their dignity, their right to be heard, their right to housing, their right to human development and so forth. To support their submission that the decision was made in bad

faith, the applicants' counsel referred this court's decision in **Accountant General v. Public Procurement Authority & 2 Others,** Misc. Commercial Cause No. 11 of 2011 (unreported).

Elaborating on ground 6(d), the learned advocates for the applicants contended that the decision to promulgate and establish Pololeti Game Reserve by the respondent has never taken into account issues required by law and disregards irrelevant matters. They accounted that the process was preceded by erecting beacons in June 2022, which was later followed by eviction of the applicants and their fellow villagers. Hence, the decision by the respondent to promulgate GN No. 604 of 2022 was fettered. They maintained that where public authority acts in a fettered manner, such decision becomes amenable for judicial review, relying on **Halsbury's Laws of England, Administrative Law** (Vol. 1(1) (2001 Reissue) and **Administrative Powers (4) Non-exercise of Powers and Duties**, paragraph 32 Fettering Discretion by own rules). They insisted that the respondent failed to consider relevant issues when exercising her discretionary Powers, as demonstrated in the applicants' affidavits.

Expounding ground 6(e & g), the learned advocates for the applicants averred that the decision to promulgate Pololeti Game Reserve was made *malafide* as the respondent used irrelevant

consideration. They defined *malafide* as bad faith, referring to **Black's Law Dictionary** (8th Edn 2004). Relying on **Mahesh Chandra v. Financial Corporation**, the learned advocates asserted that the law requires the public authority to act according to law, fair play, justice, and equity and should try to avoid doubts about their decisions. Counsel for the applicants submitted that the promulgation of GN No. 604 of 2022 was preceded by the promulgation of GN No. 421 of 2022 by the Minister for Tourism and Natural Resources, and it was marred with arbitrary actions, excessive use of powers, arrest and imprisonment of leaders of the area and deployment of military forces to threaten and harass residents of the area. They made reference to specific paragraphs of the applicants' affidavits to that effect. It was their firm submission that doing something that conflicts with that requirement is not only unlawful but also *malafide*, relying on the case of **Shafiullah v. Government of Pakistan**, PLD 2002 PHC 50. Since there was no consultation in terms of section 14(1) of the WCA, then the decision is *malafide*, the learned advocates insisted.

The reason that the decision was triggered by the increase in human population in the area, which created competition, affecting the habitats and ecology with detrimental impacts on wildlife breeding sites and migratory routes within the Masai Mara ecosystem, is an irrelevant

factor as it was not supported with scientific evidence. They maintained that there was no statistical proof of the number of people in the area to exert pressure on the land. It was the counsels' submission that scientific studies show that wild animals and livestock can co-exist without any negative impact. To support their proposition, they referred to the following books: **Brockington, D; "Fortress Conservation; The Preservation of the Mkomazi Game Reserve, Tanzania,** Indiana University Press & **Oxford, 2002. P. 56 and Homewood K. M & Rodgers, W. A "Maasai land Ecology; Pastoralist development and wildlife conservation in Ngorongoro, Tanzania,** Cambridge University Press, Cambridge, 1991, P. 265."

It was submitted by the learned counsel for the applicants that relevant factors such as livelihood, human settlement, rites, and water as basic needs ought to have been considered by the respondent. They insisted that once it is established that irrelevant matters that ought not to have been taken into account have been considered and that relevant matters have not been taken into account, it amounts to ground for the writ of *certiorari* to issue. To bring the argument home, the learned advocates referred to the Court of Appeal decision in **Sanai Murumbe & Another v. Muhere Chacha** [1990] TLR 54. They concluded that

the decision to promulgate GN No. 604 was made malafide as relevant factors pointed out by the applicants were not considered.

Elaborating ground 6(i), the applicants' advocates averred that a person expects to be treated in a certain manner by the administrative body even where there is no legal right, still he may have a legitimate expectation of receiving such privilege. Such expectation may arise either from an express promise or from the existence of regular practice which the applicant can reasonably expect to continue. That, in such circumstances the court may protect the expectation by invoking the principle of legitimate expectation. In bolstering what amounts to legitimate expectation, the learned advocates referred to **Halsbury's Laws of England, Judicial Review** (Vol 61 (2015) 5th Edition, at paragraph 649. It was further submitted by counsel for the applicants that if a public authority's conduct creates a legitimate expectation that a certain course will be followed, it would be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. To support their position, they referred to the case of **Council of Civil Service Union v. Minister for the Civil Service** [1984] 3 All ER 935. They added that the right or privilege can be conferred by representations, promises, or consistent past practices of the authority.

The learned advocates for the applicants pointed out factors that must be met to establish the doctrine of legitimate expectation. **First,** there was clear and unambiguous representation by the respondent leading to legitimate expectation to the residents of Loliondo. Specifically, they referred a letter dated 30/05/2013 written by the Prime Minister by then addressed to the Regional Commissioner, which stayed the promulgation by that time. In their firm view, the letter confirmed recognition of the villages and their infrastructure, thereby creating a clear and unambiguous promise that residents would not be evicted.

Second, the learned advocates accounted that the applicants demonstrated that the public authority's actions and statements induced a legitimate expectation. They maintained that the villages affected by GN No. 604 were duly registered and issued with registration certificates, which are recognised under section 22 of the LGDAA. They asserted that recognition of the certificates by the relevant authorities influenced the villagers' expectation that their land rights would be respected. **Third,** the applicants clearly demonstrated that the representation was made by the Prime Minister, who is an official with apparent authority. **Fourth,** the letter by the Prime Minister was addressed to the residents of Loliondo, the applicants inclusive, as the aggrieved parties. Further, the expectation was induced by the legal

regime of the time, which clearly recognised co-existence between wildlife and human activities in the area.

They relied on section 16(5) of the WCA, which ensures that the establishment of any Game Controlled Area must respect existing village lands and the livelihood of those depending on the land. Further reliance was placed on section 14(1), which mandates the President to declare any land Game Reserve, but it is subject to consultation with the local authorities. Again, the applicants' advocates referred to section 14(4) of the same Act, which requires the Minister responsible to review the list of the Game Controlled Areas after consulting the relevant authorities as required by law. In the case at hand, the Minister did not fulfil such an obligation, which is a clear breach of the legitimate expectation. It was further contention by counsel for the applicants that Article 24(1) of the URT Constitution guarantees the right to own property. They urged the court to find their legitimate expectation a valid ground for allowing the application.

Substantiating ground 6(j), the applicants' advocates submitted that the three tests were not met by the respondent in promulgating the village land to a Game Reserve. They accounted that the aim was illegal as there was no consultation as per the dictates of law. **Second,** the exercise was arbitrary as it was tainted with excessive use of force.

Third, there were other means less restrictive that could have been employed by the respondent in order to achieve the intended objective. To support their contention, they referred to the following decision: **Ranjit Thankur v. Union of India and Others** [1987] AIR 2386, 1988(1) SCR 512. According to counsel for the applicants, the object/purpose stated for the promulgation of GN No. 604 of 2022 does not supersede the life of the residents of the affected area. It was further submitted that the area promulgated was village land with human settlement, grazing land, spiritual rites and water for human use, and livestock. They urged the court to find the ground of proportionality with merits and hold the promulgation of GN No. 604 of 2022 illegal.

Based on their submission, the learned counsel for the applicants urged the court to issue the writs of *certiorari* to declare GN No. 604 of 2022 illegally promulgated based on the above substantiated grounds. They further pressed for a prohibition order against the respondent from further evicting the applicants and their fellow villagers from their villages.

Responding to the grounds raised by the applicants, the learned State Attorney first adopted the counter affidavit opposing the application, to form part of her submission.

Giving a brief background of how the Pololeti Game Reserve came into existence, the learned State Attorney stated that the Loliondo Game Controlled Area was established in 1951 under the Fauna Conservation Ordinance. She referred to the 7th schedule, item 94 of the Ordinance. The Loliondo Controlled Area was enhanced and recognised by the WCA No. 12 of 1974, through GN No. 269 of 08/11/1974 and the WCA No. 5 of 2009. The Loliondo Controlled Area covered an area measuring 4000 square kilometres. During villagization in 1974-1976, the Government established villages in 2498 square kilometres, retaining 1502 square kilometres as Game Controlled Area for wildlife breeding, source of water and wildebeest migration. Due to the increase in population, pastoralists were seen to extend grazing cattle in the reserved 1502 square kilometres.

The increase of human population pressure has caused resource use competition, affecting the habitats and ecology with a detrimental impact on the breeding sites and migratory routes. To ensure that the government abides by the rule of law and protection of human rights, it allocated 2498 square kilometres of land for development activities. That, the reserved 1502 square kilometres is a core area for calving, feeding and wildlife migratory corridor for over 1.5 million wildebeest and has no human activities, including settlements. She maintained that

for the purpose of ensuring the integrity of the greater Serengeti-Mara ecosystem and protecting tourism and conservation, eviction of those who encroached on the reserved area was unavoidable. Through GN No. 421 of 2022, the Government promulgated the Pololeti Game Controlled Area before it was enhanced through GN No. 604 of 2022 to Pololeti Game Reserve on 14/10/2022 by the President of the United Republic of Tanzania so as to ensure sustainable conservation.

The learned State Attorney referred the case of **Ndalamia Pantareto Taiwap and 4 Others v. The Minister for Natural Resources and Tourism**, Misc. Civil Cause No. 21 of 2022, wherein the applicants were challenging the promulgation of GN No. 421 of 2022. The learned State Attorney maintained that grievances raised in that case are similar to those in this case. That, the grievances were resolved by the court, therefore in the view of the learned State Attorney, this court is *functus officio* to determine otherwise, since the decision was made by the High Court Judge with the same status. To justify the contention that the High Court Judge cannot re-open a matter conclusively determined by a fellow Judge by reversing the decision, she relied on the Court of Appeal decision in **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported). The learned State Attorney insisted that the issue of

functus officio being a point of law, can be raised at any stage of the proceeding referring **Mohamed Enterprises (T) Ltd** (supra).

According to the learned State Attorney, in judicial review proceedings, the court is concerned with whether the decision-making authority exceeded its powers, violated the rules of natural justice, reached a decision which no reasonable man would have reached or otherwise abused its powers. In judicial review, the court is not concerned with the conclusions of that process, whether it was correct or wrong, as long as the right procedures are observed. Reference was made in the cited case of **Sanai Murumbe and Another** (supra).

Reacting to the first ground that the respondent in the promulgation of GN No. 604 of 2022 did not consult the local authorities, the learned State Attorney submitted that the local authority is defined under section 3 of LGDAA to mean local government authority, which is also defined to include district authority. District Authority is again defined to mean District Council, Township Authority, or village Council. In her view, the definition of District Council under section 5 is not clearly defined. Its composition is set out in section 35, whose composition is among others ward councillors. It was the learned State Attorney's submission that the local authority which ought to be consulted in this regard was the District Council. Relying on annexure

OSG1, the minutes of the meeting held on 24/09/2022, it is indicative that all members of the village council participated as 25 councillors. She added that only 13 councillors did not attend. She relied on section 64 of the LGDAA, which provides that one-half of all members of the District Council shall constitute the quorum at an ordinary meeting and in a special meeting, the quorum shall be two-thirds of all members.

The learned State Attorney was of the view that the contention by the applicants that the village council and vitongoji were subject to consultation, is not backed up with the law. It was the respondent's counsel's further submission that consultation was made appropriately. Since the President is mandated to declare any area as a Game Reserve in terms of section 14(1) of the WCA, subject to consultation with the relevant local authorities, that mandatory requirement was adhered to, argued the learned State Attorney. It was her further submission that immediately after receipt of the letter with reference No. CBA.243/389/01B from the Ministry, the Regional Administrative Secretary wrote to the District Director of Ngorongoro vide a letter with reference No. CFA 44/60/01/N/35 intimating the intention of the Government to upgrade the Pololeti Game Controlled Area to a Game Reserve. Regarding the complaint that political leaders were arrested, the learned State Attorney submitted that only two out of the 27

accused persons were councillors and all the accused persons were accused of murdering a police officer.

It was a firm submission by Ms. Kinyasi that the writ of certiorari is limited in reviewing the lawfulness or legality of the decision or action complained by the public body but not its decision. That, it is issued to ascertain whether authority's decision has been made in error or in excess of the bestowed powers or in contravention of the principles of natural justice. The learned State Attorney relied on the reported case of **Ally Linus & Others v. THA and Another** [1998] TLR. She concluded that the President had jurisdiction to promulgate the Pololeti Game Reserve, as she complied with the legal requirement

Responding to ground 6(c), the learned State Attorney argued that the promulgation of GN No. 604 of 2022 was not made irrationally. She accounted that prior to the promulgation of GN No. 604 of 2022, the whole of the Loliondo area, covering 4000 square kilometres, formed part of the Loliondo Controlled Area. During the promulgation of GN No. 421 of 2022 by the Minister, it was decided that 2498 square kilometres be left to the villagers for other community use while 1502 square kilometres be reserved to protect the ecosystem. It was Ms. Kinyasi's view that the question for determination is whether the decision to allocate 2498 to the indigenous is outrageous and the decision to

conserve 1502 square kilometres is outrageous to warrant the court to quash the decision of the President. In her considered view, the applicants' claim that they were deprived of their ancestral land was unsubstantiated as they did not prove ownership. Similarly, the President, in promulgating GN No. 604 of 2022, duly abided by the law as per section 14 (1) of the WCA. Counsel insisted that the decision to demarcate 1502 square kilometres was not unreasonable.

On the allegation that the applicants' land was taken without being fairly compensated, she referred to sections 6 and 7 of the Land Acquisition Act, insisting that the issue of compensation does not arise. It was her argument that taking a person's land for public use attracts compensation in certain circumstances, referring to the case of **Attorney General v. Tanzania Electric Supply Company Limited & Others**, Civil Revision No. 1 of 2023) [2024] TZCA 520. Whether the applicants' land was acquired by the government, the learned State Attorney relied on the case of **Ndalamia Partareto** (supra), which held that the area in question is not village land. Hence, the issue of compensation does not arise.

Regarding failure to give reasons for promulgating GN No. 604 of 2022, the learned State Attorney accounted that such a complaint was never raised in the pleadings. It was her further submission that the

principle that parties are bound by their pleadings is applicable in this case, relying on the case of **Martin Fredrick Rajab v. Ilemela Municipal Council and Another,** Civil Appeal No. 187 of 2019 (unreported). On the allegation that there was no scientific evidence placed before the court to justify the promulgation, the learned State Attorney insisted that there existed Loliondo Game Controlled Area since 1951 while the purported villages were formed in the 1990s. It was counsel's insistence that the land in issue was a Game Controlled Area, hence scientific proof of the intensive human population pressure was uncalled for. The learned State Attorney referred to annexure LN 11 on pages 29 and 43, wherein the report shows that the need to resize the land was in response to the scientific research conducted by TAWIRI.

Responding to ground 6(d) on the allegation that the respondent acted in fettered discretion, the learned State Attorney accounted that such issue was determined by this court in lengthy in **Ndalamia's case,** hence this court becomes *functus officio* to redetermine it. It was further submitted that the applicants failed to prove that the beacons were erected during the promulgation of GN No. 604 of 2022; on the contrary, they admitted that the beacons were constructed before the promulgation of GN No. 421 of 2022.

In response to the ground that the promulgation was based on irrelevant consideration, namely that the area used to be a water catchment area and breeding area for animals, the learned State Attorney accounted that the alleged prior and post promulgation series of events including arrest and harassment of the political leaders did not exist as it was resolved in Misc. Civil Cause No. 21 of 2022. The respondent's counsel insisted that the alleged events had nothing to do with the promulgation of GN No. 604 of 2022. It was the learned State Attorney's insistence that digging into the alleged events requires the Court to draw a long-drawn conclusion, which is not the case in judicial review proceedings. That, in the counsel's view, defeats the purpose as the court will sit as an appellate court. Reference was made in the case of **Hausa Alfan Salum and 116 Others v. Minister for Lands Housing and Urban Development and National Housing Corporation** [1992] TLR 293. On the allegation that the promulgation was tainted with bad faith, the learned State Attorney submitted that the allegations are unsubstantiated. She maintained that the attached videos are not connected to the promulgation of GN No. 604 of 2022. Regarding the arrest of the political leaders, the learned State Attorney recounted that according to Annexure LN 7, they were charged with the murder of a police officer during the exercise of marking boundaries

of the Loliondo Game Controlled Area. The arrest is, therefore, not linked to the promulgation of GN No. 604 of 2022. It was, therefore, submitted that the ground of irrelevant consideration is devoid of merits.

Regarding ground 6(i) that the promulgation was against the legitimate expectation of the inhabitants of 14 villages, the learned State Attorney submitted that the discussion to settle the pastoralists in the remaining 2498 square kilometres and reserve 1502 square kilometres persisted for about 30 years until it was implemented by the promulgation of GN No. 421 and subsequently GN No. 604 forming the Pololeti Game Reserve. Reference was made in **Ndalamila's case** (supra), where the court resolved that since the applicants failed to prove that they owned parcels of land in the disputed area, they failed to prove the ground of legitimate expectation.

According to the learned State Attorney, during the promulgation of GN No. 604, there was nobody residing in that area as they knew the existence of GN No. 421 of 2022. A further note is that since the inhabitants knew the existence of the Loliondo Game Controlled Area, that in itself suffices to relinquish their legitimate expectation. Again, counsel for the respondent averred that by virtue of section 16(4), failure by the Minister to review the former Loliondo Game Controlled Area within 12 months from the time WCA became operational did not

revoke or cease to exist automatically. She maintained that for a Game Controlled Area to cease existing, the same must be revoked by the Minister. She added that another way for the Game Controlled Area to cease to exist is through the upgrade to Game Reserve by the President in terms of section 14 of the WCA.

The last ground pertains to whether the decision to promulgate GN No. 604 of 2022 was against the doctrine of proportionality. The learned State Attorney accounted that the President did not establish a completely new Game Reserve through GN No. 604 of 2022, rather it was upgrading the existed Loliondo Game Controlled Area. It was her further submission that the President is mandated under section 14(1) of the WCA to declare any land Game Reserve subject to consultation with the local authority. She submitted that the promulgation aimed at ensuring progressive conservation, therefore, justified. Whether the land was village land, the learned State Attorney was of the view that it was not village land because what was done was to resize the existing Loliondo Game Controlled Area.

According to the learned State Attorney, even if the court finds that the procedures were not adhered to, the recourse is not to quash the decision and give right on the applicants' side; rather, it is obliged to return the same to the President for compliance purposes. In support of

the proposition, counsel relied on the following Court of Appeal decisions: **James G. Kusaga v. Sebastian Kolowa Memorial University (SEKOMU)**, Civil Appeal No. 73 of 2022 and **Ezekiah Oluoch v. PS Presidents' Office, Public Service Management and 4 Others,** Civil Appeal No. 140 of 2018 (Both unreported)

Regarding the order of prohibition, the learned State Attorney differed. It was argued that such an order to allow the applicant to access restricted land, which is reserved as per sections 19, 20(1) and 21 of the WCA, cannot be issued. Again, she submitted that any decision issued by this court is judgment in persona, which means the only beneficiary will be the applicants and not any other person. To reinforce the argument, the learned State Attorney referred to the case of **Mariam Ndunguru v. Kamoga Bukoli and Others** [2002] TLR 417. She asserted that at the leave stage, it was the applicants only who managed to show sufficient interest in the matter and not any other person. Therefore, any order issued will be binding upon the applicants only. The learned State Attorney urged the court to find the matter devoid of merits and proceed to dismiss it with costs.

In rejoinder submission, the advocates for the applicants submitted that in declaring land Game Reserve, the President must consider not only consultation with the local authorities but also

the economic and social welfare of citizens, particularly those who are likely to be impacted by the establishment. They made reference to sections 5(2) of the WCA and 4(2) of the Land Act, Cap. 114 [R.E 2019]. They maintained that the applicants and the pastoral community have been in occupation of the land subject of the declaration since the German colonial era. To further defeat the submission that the pastoralists were intruders on the land, the learned advocates submitted that even the Judiciary established courts thereat, as well as the District Land and Housing Tribunal. A prison was also built at the centre. It was their further argument that the law takes cognizance of both customary and modern land tenure systems, which takes on board pastoralists as land owners. They made reference to **section 4(3) of the Land Act**.

The learned advocates for the applicants insisted that the area has a population of about 97,000 people, as per the national census of August 2022, who depend on the area for their livelihood. They insisted that the 1502 square kilometres promulgated falls within the registered village land. Regarding consultation, the learned minds insisted that consultation ought to be made to the village and vitongoji which were affected by the declaration. In support of their submission, they relied on **Mayor and Corporation of Port Luios v. The Honourable Attorney General** (1964) AC, which insisted that the local authority to

be affected by the order of the authority has to be consulted and their views considered. The learned advocates for the applicants challenged the doctrine of *functus officio* inflicted by the respondent's counsel, arguing that **Ndalamia's** case was challenging GN No. 421 of 2022, while in the present matter, the applicants are challenging GN No. 604 of 2022. It was their firm submission that the two cases are aiming at challenging two distinct orders, therefore the principle becomes inapplicable. To reinforce their argument, they referred to the case of **Kamundu v. Republic** (1973) E.A 540. The applicants' advocates reiterated what they submitted in the submission in chief, including the reliefs.

I have considered the affidavits for and against the matter, as well as the well-researched submissions by counsel for both sides. It is now instructive to determine the matter in the manner in which the grounds were argued.

Before delving into the merits of the case, I feel compelled to deliberate on one pertinent issue raised by both counsel for the parties in their respective submissions, which do not feature as grounds upon which the application is pegged. The respondent's counsel invited the court to find and hold itself *functus officio* to determine this matter since most of the issues raised on the grounds were conclusively determined

by this court in **Ndalamia's case** (supra). On the other hand, the applicants' counsel seriously disputed the submission on the account that the two cases aimed at challenging two distinct Government Notices.

Perhaps at this stage, I will consider the principle of *functus officio*. The principle is applicable in the sense that when the court has heard the matter and given a final determination, the same court or adjudicator of the same rank cannot re-open the matter with a view of making a determination of the same matter. This position is a clear demonstration of what the Court of Appeal in the case of **Yusuf Ali Yusuf @ Shehe @ Mpemba and 5 Others v. Republic**, Criminal Appeal No. 81 of 2019 (unreported), pursued, where the Court held inter alia that:

> *"We wish to begin by stating the position which this Court has occasionally taken while answering the above question on when courts in Tanzania become functus officio. This Court is settled that,* ***a court becomes functus officio over a matter if that court has already heard and made a final determination over the matter concerned."*** (Emphasis added)

In **Tanzania Telecommunications Company Limited and 3 Others v. TRI Telecommunications Tanzania LTD,** Civil Revision

No. 62 of 2006 (unreported), the Court considered the scope of *functus officio* and quoted with approval the principle laid down by the Court of Appeal for Eastern Africa in the case of **Kamundi v. R** (supra), where it was held:

> *"...A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder* ***case that this arise only be when the court disposes of a case*** *by a verdict of not guilty or by passing sentence* ***or making some orders finally disposing of the case.*** *"*(Emphasis added.)

Following the above authority, I am settled that, the purpose of the principle of *functus officio* is to provide finality. That, once a matter is finally concluded by the court, that court cannot re-open or alter its decision, it must be taken to a higher court by way of appeal or revision. The question is whether the matter at hand falls within the ambits of *functus officio* above explained. It is noteworthy that in **Ndalamia Partareto Taiwap & 4 Others v. Minister for Natural Resources and Tourism & Another** (supra), the applicants therein were quite different from the applicants in this case. Similarly, the applicants in that case were seeking similar writs of *certiorari* and prohibition, but they were challenging the decision of the Minister for Natural Resources and Tourism, who promulgated GN No. 421 of 2022, which established the

Pololeti Game Controlled Area. In this matter, the applicants are seeking the same reliefs, but they challenge the decision of the President of the United Republic of Tanzania, who promulgated and established Pololeti Game Reserve vide GN No. 604 of 2022.

Therefore, as correctly argued by the applicants' advocates, despite the fact that the grounds relied upon in this matter are similar to those relied on in Misc. Civil Cause No. 21 of 2022, yet the applications are meant to challenge two distinct administrative orders. The argument by the learned State Attorney that this court be found *functus officio* is misleading and, to say the least, a misapprehension of the principle. I hold this view because the application to challenge GN No. 604 had not been determined to its finality. For the assigned reasons, the prayer that the court declares itself *functus officio* is rejected.

I now proceed to determine the grounds upon which the application is pegged in the promulgation of GN No. 604 of 2022. I have considered the affidavits for and against the application as well as the annexures thereto. Before indulging on whether there was consultation or not, it is instructive to point out the provision relied upon by the President to promulgate GN No. 604 of 2022. Quite uncontested, **section 14(1) of the WCA** mandates the President to declare any area in Tanzania, Game Reserve. The provision provides:

"14.-(1) The President may, after consultation with relevant local authorities, and by order in the Gazette, declare any area of Tanzania to be a game reserve."

From the above provision, the law is silent on the manner the consultation shall be made. Further, there is no definition of what amounts to local authorities in the WCA. Correctly, as submitted by both counsels for the parties, recourse is made to the LGDAA. Section 3 of the Act defines "Local Government Authority" to mean District Authority or Urban Authority. The section further defines "District Authority" to mean a District Council, a Township Authority or a Village Council.

The above definitions are implicit that local authority may either be the district council or village council, in the context of the matter at hand. The submission by advocates for the applicants that Kitongoji is among the Local Government Authorities is, in my considered view, misleading. I am aware that the learned counsel referred to **section 4 of the Interpretation of Laws Act,** Cap. 1 [R.E 2019]. The said section defines Local Government Authority to mean:

"Local Government Authority" means:-

a) a village council, a township, a kitongoji, a district council or any other local government authority established under the Local Government (District Authorities) Act; or ..."

However, the learned counsels for the applicants are to be mindful that the law makes reference to local authorities and not local government authorities. A further note is that the Interpretation of Laws is general law while specific law to the matter at hand is the LGDAA. When there arises a conflict between the general law and specific law on the interpretation of a particular provision, the provisions of the specific law shall prevail. In the contextual applicability in this matter, the LGDAA shall be considered as the governing law.

From the above overview, since the law recognises either District Council or Village Council as the local authorities, for the purpose of WCA if consultation is made to either of the two, it suffices. My position is instigated by the fact that the law is silent on the manner and the level of local authority where consultation shall be made. In the matter at hand, the respondent's counsel has relied on annexure OSG1, respectively, to underscore that there was consultation. The respondent in the counter affidavits under paragraphs 13, 8, 11 referred several correspondences between the Ministry of Natural Resources and Tourism, Regional Administrative Secretary and Director Ngorongoro District.

The letter dated 07/06/2022 with reference No. CBA.243/389/01B from the Permanent Secretary, Ministry of Natural Resources and

Tourism addressed to the Regional Administrative Secretary Arusha Region, informing him that the government intended to upgrade the existed Loliondo Game Controlled Area, and then Pololeti Game Controlled Area to Pololeti Game Reserve. The letter was intimating the intention of the President to promulgate GN No. 604 of 2022. The RAS was inquired to consult the local authorities under him.

On 14/06/2022, the RAS wrote a letter with reference No. CFA.44/60/01/N/35 to the Director of Ngorongoro District, notifying him of the move. Under paragraph 4 of the letter, the RAS notified the DED that under section 14(1) of the WCA, the President is required to make consultation with the local authorities. The duty to consult the local authorities was left with the DED as per paragraph 5 of that letter. On 02/09/2022, the District Executive Director responded the RAS's letter vide a letter with reference No. CNGOR/DC/W.2/1/89 admitting receipt of the letter and that it was being implemented.

There was a district council meeting on 04/07/2022, wherein among the agenda was the deliberation on promulgating the Pololeti Game Reserve as it featured as agenda No. vi. Another meeting was convened on 20/09/2022, the minutes of which are attached in annexture OSG 1. In that meeting, the attendance register shows that it was attended by 12 ward councillors who signed the attendance

register. Again, another meeting was convened on 24/09/2022, wherein among other attendees, were 25 ward councillors who signed the attendance register. The composition of the District Council is provided under **section 35 of the LGDAA**. Among other members in the District Council is one member elected from each ward. A quorum of the ordinary meeting is one half of the members and two third in special meeting as per section 64 of the Act.

The applicants' advocates raised concern that the letters relied on as annexure OSG 1 were not properly labelled as annexures. It is true that they were not labelled as annexures, but they were referred to in the counter affidavits as annexures. Refer to paragraphs 13, 13, 13, 11, 12, 8, and 12 of the counter-affidavits. The fact that the letters were not labelled is considered inadvertent and does not render the letters unreliable.

In the rejoinder submission, the counsel for the applicants also challenged the letters, especially that of 07/06/2022 and 14/06/2022, which referred to the Pololeti Game Controlled Area, while the same was established on 17/06/2022 vide GN No. 421 of 2022. That contention is baseless on two folds: **First,** the establishment of a Game Controlled Area is a process which does not last in a day. It is a long-term process. As can be gleaned from the affidavits in support of the application,

specifically annexure LN11, the process can be traced way back in 2013. At the time the letter was written by the Permanent Secretary, who is the chief executive machinery in the Ministry, GN No. 421 was already in place. Even assuming that it is true that it became operational on 17/06/2022, orders are still documented prior to becoming operational.

Second, the letters aimed at establishing the Pololeti Game Reserve, which was promulgated on 14/10/2022. Thus, at the time the correspondences were made through the letters, that declaration was yet to be implemented. The letters were specific that they were based on the establishment of the Pololeti Game Reserve, GN No. 604 of 2022. It is, therefore, the finding of this court that the letters are meant to consult the local authorities.

In the totality of the above discussion, the requirement of **section 14(1) of the WCA** was complied with. There was adequate consultation with the local authorities prior to the establishment of the Pololeti Game Reserve, GN No. 604 of 2022. The contention by the applicants' advocates that some of the ward councillors did not attend the meetings, as conceded by the learned State Attorney, the quorum as per section 64 of the LGDAA was met. With the presence of the ward councillors in the District Council, it is a clear demonstration that the impacted areas were represented.

I have considered the supplementary affidavits of the ward councillors and village leaders who denied being involved in the process. I have pointed out earlier that those who attended the District Council meeting on 20/09/2022 and 24/09/2022 signed the attendance registers, which is conclusive proof that they attended. Since the quorum was met, the Council meeting was properly constituted and valid.

There was a challenge by the applicants' advocates that the establishment of GN No. 604 of 2022 was not featured on the agenda. That is not the case because the minutes reflect that in each meeting the matter was among the agenda. Moreover, the law does not specify the manner in which the consultation shall be carried out. There is also a complaint by the applicants' advocates that the impacted persons were not called upon to give their opinion. That complaint does not hold water because it is not a legal requirement that the affected persons must give their opinion. The law is straightforward that there must only be consultation.

Further, there is contention that in **Ndalamia Partareto Taiwap & 4 Others** (supra), it was held that there was no consultation by the Minister. In the first place, in the matter at hand, consultations were made as per annexure OSG 1. Second, the annexure relied on by the

respondents in that matter was the so-called "Taarifa ya Kamati Shirikishi." The decision does not show whether there was consultation as in this case, where annexures OSG 1 collectively suggest. Therefore, the facts and evidence relied upon in **Ndalamia Partareto Taiwap** (supra), and those relied on in this case are quite distinct. Eventually, the ground that there was no consultation fails.

I now turn to consider the ground of irrationality and unreasonableness in 6(c). Consistent with the **"Wednesbury test"** in the **Associated Provincial Picture House** (supra), the decision to promulgate the Pololeti Game Reserve was made by the President pursuant to section 14(1) of the WCA. The President is mandated to declare any area Game Reserve subject to consultation with the local authorities. As I have hinted above, there was adequate consultation. Therefore, the promulgation of GN No. 604 of 2022 was made with the authority of the law.

The contention that the President was not mandated to make the order since the applicants were not compensated is misplaced without prejudice. When giving historical background of how the Game Reserve was established, the learned State Attorney accounted that the same was established from the defunct Loliondo Game Controlled Area which was established way back 1951 by the Fauna Conservation Ordinance

Cap 302 of the Revised Laws. I have revisited the law, Loliondo Game Controlled Area is provided under the 7th Schedule, Item 94 and its boundaries. The Loliondo Game Controlled Area continued to enjoy legal protection by the WCA No. 12 of 1974. Later it was also recognised by the WCA No. 5 of 2009, and its revised editions. The applicants do not dispute existence of Loliondo Game Controlled Area. It is the same area that initially had 4000 square kilometres, but was resized to 1502 square kilometres, forming the Pololeti Game Controlled Area, vide GN No. 421 of 2022. That historical background is also reflected in annexure OSG 1 to the counter affidavit, the letter from the Ministry dated 07/06/2022.

I have also considered the holding in **Ndalamia Partareto Taiwap** (supra) where this ground was found to have failed, wherein the court relied on the historical background to conclude that the established GN No. 421 of 2022 was traced way back from the Loliondo Game Controlled Area. Having resolved that the promulgated GN No. 604 of 2022 emanated from the existed Loliondo Game Controlled Area and later Pololeti Game Controlled Area, GN No. 421 of 2022, the complaint that the applicants ought to be compensated does not arise. The reason is simple. That, the land was reserved as game Controlled Area prior to establishment of the villages. Being reserved as controlled area, there was no room for compensation.

Another complaint is that there were no reasons for the establishment of GN No. 604 of 2022. The complaint is not backed up with the record because in the GN No. 604 of 2022 and in the letter addressed to the local authorities by the Ministry, the reasons for establishment were indicated. The main reason for its establishment as correctly submitted by the learned State Attorney is to ensure sustainable conservation and protection of the ecology. It is, therefore, apt to note that given the contributions made by the Tourism sector to our economy, the President promulgated the Pololeti Game Reserve based on relevant and authentic consideration.

The respondent made it succinctly clear that the order was triggered by the increase in population pressure, which was inconsistent with the conservation and adversely affected the ecosystem. It was made both in the statement in reply, the counter affidavit and the submission that the promulgation of GN No. 604 of 2022 was perpetrated by the increase in human population, which exerted pressure on the ecosystem due to human activities such as livestock, grazing and agriculture. Therefore, the promulgation was based on valid reason and evidence.

Further, the decision by the President is not outrageous as it was made sensibly for the betterment of the entire nation. Given the fact

that the promulgated land was, since time immemorial, a game-controlled area, the applicants cannot claim ownership of the land which they had no right to own. The decision was also reasonable because, despite the fact that the game-controlled area measured 4000 square kilometres, the President reserved only 1502 square kilometres, leaving the rest to the community. Since it was a game-controlled area, the Government could have declared the whole of its Game Reserve, but out of human sense and considering the indigenous lives, only part of it was promulgated. The declaration was thus done in good faith in total consideration of the rights of those who dwelled there for a long time. The grounds of irrationality and unreasonableness lack legs to stand on, and it is hereby dismissed.

The other ground that the decision was based on fettered discretion is out of context. The allegation that there were harassments, intimidation prior and post establishment of Pololeti Game Controlled Area GN No. 421 of 2022, does not necessarily mean that it affected promulgation of GN No. 604 of 2022. The allegation that the state apparatuses such as police, army, wildlife rangers harassed the inhabitants of the promulgated area is not substantiated. The featured videos do not show whether they relate to establishment of GN No. 604 of 2022. I hold this view because the applicants stated that they related

to the establishment of GN No. 421, specifically in June 2022. However, GN No. 421 was subject of challenge in Misc. Civil Cause No. 21 of 2022, which was conclusively determined. The alleged inhuman acts complained by the applicants were of June 2022 while GN No. 604 of 2022 was established and became operational on 14/10/2022.

The respondent considered all relevant factors, including protecting the ecosystem, ensuring sustainable conservation and protecting the tourism industry at large. That, in my view, justified the decision because the authority considered the broader approach of protecting the national wealthy at the expense of the minor group, who in turn were considered by being allocated the remaining 2498 square kilometres out of the 4000 square kilometres, which was reserved as Loliondo Game Controlled Area. This ground as well fails, it is hereby dismissed.

The account that the decision to promulgate GN No. 604 of 2022 was made *malafide*, is another ground raised by the applicants. As I have hinted earlier on, the decision to promulgate the Pololeti Game Reserve was executed in good faith by the Government with a view to protect and ensure sustainable conservation in order to protect the natural resources, including the wild animals as a major source of foreign currency in our country. As submitted by the learned State

Attorney, those who were arrested and charged were arrested for murder just like any other criminal. Whether the alleged murder was connected to the promulgation or not, it does not exonerate the accused persons from being charged if the investigation machinery linked them with the alleged murder.

After all, the respondent has demonstrated good faith in resizing only part of the controlled area, leaving some to the community. That is a clear indication that the decision was not made *malafide.* Considering the historical background of the promulgated area, there is no sufficient evidence to prove that the decision was made *malafide* by the respondent. While deliberating on the preceding grounds, I have demonstrated that the alleged commotions, harassments, intimidations and arrests were not directly connected to the promulgation of GN No. 604 of 2022 because most of those acts seem to have occurred in June, 2022. The impugned order, on the other hand, was established on 14/10/2022. The applicants have failed to provide evidence to prove that the commotions were connected to the establishment of GN No. 604 of 2022.

I do not agree with the applicants' counsel that the reasons put forth by the respondent are irrelevant considerations as I have demonstrated above that the tourism sector is among the giant sectors

contributing heavily to the national budget. It deserves close protection, including protection of the areas reserved for that purpose. The respondent also considered that the applicants and the pastoralists in general co-existed with the wild animals, that is why their continued existence was left to the remaining 2498 square kilometres. There was no ulterior motive on the part of the respondent in promulgating GN No. 604 of 2022. Therefore, this ground suffers the wrath of dismissal.

Next for consideration is the ground that the decision was made against the legitimate expectations of the applicants and other inhabitants of the impacted villages. The doctrine of legitimate expectation was first developed in English law as a ground of judicial review in administrative law to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person. It is based on the principles of natural justice and fairness, and seeks to prevent authorities from abuse of power. Whether the expectation is legitimate, that is subjective, depending on the peculiar circumstances of each case.

In the case at hand, there was no legitimate expectation owing to the historical background surrounding the established Pololeti Game Reserve. As demonstrated above, there was established Loliondo Game Controlled Area by Fauna Conservation Act 1951, The Loliondo Game

Controlled Area continued to enjoy legal protection by the WCA No. 12 of 1974. Later, it was recognised by the WCA No. 5 of 2009 and its revised editions. Therefore, the Loliondo Controlled Area existed until 2022, when it was resized, forming Pololeti Game Controlled Area through GN No. 421 of 2022. The contention by the applicants' advocates that Loliondo Game Controlled Area seized to exist as it was not reviewed by the Minister after WCA became operational is, without prejudice, a misconception. Any authority established by law must be revoked by the same law or any other law.

The fact that the villages were established post establishment of the Loliondo Game Controlled Area, does not confer ownership of the land to the inhabitants of the purported 14 villages. Similarly, since 2013, as per annexure LN11, the Government demonstrated its intention of establishing the Pololeti Game Controlled Area. That itself was clear message to the applicants and their fellow inhabitants that the land they occupied was game controlled area.

The applicants heavily relied on annexure LN9 as representation made by person with authority. The Prime Minister by then did not cease the establishment, he rather advised the Ministry to stay the implementation pending consultation with the impacted citizens and the

local authorities. If anything, that cannot be equated to legitimate expectation to warrant a grant of the orders sought.

The fact that the said villages were registered, does not in itself confer land upon them. As it was held in **Ndalamaia Partareto Taiwap** (supra), the Loliondo Game Controlled Area was established prior to establishing the villages. It is also on record that the community was allocated 2498 square kilometres of land after the promulgation. By all intents and purposes, the doctrine of legitimate expectation in this matter is misplaced. This ground is dismissed.

The last ground is that the decision was against the doctrine of proportionality in that the acts of the respondent were more drastic than is necessary for attaining the desired result and that the respondent could have used a less restrictive alternative. I have weighed the submissions by counsels for both sides, it is my considered view that the decision was in compliance with the law. The legal regime bestowing such powers upon the President was complied with. Second, the decision was based on valid reason as I have demonstrated in the preceding grounds. The decision has taken into consideration the rights of those living in the established area to the extent that 2498 square kilometres were left for community use. The fact that the applicants

used the land for grazing and other economic activities does not confer upon them the right to own the land.

A close look at annexure LN10 shows that the applicants failed to prove that their villages were outside the national park boundaries. Similarly, they failed to prove ownership of the land they claimed against the respondent. A similar position has been maintained in **Ndalamaia Partareto Taiwap** (supra), where the applicants failed to prove that they owned land in the promulgated area. It is, therefore, the finding of this court that the measures used by the respondent to reserve only 1502 square kilometres out of the 4000 square kilometres controlled are less restrictive and proportionate to the desired result. The doctrine of proportionality also becomes inapplicable in the circumstances of this case. The ground fails.

In order for the writ of *certiorari* to be issued, one of the grounds established in **Sanai Murumbe and Another** (supra) must be apparent on the record. In that case, the Court had the following to say:

> *"An order for certiorari is one issued by High Court to quash the proceedings and decision of a subordinate court or a tribunal or a public authority, where among others, there is no right of appeal. The High Court is entitled to investigate the proceedings of a lower court or tribunal or public authority on any of the following grounds apparent on*

record. ***One,*** *that the subordinate court or tribunal or public authority has taken into account matters which ought not to have taken into account.* ***Two,*** *that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account.* ***Three,*** *lack or excess of jurisdiction by the lower court.* ***Four,*** *that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it.* ***Five,*** *rules of natural justice have been violated.* ***Six,*** *illegality of the procedure or decision."*

In the matter at hand, none of the above grounds has been proved to exist by the applicants. The grounds raised by the applicants are so remote to the extent that they fall short of proof. On the basis of the above deliberations, the reliefs of *certiorari* and prohibition cannot be issued.

Consequently, the application is found devoid of merits. It stands dismissed in its entirety. This matter being public interest litigation, I make no order as to costs.

DATED at **ARUSHA** this 24th day of October, 2024

N. R. MWASEBA

JUDGE