IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISCELLANEOUS CIVIL CAUSE NO. 21 OF 2022

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 CONTROLLED AREA) (DECLARATION) ORDER, G.N No. 421 OF 2022

BETWEEN

NDALAMIA PARTARETO TAIWAP .....1ST APPLICANT

LATANG'AMWAKI NDATI.....2ND APPLICANT

MEGWERI MOKINGA MAKO .....3RD APPLICANT

EZEKIEL SUMARE KUMARI .....4TH APPLICANT

LATAJEWO LANGEU SAYORI .....5TH APPLICANT

VERSUS

THE MINISTER OF NATURAL RESOURCES AND TOURISM.....1ST RESPONDENT

THE ATTORNEY GENERAL 2NDRESPONDENT

RULING

31st July & 19th September, 2023

TIGANGA, J.

In this application, the applicants are individual citizens of the United Republic of Tanzania. According to the statement filed with this application, they are Masai by tribe and residents of Loliondo and Sale Divisions within Ngorongoro District, in Arusha Region.

The first respondent is the holder of the public office mandated to oversee matters of natural resources and tourism in the Government of the United Republic of Tanzania. The second respondent is the Chief Legal Advisor of the Government of the United Republic of Tanzania and was joined in this application by virtual of section 18 of the **Law Reform (Fatal Accident and Miscellaneous Provisions) Act** [Cap 310 R.E 2019]

The court has been moved under section 2(3) of the **Judicature and Application of the 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] as Amended in 2019 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 pray for the following four reliefs which are basically in two sets, **first,** they ask for the court to call for and examine the legality of the **Wildlife Conservation (Pololeti Game Controlled Area) (Declaration) Order,** 2022 (GN. No. 421 of 2022) and to issue an order for certiorari to quash and declare the said Order, a nullity for being promulgated wrongly on the grounds of illegality, irrationality, unreasonableness, violation of the principle of the natural justice, and procedural impropriety. They believe as stated in the statement filed together with the application that, the said "Order" was promulgated illegally, irrationally, unreasonably, in violation of the principle of natural justice and with procedural impropriety.

Second, they ask for the court to grant an order prohibiting the 1st respondent from unlawfully removing the applicants from the demarcated area constituting Pololeti Game Controlled Area and from unlawfully evicting the residents of 14 villages in the area covering 1502 Square Kilometers promulgated as Pololeti Game Controlled Area. They also prayed for any other order that the court may deem just and equitable to grant.

The applicant fronted a total of ten grounds upon which the two reliefs are sought, namely;

(i) That, the 1st respondent acted in **excess of the power conferred** to him in promulgating the said **Wildlife Conservation (Pololeti Game Controlled Area) (Declaration) Order,** 2022 (G.N No. 421 of 2022) as he had no power in law to declare any village land as a game controlled area.

(ii) That, the 1st respondent acted **against the rule of natural justice** by proceeding to declare the Pololeti Game Controlled Area without consultation with the villagers who are affected by the Order.

(iii) That, the 1st respondent acted **irrationally** by taking the land which has been occupied and used for sustainable activities of the inhabitants as homes, pastureland, cultural, and spiritual sites.

(iv) That, the 1st respondent acted in **fettered discretion** in that they had already decided 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.

(v) That, the decision to promulgate the Pololeti Game Controlled Area was ***mala-fide*** as the first respondent used irrelevant consideration, namely that the area was used as a water catchment area, and as a breeding area for animals for Serengeti National Park.

(vi) That, the decision leading to the promulgation of the **Wildlife Conservation (Pololeti Game Controlled Area) (Declaration) Order, 2022** was **made arbitrarily** in that, the same members and leaders of the village have been charged with dubious cases, people have been displaced and evicted, all of which are arbitrary acts done by officials of the government of Tanzania.

(vii) That, the decision to promulgate the Wildlife Conservation **(Pololeti Game Controlled Area) (Declaration) Order, 2022** was made **with ill motive** and collateral purposes in that it was stated that the promulgation of the area became the livestock had increased thereby destroying the ecosystem, a fact which is not true.

(viii) That, the decision tc promulgate the Wildlife Conservation **(Pololeti Game Controlled Area) (Declaration) Order, 2022** was made by the colorable exercise of power which was motivated by **entirely extraneous and collateral matters** not related to the exercise.

(ix) That, the decision to promulgate the Wildlife Conservation **(Pololeti Game Controlled Area) (Declaration) Order, 2022** was made against the **legitimate expectation** 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 managed to conserve the ecosystem which they have been doing all along.

(x) That, the decision to promulgate the Wildlife Conservation **(Pololeti Game Controlled Area) (Declaration) Order, 2022** was against the **doctrine of proportionality** in that the acts of the first respondent were, and are more drastic than is necessary for attaining the desired result, in that, the respondent could have the least restrictive alternatives.

They concluded in their statement that, therefore, the decision to promulgate the Wildlife Conservation **(Pololeti Game Controlled Area) (Declaration) Order,** 2022 is illegal, unreasonably made, founded on an irrational decision, which was based on procedural impropriety, made in breach of both, the rule of natural justice and the doctrine of legitimate expectation.

The application was supported by the affidavits of all the applicants and in the affidavits of each applicant it was deposed that, the area that has been declared by the "Order" includes Ololookwan, Oloishwashi, Enkobereti, Olalaa, Kipambi, Mbuken, Piyaya, and Malambo Village lands, all of which fall under the Promulgated and Gazetted by the 1st respondent area as Pololeti Game Controlled Area, 2022. It was also deposed that on 10th June 2022, the 1st respondent signed the **Wildlife Conservation (Pololeti Game Controlled Area) (Declaration) Order, 2022,** and published it in the Government Gazette on 17th June 2022 as GN. No. 421 of 2022 which declared the land covering 14 villages of a total size of 1502 square kilometers of Loliondo and Sale Divisions within Ngorongoro District in Arusha Region as a Game Controlled Area. Some of the villages in the declared area are Oloipiri Village which was registered vide certificates with

registration No. 7182, and Oloirien Magaiduru Village with Reg. No 1196 Ololosokwana with Reg. No 7262, Arash, with Reg. No. 7264, Oloipiri Village, with Reg. No 7182. All these villages were registered in the 1990s.

According to them, following that gazettation and consequential publication, the security personnel have forcefully and violently evicted thousands of residents from within the proclaimed area, and since 10th June 2022 when the demarcation exercise commenced, the community members have been harassed, intimidated, and attacked by Army, Police, and game warden/rangers deployed to enforce the implementation of the process. The deponents attached the video clips from BBC and Watetezi TV, containing the victims' testimonies and the video of the livestock killed by the deployed paramilitary.

It was also deposed that, the declaration of the area was done without consulting the residents and the person affected, as the political leaders who were supposed to lead the consultation exercise were arrested and charged with the case of murder in PI No. 11 of 2022 before Arusha Resident Magistrate's Court.

It was further deposed by the deponent that the declaration of the area as such has affected human settlements, village lands, pastureland,

community cultural and spiritual sites and displacement of communities. Also, it was done in disregarding the letter of the Prime Minister of the United Republic of Tanzania written to the first respondent directing him to abandon the idea of establishing the Game Controlled Area within the disputed land for the said land being a village land, as exhibited by annexure NL8 attached to the affidavit. Lastly, the matter at hand has been filed with the requisite leave of the High Court of Tanzania Arusha District Registry vide Misc. Civil Cause No. 09 of 2022 allows the applicants to apply for judicial review.

When the application was served to the respondent, they, through one Mkama Musalama, State Attorney from the office of Solicitor General, filed a notice of preliminary objection with one point that, the application is bad in law for contravening Rule 9(1) of the GN No. 324 of 2014 which imposes the mandatory duty to the applicant to serve the application to the respondent within seven days from the date of filing.

Although in the ruling of this court dated 15th day of May 2023 the objection was found to be meritorious, omission or non-compliance was cured by the principle of overriding objective, therefore the court ordered the matter to proceed on merits.

The joint counter affidavits filed by the respondents in opposition to the application were sworn by Emmanuel Daniel Pius Principal Officer from the office of the 1st respondent. The same were sworn countering all affidavits filed by each applicant in support of the application. The deponent deposed that, he was involved in the exercise of demarcation and erection of the beacons marking the "Paloleti Game Controlled Area" gave the background facts of the Conservation Ordinance, 1951, The Wildlife Conservation Act 1974 and the Wildlife Conservation Act, 2009. He deposed that the promulgation and consequential demarcation of the Paloleti Game Controlled Area was for conservation purposes and was a result of resizing of the Loliondo Game Controlled Area which existed since the year 1974.

He also deposed in paragraph 7 of each counter affidavit filed that, the said Pololeti Game Controlled Area which was Promulgated vide the **Wildlife Conversation (Pololeti Game Controlled Area) (Declaration) Order**, and gazette on 17th June 2022 as GN. No. 421 of 2022 was upgraded by the President of the United Republic of Tanzania vide GN. No. 604 of 2022 on 14th October 2022 and declared as a **Game Reserve**. He also deposed that those who were arrested around the area were arrested for committing Criminal Offences which included the murder of some government officials. He also said, the letter written by the Prime

Minister was never addressed to the 1st was addressed to the Regional Commissioner of Arusha and it never intended to restrict the 1st respondent to resize and rename the area. However, the directives contained therein were to assess and evaluate the viability of the Game Controlled Area. And that, it was following the assessment of the year 2022, when the 1st respondent altered the boundaries of the "Loliondo Game Controlled Area", leaving 2498 square kilometers out of 4,000 square kilometers for the use of the Community while 1502 out of 4,000 square kilometers were put to the control as the Paloleti Game Controlled Area.

Throughout the pendency of this application, parties were represented by learned counsels. The applicants were represented by a team of five lawyers under the stewardship of the learned Senior counsel Mr. Mpale Mpoki. Others were Joseph Moses L. Oleshangai, Jebra Kamboie, Jeremiah Mtobesya, and Yonas Masiaya, all learned Advocates. The respondents were also represented by a team of two State Attorney led by Mr. Peter J. Musetti, Principal State Attorney, and Miss. Jackline Kinyasi, State Attorney.

Hearing of this application was conducted by way of written submissions. Parties filed their respective submissions as ordered in support of the application. The counsel for the applicants started narrating the historical background of the law that governs conservation, particularly the

Game Controlled Areas in Tanganyika before independence under the **Fauna Conservation Ordinance, 1951**, and in Tanzania after independent under the **Wildlife Conservation Act**, 1974 and later the same law as re-enacted in 2009. They also submitted that the Loliondo Game Controlled Area declaration among the 49 Game Controlled Areas in Tanzania was later followed by the registration of the village land around that area.

Following the establishment of the villages, that land turned to be the village land and has been inhabited by the villagers who have been affected by the order declaring the land as a Game Controlled Area. According to them, the land has been used for residential, pastoral, and other livelihood human activities, and at one point in time an attempt was made to declare the land as a Game Controlled Area, but the Prime Minister vide his letter with reference No. PM/P/1/569/29 directed for the said exercise to stop because it would affect the welfare of the people living in those villages.

To prove that the area covers a number of villages they pointed out the four villages and their respective years of registration. Although they acknowledged the powers of the Minister of Natural Resources and Tourism under Section 61 (1) under the **Wildlife Conservation Act** [Cap 283 R.E. 2022] to declare any land as a Game Controlled Area they said, that once

the land has been registered as the village land under Section 16 (5) of the same law the Minister has no power to do so.

They reminded the court that **the Fauna Conservation Ordinance 1951**, and the repealed **Wildlife Conservation Act, of 1974** were allowing human activities in the Game Controlled Area, but the current **Wildlife Conservation Act,** 2009, now [Cap. 283 R.E 2022] does not mix human activities and wildlife, as sections 16(4) and (5) provide that, it is the Game Controlled Areas that will be discontinued in case of conflict between the village human settlement and Game Controlled Area, leaving the village land and human settlements. This means in their view, the Game Controlled Areas established within the village land should be discontinued from human activities. They also submitted that the law provides for twelve months for the Minister responsible for reviewing a list of the Game Controlled Areas they said 12 months within which to review the list lapsed in July 2010 without the Minister reviewing the said Game Controlled Areas, therefore reviewing the same in 2022 was illegal because it was beyond 12 months.

Further to that, they said, the villages were established long before the enactment of the **Wildlife Conservation Act, of 2009**, therefore after the lapse of time for review, the village must continue to exist. And that section 16(5) of the Wildlife Conservation Act, forbids the establishment or

Continuation of the Game Controlled Areas within the village land. That in their views, makes the entire exercise illegal.

The counsel also took the court through the position of the law, that is section 2(3) of the **Judicature and Applications of the Laws Act [Cap. 358 R.E 2019]** particularly the reception clause which allowed the court to apply the principle of common law, doctrine of equity, and statutes of general application which were in force in England in 1920. On issuing the order for certiorari they cited the case of **Chief Constable of North Wales Police vs Evans (1982) 1 WLR 1155,** on the underlying objective of issuing the order of certiorari. Also the case of **Minerva Mills Ltd vs Union of India (1980) 3 SCC 625 on page 677-678** on the importance of judicial review in the protection of the citizen from the abuse or misuse of powers by any branch of the state.

The case of **P. Shambamurthy vs Union of India (1987)1 SCC 124** which terms judicial review as a tool for fostering the rule of law and **Maneka Gandhi vs Union of India AIR, (1978) SC 597** on the powers of the Court to Control the abuse of powers in administrative actions.

Further expounding the governing principle, they said, courts have been using the traditional common law categorization of substantive and

procedural *ultra vires* in judicial review and cited the case of **Associated Provincial Pictures House Ltd vs Wednesbury Corporation (1948)1 KB 223** where the House of Lord came up with the principle of unreasonableness as one of the ground for Judicial Review. That the discretion in administrative action must be exercised reasonably.

According to the Counsel even where the court finds that in making the decision, the administrative body took onto account factors that ought not to have been taken into account or that it failed to take into account factors that ought to have been taken into account, or that the decision was unreasonable that no reasonable authority would consider imposing it.

According to them, that categorization was further refined in the case of **Council for Civil Service Union vs Minister of Civil Service** (1985) AC 374 in this the House of Lords put forth the grounds of *illegality*, *irrationality*, and *procedural impropriety* as the grounds to consider in judicial review.

They insisted on the importance of the administrative tribunal to observe the laid down procedure in decision-making and the principle of natural justice and proportionality as applied by the European Economic Community.

Further expounding on the grounds, they said in Tanzania, this Court, Moshi, J. in the decision of the case of **Lausa Alfan Salum and 106 Others vs Minister for Land and National Housing Corporation** (1992) TLR 233 held that, the action or decision is challengeable if ***first***, it is tainted with illegality, that the power exercised is *ultra vires* and contrary to law, ***second,*** if it is tainted with irrationality that the decision is defiance of logic or accepted moral standards, ***third,*** if the action or decision is tainted with procedural impropriety, that is failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the action or decision.

The counsel referred this court to the decision of the case of **RE- Bivac International SA (Bureau Veritas) 2005 2SA** 42 in which it was held that, judicial review stemmed from the doctrine of *ultra vires* or natural justice and has grown to become a legal tree with branches of illegality, irrationality, impropriety of procedure and has become the most powerful enforcer of constitutionalism, one of the greatest promoter of the rule of law and perhaps one of the most powerful tools against abuse of powers and Arbitrariness.

The counsel categorized the grounds upon which the order for judicial review is sought to be ***Illegality, Procedural impropriety, Irrationality, Malafide or ill motive, Legitimate expectation, Fettered discretion,*** and ***proportionality***. In their views, the impugned order suffers these seven defects, meriting the court's intervention.

Having laid that jurisprudential foundation, the counsel went to the specifics by referring this court to look at the three key legislations involved in this matter namely; the **Wildlife Conservation Act**, [Cap. 283 R.E 2022], the **Land Act** [Cap 113 R.E 2019], and the **Village Land Act** [Cap. 114 R.E 2019].

They cited the provision of section 4(4) of the Land Act, which categorizes Public Land as General Land, Village Land and Reserved Land. The emphasis for the purposes of this case, is on the reserved land which includes the land reserved, designated, or set aside, for certain use under the provision of section 6 of the Land Act, and section 7 of the Village Land Act over the village land which is the land declared to be the village land under and by the provision of section 4 of (Cap 114 R.E. 2019) which includes any land which initially was not village land but was transferred to a village

Land and has its boundaries have been demarcated as the village land under the law in force.

They said the impugned government notice was issued under section 16(1) of the **Wildlife Conservation Act**, [Cap 283 RE. 2022] which provides that subject to section 4(2) of the Land Act, the Minister may, after consultation with the relevant local authorities and by the Order in the Gazette, declare any area in Tanzania to be the Game Controlled Area. The counsel are of the view that the declaration will be legal only when it **first,** complies with section 4(2) of the Land Act, **second,** after consultation with the relevant Local Authority, and **third** after Gazettement.

Now what section 4(2) of the **Land Act** [Cap 113 R.E 2019] provides is that the President and every person to whom the President may delegate any of his function under the Land Act, and any person exercising powers under that Act, ***to at all times exercise those functions, powers and discharge duties as a trustee of all the land in Tanzania to advance the economic and social welfare of the citizens***. They are of the view that the economic and social welfare of the citizen is a mandatory requirement to consider failure which affects the decision or an act done.

They said, scanning the whole process in the case at hand, the counsel is of a strong view that, those criteria were not taken into account, as the land so declared was occupied by the 14 villages with thousands of people with homes and other social economic and cultural value which were not considered by the 1st respondent when he promulgated the Pololeti Game Controlled Area.

It is also their complaint that, there was no consultation with the relevant local authorities particularly the Village and District Council as during the time of demarcation, all political leaders who would have formed the consultation team were all arrested and detained, only to be released later, after a violent operation led by the 1st respondent. Last they said, the Gazettation was done without due consideration of section 4(2) of the Land Act, as in their view the economic social, and cultural interests of the villagers were mutilated by the 1st respondent.

In the urge to support their arguments they cited the case of **L. Hirday Nirain VITO (1970) 2 SCC 355** where it was held *inter alia* that, if the statute invests the public office with the authority to do an act in a specified manner, it is imperative upon him to exercise his authority in the manner specified even if the words used in the statute are **prima facie** enabling.

The court will readily infer the duty to exercise powers that are invested in the enforcement of such right. In their further view, where the official exercise the powers which he does not have, doing so turns the matter *ultra vires* and becomes void *ab initio* as held in the case of **London Country Council vs AG [1902] AC 165** and **Attorney General vs Fulham Corporation (1921) 1 Ch. 440**

Addressing the second limb of illegality in so far as the impugned order is concerned, the complaint is centered on violation of section 16(4) of the **Wildlife Conservation Act,** which required the Minister to within twelve months after coming into force of the said Act, and after consulting the relevant authorities, to review the list of game controlled areas for ascertainment the potentiality justifying continuation of control of any such area.

According to them, the **Wildlife Conservation Act** was assented to by the President on 12th March 2009, and gazetted and came into force on 31st March 2009. The anticipated twelve months expired on the 31st day of March 2010. Therefore, non-review of the list extincted the Loliondo Game Controlled Area. They said the respondent wrongly avers that the defunct Loliondo Game Controlled Area continued to exist until 2022 with the

establishment of the impugned Order without saying how it ceased to exist as it was not repealed by the GN. No. 421 of 2022. In their further view, reading the intention of the legislature, **Loliondo Game Controlled Area** ceased to be as such within 12 months from the date of coming into force of the said **Wildlife Conservation Act**, for failure of the Minister to review the same to justify the need for continuous control. In their view, the cessation is not of Loliondo Game Controlled Area alone, but of all Game Controlled Areas established under the **Fauna Conservation Ordinance, 1951**, and the repealed **Wildlife Conservation Act** of 1974. In their counsel's view, they ceased to exist under section 16(4) of the inability of the Minister to review them to justify the need for continuous control "within 12 months" from the date of coming into operation of the **Wildlife Conservation Act**, [Cap 283 R.E 2022].

For that reason, they said, the act of the 1st respondent purporting to enact and declare the **Pololeti Game Controlled Area** which makes no mention of and did not purport to repeal the defunct **Loliondo Game Controlled Area** as the same is non-existent since the year 2010. One of the evidence given to justify this argument is the continuation of the existence and residing in Loliondo of all residents after the enactment of the

Wildlife Conservation Act, [Cap 283 R.E 2022]. This brings an impression that the problem is not in the law but is of the 1st respondent, they said. According to them, from 01st July 2010 Loliondo was neither a general land nor a reserved land, but the village land under the Village Land Act.

That took them to the 3rd limb of the ground of illegality under section 16(5) of the Wildlife Conservation Act, the Minister ensured that no land falling under the village land is included in the game-controlled areas. There is the limitation of powers of the Minister under subsection (5) therefore the whole land is under GN. No. 421 of 2022 is a village land, therefore the 1st respondent acted in excess of powers as he declared the village land to be the Game Controlled Area, a power which he did not have. In support of these arguments, they cited and relied on the decision of the case of **Olam (T) Limited vs Leornard Magesa and Others,** Misc. Civil Cause No. 06 of 2019 HC-(Unreported) Mwanza Registry, which relied on and quoted with approval the decision of the case of **Sinai Murumbe and Another vs Muhere Chacha**, (1990) TLR 54 in which this court pointed out a number of grounds for the order of certiorari to issue, amongst those grounds is where the decision is tainted with procedural impropriety.

While concluding on the ground of illegality they asked the court to find that, the Minister acted without jurisdiction or in excess of it when under GN. No. 421 of 2022 declared the land occupied by 14 villages without considering the interests of the villagers including the applicants herein, as required by section 4(2) of the Land Act and without consulting either the local authorities or impacted citizens.

In the reply submission filed by Mr. Peter J. Musetti, Learned Principal State Attorney from the office of Solicitor General, started by first acknowledging that on 17th June 2022, vide the Government Notice No. 421 of 2022 the 1st respondent declared 1502 square Kilometers of Loliondo and sale Division in Ngorongoro District as Pololeti Game Controlled Area. According to him, the declaration was a result of a higher increase in the human population in the Loliondo Game Controlled Area which exerted pressure on the ecosystem due to human activities such as livestock grazing, agriculture, and settlement. That, according to him, created resource use competition affecting the habitats and ecology of the area with a detrimental impact on the wildlife breeding sites, migratory route and Masai Mara ecosystem.

He also agreed that, after independence in 1961 the Loliondo Game Controlled Area which was established in 1951 under the **Fauna and Flora Conservation Ordinance** in the 7th Schedule item 94 was enhanced and later recognized by the **Wildlife Conservation Act** No. 12 of 1974 through **Government Notice No. 269 of 08th November 1974** and the **Wild Conservation Act**, No. 05 of 2009. He said during the villagization period in 1974 -1976, the government reasonably and based on its good record of the rule of law and in consideration of Human Rights, decided to organize 9 villages within about 2,500 square kilometers or so, of the Loliondo Game Controlled Area for Pastoralist and that, despite that encroachment, the Loliondo Game Controlled Area has all along remained a protected area for conservation.

He further submitted that the base for the government's decision to settle the pastoralists in 2498 out of 4000 square kilometers of Loliondo Area, while setting the remaining 1502 square kilometers as the Game Protected Area, and a discussion not to expand beyond the set area was ongoing for thirty years now. However, the pastoralists have recently been seen to further extend grazing of livestock in the remaining 1502 square Kilometers reserved for wildlife breeding, source of water, and to enhance wildebeest

migration. He said the human activities in the protected area has a detrimental impact on breeding sites and migratory route. The demarcation intends to limit the human population to the already allocated 2498 square kilometers and leave 1502 square kilometers for conservation purposes, he said.

He further submitted informing the court of the importance of the Loliondo Game Controlled Area as part of the Great Serengeti - Masai Mara Ecosystem, as the feeding and calving ground as well as the major source of water for the Serengeti National Park. In his view, any intensive human development in the area will adversely affect the ecosystem and conservation generally.

He stated that, the area has no human settlement and physical or social infrastructure therefore no eviction took place in the area. Further that, the area with such villages has never been touched, it is still there with 2498 square kilometers left for villages and community use.

He however before going further updated this court on the state of affairs of the disputed areas, that the said Pololeti Game Controlled Area has been upgraded and declared as the Pololeti Game Reserve by the President of the United Republic of Tanzania through the Government Notice No. 604

of 2022 dated 14th October 2022 as indicated in paragraph 7 of the respondents Counter affidavit. In his view, if granted, then the order sought will be granted on a non-existing or rather dead Government Notice.

Replying to the submission in chief, the learned Principal State Attorney submitted that courts are guided by law, rules, and settled principles rather than mere feelings and opinions. He said for a person to apply for judicial review he must at least meet the following minimum criteria, namely, (a) Illegality, which entails failure to follow the law and lack of jurisdiction, (b) procedural impropriety and irregularity, which entails among others failure to observe the principle of natural justice and failure to act with procedural fairness, (c) irrationality; which entails making a decision which is outrageous and in its defiance of logic or accepted moral standards that no reasonable person who had applied his mind to it could have made such decision, (d) Proportionality: that the means employed by the decision maker are more than is reasonably necessary to archive his or her legitimate aim and not the one intended by law.

He also reminded the court that, in judicial review proceedings, a judge reviews the lawfulness of a decision or action made by the public body or authority, it is not concerned with the conclusion of the process and whether

those were **right** or **wrong** as long as the rightful procedure has been followed. The court will not substitute what it thinks to be a correct decision. It must confine itself to the question of legality.

In his view, the court has to consider whether a decision-making authority exceeded its powers, violated rules of natural justice, reached a decision that no reasonable man would have reached, or otherwise abused its powers. He also cited the case of **Sanai Murumbe & Another vs Muhere Chacha** (supra) in which it was held *inter alia* that, the High Court is entitled to investigate the proceedings of lower courts or tribunals or public authorities on any of the following grounds apparent on the record, i) Taking into account matters which it ought not to have taken into account, ii) Not taking into account matters which it ought to have taken into account, iii) Lack or excess of jurisdiction, iv) Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it, v) Rules of natural justice have been violated, iv) Illegality of procedure or decision. He thus invited this court to be guided by the principle in the case of **Sanai Murumbe** (supra)

Regarding the ground of illegality particularly the allegation that the Village land cannot be promulgated as a Game Controlled area or, to put it

another way round, that the Minister has no power under section 16(5) of the Wildlife Conservation Act to promulgate the village land as the Game Controlled Area. He submitted that, section 16(1) of the Wildlife Conservation Act empowers the Minister to promulgate **any land as the Game Protected** Area, the only condition is that he must consult the local authorities, which in his view he did. He prayed that, the application be dismissed.

In resolving the first limb of illegality, I find it important to point out that, the powers of the Minister to establish the Game Controlled area are provided under section 16(1) of the Wildlife Conservation Act, and for purposes of clarity, I find it appealing to reproduce the said provision as hereunder:

> *"**16.**-(1) Subject to section 4(2) of the Land Act, the Minister may, after consultation with the relevant local authorities, and by order in the Gazette, declare **any area of land in Tanzania to be a game controlled area.**"* [Emphasis added].

Reading between lines the provision cited herein above, I find the law to be empowering the Minister responsible for Natural Resources and Tourism to establish the Game Controlled Area to have been conditioned

with three main requirements, **one,** He must do so subject to section 4(2) of the Land Act, which requires the Minister to take into account the economic and social welfare of the citizens, **two**, must do so after consultation with the relevant local authorities, **three**, must be by the order published in the gazette.

Looking at the wording of the provision, it goes without saying that, the law empowers the Minister after meeting the conditions stipulated herein also have to *declare* ***any area of land in Tanzania to be a game-controlled area***.

However, the only limitation is under section 16(5) of the same law which provides that;

> *"(5) For subsection (4), the Minister shall* ***ensure that no land falling under the village land is included in the game-controlled areas****." [Emphasis added]*

This means one of the conditions embedded in the exercise of powers by the Minister is that he should ensure that the land falling under the village land is not included in the Game Controlled Areas. Now the issue is whether the Pololeti Game Controlled Area included the village land. While the applicants alleged the same to include the village land, the respondent

disputed the same to have included the village land, the land so promulgated was not the village land but was part of the Loliondo Game Controlled Area, and the promulgation was the result of the government decision to resize the said Game Controlled Area by letting a total of 1502 square kilometers under the continuous control, while leaving 2498 square kilometers for community use.

In their further insistence that the area was a village land, the applicant attached to the affidavits filed by the applicants in support of the application, some documents proving that, the area had registered villages and therefore, the land so declared was a village land.

The issue will not detain me much, as earlier pointed out there are villages established in that area some of which with registration certificates, for instance, Oloipiri Village which was registered vide certificates with Reg. No. 7182, Oloirien Magaiduru village with Reg. No. Ololosokwana Village, Reg. No 7262, Arash Village with Reg. No. 7264, and Oloipiri Village, with Reg. No 7182 most of these villages were registered in the 1990s.

The counsel for the respondents disputed the allegations that, there were villages in the area declared to be Paloleti Game Controlled Areas. He told the Court that, the 1st respondent did not demarcate the village land as alleged. As Loliondo Game Controlled Area was established under the Fauna

Conservation Ordinance, 1951 and existed throughout, the Wildlife Conservation Act, 1974 and the Wildlife Conservation Act, 2009 continued to exist through the new Act as established under the Wildlife Conservation **(Game Controlled Areas) Order,** of 1974 GN. No. 269 of 1974 with the land size measured 4000 square kilometers; therefore the **Wildlife Conservation (Pololeti Game Controlled Area) (Declaration) Order,** 2022, GN. No. 421 of 2022 for purposes made for renaming and resizing the Loliondo Game Controlled Area, declaring 1502 as the Pololeti Game Controlled Area, while leaving 2498 Square kilometers for community use other than conservation activities was correct. Therefore, alleging that the Minister has demarcated the village land is purely misleading.

Based on the submission by both parties and the affidavits and statements in support of the application the question for determination is whether the said disputed land was a village land or a game-controlled area.

On this, there is no dispute that the Minister responsible for Natural Resources and Tourism vide GN. No. 269 of 1974 declared and promulgated 4000 square kilometers of land by then of the area called Masai District (now Ngorongoro District) in Arusha Region and named it as Loliondo Game Controlled Areas. That area was established along with other 48 Game

Controlled Areas to make a total of 49 Game Controlled Areas established by the said GN. No. 269 of 1974.

The said Government notice existed and had been amended vide a number of Government Notices the latest one made before the enactment of the Wildlife Conservation Act 2009, being GN. No. 459 of 1997. Even after the enactment of the Wildlife Conservation Act, of 2009, now [Cap 283 R.E 2022] the said Game Controlled area continued to exist. Therefore, among the subsidiary legislation that the Wildlife Conservation Act Continued to recognize is GN. No. 269 of 1974. This means that the Loliondo Game Controlled area continued to exist.

Both parties are in agreement that under the Conservation Ordinance 1951 and the Wildlife Conservation Act 1975 there was no restriction on human activities in the Game Controlled Area, but with the enactment of the Wildlife Conservation Act, of 2009, human activities were restricted in the Game Controlled Areas. Parties are also in agreement that, when human activities were allowed in the Game Controlled Areas, some villages were established as proved by the applicants and conceded by the respondents by the evidence contained on pages 17 and 18 of the document titled **"Taarifa ya Kamati Shirikishi ya Mapendekezo ya Utatuzi wa**

Mgogoro wa Matumizi ya Ardhi ya Pori Tengefu Loliondo" attached to the counter affidavit filed by the respondents. That proves that villages were established in the Game Controlled Areas and continued to exist.

The evidence as can be noted from the state of affairs proves that in Loliondo Game Controlled Area, the rectification put by the Wildlife Conservation Act, of 2009, did not change anything for the whole 4000 square kilometers styled as the situation remained as before in respect of Loliondo Game Controlled Area. Therefore, the above discussion leads to the conclusion that there is enough evidence to prove that there were villages established in the area promulgated as the **Pololeti Game Controlled Area** and these villages co-existed with the Loliondo Game Controlled Area established by GN. No. 269 of 1974.

Now the question for determination is where these two existed together, whether we can say confidentially that, was a village land in the meaning of section 7 of the Village Land Act? or a controlled Area as defined by the Wildlife Conservation Act? I ask such a question because the establishment of the villages in the Loliondo Game Controlled Area did not repeal the Government Notice No. 269 of 1974 which established the Loliondo Game Controlled Area over the area. Instead, villages were

established along with the Loliondo Game Controlled Area. Therefore, the establishment of the village did not extinguish the Loliondo Game Controlled Area. The applicants argue that section 16(5) of the Wildlife Conservation Act, 2009 provides that the Minister shall ensure that, no land falling under the village land is included in the game-controlled areas.

This means where the Minister wants to establish the new Game Controlled area or he should not include the land belonging to the village established and registered under the law. Now, the question here is what came first between Loliondo Game Controlled Area and the Villages established in that area, the answer to this is straightforward, Loliondo Game Controlled Area preceded the establishment of the villages, therefore since the original idea was for the two to co-exist, we cannot say that the establishment of the villages extinguished the Loliondo Game Controlled Area turning the land in question exclusively to be the village land.

That said, I find in the case at hand the said land was both the Game Controlled Arred with villages established in it. As it is the Loliondo Game Controlled Area which existed first vide GN. No. 269 of 1974 while most of the villages were established in the 1990's. This ground therefore fails for the reason stipulated above.

Moreover, in the urge to prove that the land was only the village land and not Loliondo Game Controlled Area was not in existence, the applicants argued that the said Loliondo Game Controlled Area ceased to exist twelve months after the enactment of the Wildlife Conservation Act, 2009 as provided by section 16(4) which provides that;

> *"16(4) The Minister shall,* ***within twelve months after coming into operation of this Act*** *and after consultation with the relevant authorities, review the list of game-controlled areas for purposes of ascertaining potentiality justifying the continuation of control of any of such area."*

The counsel also argued that failure by the Minister, to review the list of the Game Controlled Area within twelve months after coming into operation of this Act, and after consultation with the relevant authorities, for purposes of ascertaining the potentiality justifying continuation of control of any of such area rendered the cessation of the said Game Controlled Area.

On the other hand, the respondents submit that the argument was misplaced because section 16 (4) does not state that, any Game Controlled area will automatically cease to exist for failure of the Minister to review the same within 12 months, as in law, the Game Controlled Area ceases to exist when it is revoked by the Minister through a Government notice in a

government gazette. He backed that contention by referring to section 36(4) of the **Interpretation of the Laws Act**, [Cap 1 R.E 2019] which empowers the person who makes subsidiary legislation to be the only one to amend, revoke or repeal it.

He gave an instance of Government Notice No. 427 of 2020 published on 05th June 2020 which revoked 13 Game Controlled Areas to substantiate the argument that Game Controlled Areas are revoked, they do not die because Ministers failed to review them. He also further submitted that the other way for a Game Controlled Area to cease to exist is after being upgraded to become the Game Reserve, by the President under section 14 of the Wildlife Conservation Act.

He said while concluding on this point that, Loliondo Game Controlled Area continued to exist, and the promulgation of Pololeti Game Controlled Area, was renaming and resizing the said controlled area to leave the substantive portion of 2498 square Kilometers land for community use while 1502 Square Kilometers land was promulgated and renamed as Pololeti Game Controlled Area. In his view, the 1st respondent followed the procedures in declaring the Game Controlled Area in the impugned Order.

In resolving this issue, reading between the lines the provision of section 16(4) of the Wildlife Conservation Act, 2009, it is true that, the

Minister was mandated to review a list of the Game Controlled Area within 12 months from the coming into force of the Act, however, the law does not provide for the consequences if the Minister fails to review the list. It does not provide that, the said Game Controlled Area will automatically cease to exist, and become an uncontrolled areas.

Further to that, taking into account the importance of the conservation for the health of the national economy and environmental needs, definitely we find that it could not be the intention of the Parliament that, failure of the Minister would render all 49 Game Controlled Areas unprotected and un-conserved. That said I find no logical and legal support in the argument that failure to review the list revoked the Government Notice No. 269 of 1974 which established all 49 Game Controlled Areas including the Loliondo Game Controlled Area. That led to the conclusion that the Loliondo Game Controlled Area continued to exist covering the whole 4,000 square kilometers but co-existed with human settlement and activities, those human beings organized in their villages established under the law.

There is also enough evidence to prove that, there has been a continuous discussion on land use, and on a number of occasions the government authorities have been debating on the need to delimit the human activities over the area, which can be seen in the evidence presented

by both parties, one being, the directive given by the Prime Minister to the Regional Commissioner of Arusha regarding the intention to resize and reduce the Loliondo Game Controlled Area as presented by the Applicants. That letter informed the addressee of the actions that were being taken by the government which included the identification of the infrastructures in the area recommended to remain under control. This being the evidence presented by the applicants themselves, they cannot again be heard saying that they do not recognize the existence of the Game Controlled Area on the said land.

The other evidence is the report annexed by the respondents to the counter affidavits filed in opposition to the application showing that the Prime Minister established the Committee to carry out the directives by the Premier in the letter dated 30 May 2013, and the findings of that Committee which was led by the Regional Commissioners that there was no infrastructures on the area proposed to remain under the control. That Committee and the discussion involved not only the government personnel and officials but the representatives of the community like the Ward Councilors and members from Community groups. Therefore, since these two co-existed, there is no way the village can be taken to outlaw the Game Controlled Area. It is instructive to conclude that, the Loliondo Game Controlled Area continued to

exist, the establishment of the Paloleti Game Controlled Area was a resizing of the same, it was the establishing a new controlled area within the meaning of the law. This ground fails for the reason given above.

The next ground is the failure of the 1st respondent to consult relevant local authorities before declaring the land as a Game Controlled Area as required by section 16(1) of the Wildlife Conservation Act. In the applicant's view, consultation with the local authorities by the 1st respondent before taking any action relating to declaring any land as a Game Controlled Area is necessary. They went further and said consultation means a dialogue or conference geared to the meeting of the mind of two or more persons by exchange of view on the issue for which the consultation is conducted.

In their further view, consultation must be meaningful, and detailed and the result of it must be made available for scrutiny by the court. They said in this case, consultation was very important because the decision made by the Minister was affecting the peoples' homes and grazing areas, as Game Controlled Areas impose significant costs on the community that lives or depends on such land for survival. They submitted that, in establishing and declaring the Pololeti Game Controlled Area vide GN. No. 421 of 2022 not only that there was no meaningful consultation conducted but also no any

sort of consultation either to the local authorities or impacted community members, including the applicants was conducted by the 1st respondent as required by law. Speaking on the importance of consultation, they referred this court to **the Judicial Committee of the Privy Council in the case of the Mayor and Corporation of Port Louis vs. The Honourable Attorney General (1964) AC** in which it was held that, where there is a proposal to alter the local community boundaries, the said local community must be consulted, by firstly being informed the proposed alteration and secondly, be allowed to give their free view on that proposition. The Privy counsel insisted that the consultation should not be treated perfunctorily or as a mere formality. The counsel urged the court to find that in executing the requirement of section 16(4) of the [CAP 283 R.E 2022], the authority must avoid indulging in the perfunctory public consultation meetings that are merely *an alibi* for a pre-determined political cause.

In their view, the 1st respondent has not shown in the pleading that there was consultation, and that, failure to show in the pleadings leads to the conclusion that there was no consultation conducted. They said when the consultation was to be conducted, the local leaders of the 14 impacted villages were arrested and incarcerated before the promulgation of the

impugned GN. No. 421 of 2022, before they were released after six months when the whole exercise was over. They supported this argument with annexures NL6, EL6, LL5, SL6, and ML6 which are copies of the charge sheets. They concluded this ground by urging the court to find that the promulgation of GN. No. 421 of 2022 dated 17th June 2022 was done without consultation as required by the law, they thus requested the court to invoke its judicial review powers and quash the decision by the 1st respondent.

The learned Principal State Attorney submitted that under section 16(1) of the Wildlife Conservation Act, the Minister has powers to declare any area of land in Tanzania to be a Game Controlled Area, under one condition, that he should do so after consultation with the relevant local authorities. According to him, the counter affidavits filed by the respondents categorically stated that, the consultation was made not only to the public authorities but also to the Non-Governmental Organizations, the villagers, and community groups. He said they were all involved in obtaining the approval before demarcating the Pololeti Game Controlled Area established by GN. No. 421 of 2022. To prove that, the respondent attached the report titled "**Taarifa ya Kamati Shirikishi**" showing that, the 1st respondent acted within his powers "intra vires" and followed the procedure stipulated

by law which is consultation under section 16(1) of the Wildlife Conservation Act. By consultation, the principle of natural justice was observed. To support his argument the PSA cited the case of **Ally Linus & Others vs THA and Another** [1998] TLR CAT 9, 10 in which it was held that certiorari lies where there is an absence or lack of jurisdiction, error of law on the face of the record, or the breach of natural justice. In his view, the minister has not committed any error regarding these principles in establishing the Pololeti Game Controlled Area vide GN. No. 421 of 2022. In resolving this issue, I should start that, from the dictate of the law giving powers to the Minister, consultation is an important step in establishing the Game Controlled Area. That consultation should be made to the entities mentioned by law, and if the Minister finds it prudent to add other persons to consult, then those will be additional but the law puts it primarily that the persons or entities to be consulted are the "**relevant local authorities**". Unfortunately, the law has not defined the term "relevant local authorities" and has not provided how that consultation should be conducted. Although the term used is the local authorities, I believe that the law meant the "local government authorities". To understand what the local government authorities are, we need to go to the Interpretation of the Laws Act, [Cap 1 R.E 2019] which under section 4 defines the local government authorities to mean:- (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 (b) An Urban Ward, a Mtaa, a Town Council, a Municipal Council or City Council established under the Local Government (Urban Authorities) Act.

That means the local authorities to be consulted in establishing the Game Controlled Area are the Ward, Villages, and District Council. In the case at hand the relevant local authorities which were to be consulted are the village authorities of the impacted villages, the Ward leaders of the impacted wards, and the Ngorongoro District Council. As I have already pointed out the manner in which the consultation should be conducted has not been provided by the law. What is important is whether these local authorities were consulted regardless, of how they were consulted.

That being the position of the law, the issue is whether the relevant local authorities in this case were consulted. As earlier pointed out the applicants say that the local authorities were not consulted while the respondent said they were and the evidence proving that has been said to be a document titled "**Taarifa ya Kamati Shirikishi.**" Attached to the counter affidavits. That document is a report of the Committee established by the Prime Minister. It was charted by the Regional Commissioner and

drew members as follows; The members of that committee were 41 of which 11 were Ward Councilors from the impacted ward, one member Samwel Nangiria, was a community representative, two members from the District Council styled to be from the office of DED. The secretariat had 15 persons, 5 persons from the local authorities, and members of the local community. Moreover, having studied the document, I am firmly in agreement with what has been said by the counsel for the applicants that, this does not seem to be a consultation within the meaning of the law. I hold so because the same does not seem to involve in any way, the Minister responsible for Natural Resources and Tourism who was to carry that mandate of consultation under section 16 (1) of [Cap 283 R.E. 2022] Although the same seems to be dealing with the same area, and the same people, but the motion which resulted into this report was initiated by the Prime Minister, who constituted the committee and gave it terms of reference. **That committee was not for consultation purposes but to settle the dispute in land use**. It was led by the Regional Commissioner and there was no mention showing that in so doing the Hon. Prime Minister stepped into the shoes of the Minister responsible and did so while in compliance with section 16(1) of the Wildlife Conservation Act.

Since there is no other evidence showing that the Minister consulted the relevant local authorities, then it is instructive to find that the Minister did not consult as required by the law, i.e. section 16(1) of the Wildlife Conservation Act. [Cap. 283 R.E 2022]. This ground therefore succeeds.

The other ground that the court called upon to look at, is irrationality and unreasonableness. They said the decision made by the 1st respondent is irrational and unreasonable, as an action of any administrative authority is regarded to be rational and reasonable if it directs itself properly in law, considers the matter which it is bound to consider, excludes irrelevant consideration, and there must not be anything so absurd that no sensible man could have ever dream that it lay within the powers of the authority. To support that contention, they cited the case of **Lausa Alfan Salum and 116 others vs The Minister for Lands Housing and Urban Development and National Housing Corporation** (supra). They also relied on the case of **Associated Provincial Picture House vs Wednesbury** (1948) KB 223 where the court developed the test of irrationality which later came to be known as the **"Wednesbury test"** to determine the **"irrationality"** of an administrative action. It is the principle in that authority that, the decision of administrative authority shall be

considered irrational if, *i) it is without the authority of the law, ii) based on no evidence, iii) based on irrelevant and extraneous consideration, iv) it is outrageous in its defiance to logic or accepted norms of moral standards that no sensible person on the given facts and circumstances, could arrive at such a decision, v) It is so unreasonable that it may be described as done in bad faith.* They also cited the authority in the case of **Kruse vs. Johnson (1898)2 QB 91** on the test of irrationality that the court with jurisdiction should consider in issuing the writ of certiorari.

In their view, the magnitude of the substantial impact to the residents of all 14 villages occupying the land which was promulgated as Pololeti Game Controlled Area by the 1st respondent is untold compared to an improper purpose asserted by him. They said the livelihood of these people, their traditional & cultural beliefs, rituals/beliefs, settlement, traditional medicinal, and water for human and livestock use were seriously affected because as indigenous people, their lifestyle depends on their land for survival. According to them, these people have been intimidated, harassed, shot with fire bullets, and badly injured/wounded, and consequently, they are forced to flee to the neighbouring country of Kenya as refugee*s* and for treatment.

In their view, these would have been avoided if the 1st respondent would have acted rationally.

As to the point of unreasonableness, they submitted that the decision of the 1st respondent is unreasonable as no sensible person would make such a killing and life-depriving decision to the society of 14 villages which solely depend on that subject for survival. They insisted that the decision was irrational and unreasonable, and consequently asked for the court to quash it and declare it illegal.

Replying to the third ground which raises the complaint that the 1st respondent acted irrationality by taking the land which has been occupied and used for sustainable activities of the inhabitants used as homes, pastoralist, cultural, and spiritual sites. Mr. Musseti, Principal State Attorney said, that GN No. 421 of 2022 was not made irrationally, therefore, the applicants are misleading the Court in alleging that the said decision was made on the ground of irrationality. While agreeing with the authorities in the case of **Associated Provincial Picture Houses Ltd vs Wednesbury Corp** (supra) where the House of Lords held that the court should interfere with a decision that was so unreasonable, he said, irrationality as a ground of judicial review, applies to the decision which is outrageous in its defiance

of logic or is of unacceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such decision. He invited the court to take a look at what prompted the Minister to promulgate GN. No. 421 of 2022 by referring this court to pages 2, 3, and 4 of the respondent's Counter affidavits. The only area that was promulgated as the Game Controlled Area covers only 1502 out of 4,000 square kilometers, the aim being to protect the ecosystem while leaving 2498 for human use and Community development. He posed the question of whether this was an outrageous decision. He said the claim seemingly is a land dispute that can be resolved by a land court after visiting the *locus in quo*.

Submitting in support of the argument that the purpose for which a decision is made is important and all matters the Principal State Attorney cited the authority in the case of **R. vs. The Ministry of Defence exparte Smith [1996] ALL ER 256 [1996] QB 517** where the decision to discharge individuals from the army on the ground that they are homosexuals and that their presence would have substantial and negative effect on the operational effectiveness of the armed forces, was affirmed by the Court of Appeal as a valid decision of the government and developed the

principle of anxious scrutiny, even though the decision was discriminatory and therefore against human right, the court proceeded to indicate that the decision was valid and reasonable.

He said the applicant submitted at length that there was harassment, shooting, and injuries, which are the issues of human rights. He said the ground of irrationality does not involve issues of human rights and that the issues of human rights should be left to the Human Rights Commission or Human Rights Court. This court should confine itself to the issue of whether the decision to allocate 1502 square kilometers for conservation and 2498 for community use is outrageous to warrant this court to quash the said decision. In his view the decision was reasonable and rational, it also followed the procedure laid down by law. He asked the court to find that the ground failed for want of merits.

In resolving this ground, I entirely agree that irrationality is one of the grounds upon which the judicial review can generally lie and certiorari can issue. I am also at one with the counsel for both sides that, for irrationality to stand the "**Wednesbury test**" established to determine the **"irrationality"** of an administrative action must be proved. These are that; the decision of the administrative authority is made i) "*without the authority*

of the law, ii) based on no evidence, iii) based on irrelevant and extraneous consideration, iv) it is outrageous in its defiance to logic or accepted norms of moral standards that no sensible person on the given facts and circumstances, could arrive at such a decision, v) It is so unreasonable that it may be described as done in bade faith".

I have considered the historical background of the matter tracing from the establishment of the Loliondo Game Controlled Area, and the government policy allowing human activities to co-exist with the Game Controlled Area. I have also revisited the reasons that prompted the 1st respondent to promulgate the Pololeti Game Controlled Area vide GN. No. 421 of 2022, which is mainly the conservation purposes. I find no irrationality or unreasonableness in the reasons given. I hold so because, the evidence tendered by the respondent, particularly the report by the committee established by the Prime Minister, looking at the findings of the Committee after the research and the consultative deliberations done, which involved a vast number of stakeholders coming from almost every sector. Looking at the discussion in the report and the findings reached, it cannot be said that, the 1st respondent acted without authority of the law, it cannot be said that he acted without evidence justifying what he did. It cannot also be said that

he based on irrelevant and extraneous consideration or that his decision is outrageous in its defiance of logic or unaccepted norms of moral standards that no sensible person on the given facts and circumstances, could arrive at such a decision. Last, it cannot be said that the decision is so unreasonable which can described to have been in bad faith.

That said I find the ground of irrationality and unreasonableness to have failed, it therefore suffers dismissal.

On the grounds of *malafide* or bad faith, the counsel for the applicant argued that the decision was made malafidely rendering of imperfect performance, abuse of power, and done without honest intention with or without failure to render imperfect performance, abuse of a power to testify terms, and interference with or failure to cooperate in the other party's performance. They said, public authorities are required to act according to law, fair play, justice and equity and should try to avoid doubts about their decisions. They cited the case of **Mahesh Chandra vs. UP Financial Corporation,** AIR (1993) SC 935 in which the Supreme Court of Pakistan defined *malafide* as an action based on dishonest intention, ulterior motives, or personal will. In their view, the evidence of *malafide* includes public utterances of the authorities, statements in the pleadings or affidavits filed

by the authority, failure to file an affidavit denying the allegations, and colorable exercise of powers. To substantiate that, they said in the case at hand there was a series of utterances or events before and after the promulgation of Pololeti Game Controlled Area which all led to proof of *mala fide*. Giving examples of these actions, they mentioned the deployment of paramilitary task forces comprising the army, police, and game wardens in various parts of the villages, to intimidate, harass and arrest the community members of the area. They referred this court to the video named ASKARI WAMFANYIA HAYA WAZIRI MKUU SHOWING THE DEMONSTRATION BEFORE THE PRIME MINISTER. The other allegedly evidence is the media briefing statement issued by the Regional Commissioner for Arusha John Mongela explaining the government's plan to demarcate the impugned Game Controlled Area including the applicant's villages and applauding the Chief of Defence Forces (CDF) for allowing soldiers to participate in the military operation for Loliondo. They referred to the video titled "TAZAMA ALOCHOFANYA RC ARUSHA KWA JENERALI MABEYO MONDULI WAKATI WAKIAGANA", as reported by Gadi online TV.

The other evidence relied on by the applicants was that the GN. No 421 of 2022 was promulgated a week after the arrest of all political

representatives of all the impacted villages including the Ward Councilor who would have participated in the consultation process, and the said fact has been admitted by the respondents in paragraph 17 of their joint counter affidavit. They referred to the evidence in the video clip titled "WANAODAI KUUMIZWA LOLIONDO WAENDELEA KUPATA MATIBABU KENYA" reported by Watetezi online TV, also another video clip titled "**Majeruhi wa Loliondo Tanzania Walia na usalama wao**", reported by BBC.

The other evidence of *malafide* was said to be the contradictions in the respondent's counter-affidavits, where in paragraph 6 they seemingly disputed to have annexed the village land, while in paragraph 8 they said the proclamation was due to the increase of human population which exerted pressure on the ecosystem, which according to them raises the question if the said annexed land is outside the village land how population pressure affected it?. And that there is no evidential proof to support the respondent's assertion.

In their view, combining all these factors, the Applicant's counsel urged the court to find that the respondents were motivated by improper motives in promulgating the Pololeti Game Controlled Area from the village land. They cited the case of **Shafiullah vs. Government of Pakistan,**

PLD 2002 PHC 50 in which it was held that a thing required to be done in a particular manner must be done accordingly or not done at all. Doing something that conflicts with that requirement is not only unlawful but Malafide.

They said that the 1st respondent considered irrelevant factors that the said defunct Loliondo Game Controlled Area continued to exist and it was under it to resize it while leaving out the relevant factors of the affected community, their livelihood, and all other affected areas of their life particularly on the basic needs. In their view, the court has to set aside the decision if relevant factors are not considered and irrelevant factors are considered and their consideration has substantially affected the outcome. On that, they relied on the case of **R. vs Secretary of State for Social Services EX P Wellcome Foundation Ltd (1987) 2 All ER 1025.** Also see, **Sanai Murumbe & Another vs Muhere Chacha** (1990) T.L.R No. 54.

Submitting in reply to the fourth ground of malafide, the learned Principal State Attorney argued that the factors considered are relevant, he mentioned those factors to be that, the area is to be used for conservation as the water catchment area and as a breeding area for an animal of

Serengeti National Park. Regarding the evidence that there was utterance as contained in the video attached to the affidavit, he said having gone through the evidence in the video clips, he reminded this court that, the courts in judicial review do not decide what is wrong and or what is right but rather whether due process of the law has been observed. In the cited case of **Sanai Murumbe** (supra), it was held that the court is entitled to investigate the action or decision of the lower court administrative tribunal or public authority on the errors apparent on the record, not the one that requires the court to draw a long-drawn conclusion as it transpires in the instant case. Thus, making this court to seat as the appellate court.

In his view requiring the court to sit and watch a number of videos to establish the connection between those videos and the Ministers' acts of declaring the Paloleti as the Game Controlled Area, goes against the dictates of the principles governing judicial review. To cement that position, he cited the case of **Hausa Alfan Salum and 116 Others vs Minister for Lands Housing and Urban Development and National Housing Corporation** [1992] TLR 293, where it was held that;

> *"...judicial review is all about the procedural irregularities and improprieties, any invitation that would lead this Court to*

determine the sufficiency/credibility or otherwise of the evidence before the tribunal is a serious misconception."

He said the video does not connect the contents with the promulgation of the GN. No. 421 of 2022. That shows and proves that there is no improper motive established, and had the promulgation of GN. No. 421 of 2022 had been made with improper motive or malafide then the consultation would not have been adhered to but to the contrary and other authorities were invited to air out their opinion before the GN. No. 421 of 2022 was made. He said GN. No 421 of 2022 does not discriminate against any group, it was promulgated to secure the 1502 square kilometers against the invasion and encroachment by the villagers. It was meant to secure and protect the ecosystem of the area and it was not made against any particular person, while 2498 square kilometers were all left to the village communities and the villagers who reside in the area.

In resolving this ground, I should start with a general understanding of the nature of *malafide* as a ground of judicial review. *Malafide* is by nature a state of mind, which may be ascertained through outward manifestation. The said manifestation must be the act directly done by the officer acting or public authority involved, or making the decisions and must be connected with the decision made. *Malafide* actions are often malicious and done with

intent to harm others, it is evident that, around that period when the promulgation was about to be done, there were some statements, made by government officials. That was proved by the video clips submitted by the applicants.

There was also arrest and some violence proved to be happening in the area. However, there is evidence that those who were arrested were charged with Criminal offences. The applicant has not directly connected the 1st respondent with what was happening and what was being said. It is the principle of law under section 110 of the **Evidence Act** Cap 6 R.E. 2022 that, he who alleges must prove. It was the duty of the applicants to prove that the information in the video clips and the happening was directly related to the matter at hand for them to be taken to be true that the promulgation was actuated by bad faith. There is also no evidence proving that the promulgation of the Paloleti Game Controlled Area was done maliciously and with the intent to harm others.

Without such evidence and taking into account the reasons for the decision made and the historical background of the matter, I find the respondent to have failed to prove *malafide* in this case. There is no direct connection that the pronouncement made by the Regional Commissioner

and the video shown directly or impliedly that whatever was done by the directive of the 1st respondent.

The other ground for judicial review, raised by the applicants is a legitimate expectation. In principle this is based on three folds, **one,** is that both the Fauna Conservation Ordinance and the Wildlife Conservation Act, of 1974 accommodated both the wildlife and human activities in the game-controlled areas. **Two,** that the applicant was living in the village land and the law i.e. section 16(3) of the Wildlife Conservation Act, categorically prohibit the village land from being included in the Game Controlled Area. The applicants expected that, the 1st respondent would respect the law and article 24 of the Constitution of the United Republic of Tanzania, 1977 on right to property. **Three,** at the time of demarcating of the disputed land the 1st respondent stated that there would be no citizen who would be going to be displaced from the said land, and what they were doing was to put the beacons to mark the area. However, contrary to that expectation, the 1st respondent using the armed personnel started harassing and intimidating the respondent forcing them to vacate. That in the applicant's view is contrary to the expectation of the applicant. Therefore, the court is called to

find that the order of certiorari is appropriate to quash the impugned order of the 1st respondent.

Responding to this issue, the learned PSA submitted that, on this ground, the applicants ought to prove that they have a certain right to the land and that right has been infringed and thus they are inviting this court for intervention. In his view apart from indicating that there used to exist villages, they have not indicated where they have been allocated to stay and conduct their lives as pastoralists.

In his view, they were supposed to prove that, they were lawful residents of the area inclusive of the proof that they were lawful owners of the land and that they should be protected by the court. He asked the court to note that not every expectation is considered legitimate in the eyes of the law.

In his further view, for the applicants to be entitled to legitimate expectation, the applicant had to prove the following; **Firstly**, it is essential that the expectations arise from an unambiguous promise, representation, or past practice made by a public authority. In his further view, the evidence presented by the applicant did not in any way show to what extent their expectation was valid. **Secondly**, the expectation should be reasonable. It

is not expected to be completely unrealistic, the fact that they said the GN. is bad and that it was made in bad faith something which they did not prove, cannot in his view be considered a legitimate expectation. **Thirdly**, the expectation should not override public interest or Public legal right that takes precedence over individual expectation. This is because courts will weigh the importance of the individual expectation against the broader societal interest and legal principles. He said the demarcation of 1502 square kilometers for conservation and leaving 2498 square kilometers for the use of the villagers has considered both, the public interest and the individual interest as it is in favour of the community surroundings the area, and the world at large. Therefore, in his view, the applicants' alleged expectation falls short of overriding the public interest of the Community and the World interest at large.

Finally, on that ground, courts have the authority to decide whether or not an expectation is legitimate, in his view the legitimate expectation in this matter has not been established.

On that, I entirely agree that legitimate expectation is one of the grounds for Judicial Review and that for the same to be established the applicant must have made it clear that, there is a law, conferring him some

right, or privileges on that there is a right which has been enjoyed by the applicants, and by all reasonable means they were expecting to continue enjoying that right. It should be noted that the matter at hand is not a representative suit, it is a suit in persona, as well articulated by the counsel for the respondents they were supposed to show that, they personally had the right over the land promulgated as the Paloleti Game Controlled Area. Concerning the applicants, that has not been shown, therefore without establishment that they owned pieces of land on the disputed area, or that they were personally using the land by whatever style, their legitimate expectations remain unproven. The existence of knowledge that the area in which they were was a Loliondo Game Controlled Area is enough to take away the legitimate expectation.

The other ground advanced by the applicants is fettered discretion. The Counsel for the applicants submitted that the 1st respondent acted in a fettered manner because the demarcation of land was made one week before the order declaring the land as a Game Controlled Area. The counsels submitted that it is trite law that every administrative authority is expected without influence, fear, or favour to act in an unfettered manner. In the

counsel's view, the authority acting in a fettered manner endangers the action to become amenable for judicial review.

On the issue of whether the 1st respondent acted in a fettered discretion in that they had already decided to take the land as they started erecting beacons on the land well before the declaration of the areas to be Game Controlled Area which made them fail to exercise the discretion. In that, the learned PSA submitted that the 1st respondent followed the procedure laid down under section 16(1) of the Wildlife Conservation Act which requires him to consult the public authorities. The allegations that the demarcation of the boundaries was made before the enactment of the GN No. 421 of 2022 is unsubstantiated with any proof and it has not been shown how it has affected the promulgation of GN. No. 421 of 2022. He asked the court to find the ground to have failed to warrant the quashing of the said decision of the Minister.

In dealing with this ground, I should point out what entails fettered discretion in administrative law. It is when the decision maker in public authority does not genuinely exercise his powers independently or where the action is based on external or internal influences. The reason for the applicants raising fettered discretion as one of the grounds for Judicial

Review is that the beacons and demarcation were put a week before the promulgation of the order. The respondent said that the allegations that the demarcation of the boundaries was made before the enactment is unsubstantiated with no proof and it has not been shown how it has affected the promulgation of GN. No. 421 of 2022. It is true there was no clear evidence to prove this, it has also further not been said at whose influence was the 1st respondent acting. Further to that, it has not been established that if that is true the same affected the whole process and consequently entitle this court to invalidate whatever was done. The order of certiorari is only issued where the ground relied upon has been proved to have seriously affected the applicant. In this case and in respect of this ground, that has not been shown with the principle of overriding objective, it is not enough for the person to allege the non-compliance he must also show how that non-compliance prejudiced his right. The ground also fails for the reasons given.

The next ground is built on the principle of proportionality, in the counsel's view the principle of proportionality as a ground of judicial review is said to be the expansion of the "Wednesday reasonableness principle", and that for the administrative authority to be proportionally reasonable, it

should meet four tests, first, the aim must be legal in the sense that it is not arbitrary, **second,** the means employed should be suitable to achieve the end/object. **Third**, whether the aim has been achieved on a less restrictive alternative. **Fourth**, the impugned means is justifiable in a democratic society. In support of that proposition, the counsel cited the case of **Ranjit Thakur vs Union of India and Others 1987, air 2386 1988(1) SCR 512.**

Responding to this issue the learned Principal State Attorney submitted that, the ground of proportionality entails the means employed by a decision maker are none more than reasonably necessary to achieve the legitimate aim intended by law. He asked the court to find that there was a proportionality in the decision reached. To cement that stand, he said based on the fact that, the decision reached was through established law and procedures. He said section 16(1) empowers the Minister to establish the Game Controlled Areas. And that he followed the procedure required by law.

In this case, in resolving this ground, I feel indebted to say a word on the principle. The principle of proportionality as the ground of Judicial Review, requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective. In

realizing that a four-step test with subtests of legitimacy, suitability, necessity, and proportionality. The ground of proportionality is based on the complaint that, the effect of the order made is so drastic as the same is going to render the applicants homeless and is going to alienate the applicants from the land they have been using for years as their pastureland, spiritual ancestors, home and by any means the said land was all that the applicants have. The respondents on the other hand said the land in question has never been exclusively for community use it was and continues to be both the Game Controlled Area and Community use. The increase and extension of the use of land by the local community endanger the ecological system, the breeding place, and the wildebeest migration route and a source of water for the survival of the wildlife in Serengeti and Masai Mara.

I have passionately considered the arguments by both parties, I find the ground of proportionality to have no merit, the decision of the Minister was not to establish a completely new Game Controlled Area, he just established the Game Controlled Area by resizing the existing Loliondo Game Controlled Area. The reasons for him to do so were well stated, by the counter affidavit and the submissions by the respondents. The main reason is the conservation. Also from the evidence, and the submissions by both

parties, the importance of Wildlife and Conservation, in the economy of this country cannot be over-emphasized. it is both a source of National Revenue and the environmental protection and natural resources depended globally. Striking the balance, we find that, by such declaration promulgation the interest protected is national and global compared to that of an individual or community group. In looking at the means used in achieving the objective, it should be noted here that, the act complained of is the promulgation of the Paloleti Game Controlled Area, the objective being to protect the water source for Serengeti National Park, the breaching area and protect the wild beast migration route. The Minister has taken only 1502 square kilometers, leaving 2498 square kilometers for community use. The act is legitimate as it is permitted under section 16 (1) of the Wildlife Conservation Act, it is necessary for conservation, and suitable for purposes of having progressive conservation, lastly the fact that it has taken only 1502 square kilometers out of 4000 square kilometers makes it proportional. This ground also fails for the reasons given.

The second relief sought is prohibition, against the second respondent from unlawfully establishing the future controlled area. The Counsel for applicants submit that the ground that has been relied upon in the order of

certiorari to issue, also applies in the order for prohibition, in support of that position they cited the pronouncement in the case of **R vs Electricity Commissioners exparte London Electricity Joint Committee Co. 1920 Ltd [1924] 1 KB 171 at 206** where it was held that, there is no difference between certiorari and prohibition, as where it has been established that certiorari will lie, prohibition follows to restrain the administrative authority from exceeding its jurisdiction. Still, in support of that legal position, they cited the case of **East India Commercial Company Ltd vs Collector of Customs AIR 1962 SC 1893.**

They submitted that the affidavits of all five applicants demonstrate the magnitude of the force employed by the 1st respondent to evict the applicants based on irrelevant considerations. They also said that, the eviction started before and after the promulgation of the 1st respondent's Notice therefore it is a continuous process that attracts judicial control by way of prohibition. They said it is only by way of prohibition the court can prevent the 1st respondent from exercising powers illegally against the interest of the Applicants and other residents from 14 villages affected by the promulgation order made by the 1st respondent. The order for prohibition will prevent the continued eviction or restraining access to the disputed areas

to persons who were lawfully residing in the area before the impugned declaration. They supported their arguments by citing the case of **Abdi Athuman & 9 Others vs. DC Tunduru & Others Consolidated Misc. Civil Cases No. 2 & 3 of 1987** where the court issued the prohibition order against the District Commissioner of Tunduru District from issuing a removal order removing Mohamed Athumani and Lali Athumani.

They also relied on the decision of **Festo Balegela & 784 Others vs Dar es Salaam City Council,** Misc. Civil Cause No. 90 of 1991 where the court issued a prohibition order against the Dar es Salaam City Council on continuous use of Kunduchi Mtongani as a refuse dumping site. It is their submission that this court has the power to do so and they call upon it to issue a similar order against the eviction of the applicants and other 14 village members of the promulgated area.

In the end, they called upon the court to base on the cited authorities and the statement supporting the application to issue an order for certiorari by declaring the Government Notice No. 421 of 2022 to be made illegally, against a principle of natural justice, arbitrary, unreasonably, irrationally, with fettered discretion made with *malafide*, against the doctrine of legitimate expectation and the doctrine of proportionality. The court was also

called to issue an order prohibiting the 1st respondent from illegally interfering with accessing the disputed land and further creating the Game Controlled Area over the disputed area.

On the order of prohibition in which the applicants prayed this court to prohibit the respondent from unlawfully establishing in the future any Game Controlled Area on the disputed land as prayed under paragraph 2 on page 27 of the applicant's submission.

Responding to this relief the learned State Attorney said, in his view this prayer for the prohibition is farfetched since in judicial review, the Court deals with the present matter and cannot give an order of something in the future. **Secondly,** the power to establish any area as a Game Controlled Area is vested in the Minister, therefore he can establish it in any area provided he observes the law, and if it appears in the future that he has not observed the law then his act may be subject to judicial review order. Lastly, he said the area in question, no longer exists as a Game Controlled Area, now it is Pololeti Game Reserve Area which is not the subject of this application he thus asked the court order to be precise.

Regarding the prayer that the applicants and other 14 village members have unrestricted access to the land in question, he said under sections 19,

20(1), and 21 of the Wildlife Conservation Act, the Game Controlled Area and Game Reserves are protected with restricted entrance and the Court cannot make an order which will allow the applicant to access the land which is reserved, therefore asked the court to disregard the prayer for want of merits.

Last, the learned PSA submitted that any prayer issued shall be a judgment in persona meaning that the only beneficiaries will be the applicants and not all other people alleged to reside in 14 villages as prayed. To support that contention, he cited the case of Mariam **Ndunguru vs Kamoga Bukoli and Others** [2002] TLT 417 which is why before instituting this application the applicant had to obtain leave, and before getting it had to be established that the applicants had sufficient interest to institute the matter. According to him, this case/application was filed by the applicants who had established sufficient interest, therefore any order or orders issued will only affect the applicants alone and not other residents of 14 villages who are not part of this case. Based on the above submission and the counter affidavit he asked the court to find that the application has no merit and it should be dismissed in its entirety.

Further reminding of what the relief likely to be granted, he said even if the court finds that the 1st respondent went against the law for not consulting the local authorities, and then quashed the said Government notice, it will be required to return the same to the Minister for him to comply with the proper procedures by consulting the relevant local authorities as required under the law. He cited the case of **James G. Kusaga vs Sebastian Kolowa Memorial University (SEKOMU),** Civil Appeal No. 73 of 2022, CAT, Tanga at Page 17 (unreported) where after finding that, the University did not afford the applicant her right to be heard before discontinuing him from studies it quashed the decision so discontinuing him and ordered the university to go back and follow the procedures even though, the appellant prayed the court to compel the University to reinstate and allow him to continue with his studies. Also, **Ezekiah Oluoch vs PS Presidents Office, Public Service Management and 4 others,** Court of Appeal of Tanzania, Dar Es Salaam, Civil Appeal No. 140 of 2018 at Page 29 where the court upon finding that the 1st respondent, in that case, exceeded his powers when he ordered the termination of the appellant from the public service, quashed the decision and ordered the proper procedures, to be followed, the court refrained from ordering prohibition and mandamus prayed. This is because the judicial review is not exercised in an appellate

manner. This is also provided for under rule 15(2) of the Law Reform (Fatal Accident and Miscellaneous Provisions GN. No. 324 of 2014).

The learned State Attorney asked a rhetorical question as to whether in the case at hand if the court finds that the procedure was not followed can order that the procedure be followed, he said that can practically not be possible, because the Pololeti Game Controlled Area has already been upgraded and declared as Pololeti Game Reserve by the President of the United Republic of Tanzania through Government Notice No. 604 of 2022 dated 14th October 2022 as indicated in paragraph 7 of the respondent's counter affidavit. Since the same is no longer in existence the court cannot return it to follow the procedure something that will be an academic exercise.

I have passionately considered the submissions by counsel for both sides, it is a position of the law that the relief for prohibition is a consequential relief depending on the nature of the violation committed. In this application, it has been found that the 1st respondent while exercising his powers, violated the provision of section 16(1) of the Wildlife Conservation Act, by his failure to consult the relevant local authorities. That failure entitles the applicants to an order for certiorari quashing the said order. However, the respondents in paragraph 7 of the counter affidavit

deposed that on 14 October 2022, the Pololeti Game Controlled Area was upgraded by the President of the United Republic of Tanzania to be a Game Reserve. They also attached a copy of the Government Notice i.e. GN. No. 604 of 2022 naming the **Paloleti Game Controlled Area** to be the **Pololeti Game Reserve**. That act upgraded the said Pololeti Game Protected Area to be the Game Reserve under section 14 (1) of the Wildlife Conservation Act. That was also supported by the learned State Attorney in the submission made in opposition to the application. These facts were not seriously disputed in rejoinder, but the counsel for the applicants simply said that, the allegation was not backed by any evidence.

It should be noted that, under section 4(1) of the **Land Act**, [Cap 113 R.E. 2019] all land in Tanzania is public land, and remains vested in the President as trustee for and on behalf of all the citizens of Tanzania.

Under section 3 of the **Land Acquisition Act,** [Cap 118 RE.2019] the President may acquire any land for any estate or term where such land is required for any public purpose. The President may also, under section 14 (1) of the Wildlife Conservation Act [Cap 283 R.E. 2022] declare any area of Tanzania to be a Game Reserve. Any area here means, any land whether

already declared the Game Protected Area, or allocated to any government department or individual, provided he follows the law.

Now that it has been established that the President has powers as I have pointed out under the three statutes hereinabove mentioned, and through those powers has already upgraded the said area and declared it the Game Reserve, that by necessary implication, automatically revoked the **Pololeti Game Controlled Area** GN. No. 421 of 2022. I hold so because of the doctrine of implied repeal, a concept in the constitutional theory of statutory interpretation that states; where an Act of parliament conflicts with the earlier one, the later Act takes precedent, and the conflicting parts of the earlier Act become legally inoperative.

The implied repeal of an earlier law can be inferred only where there is enactment of a later law that has the power to override the earlier law and is totally inconsistent with the earlier law and the two laws cannot stand together. Facing a similar question, the Supreme Court of Pakistan in the case of **Abdul Samad vs. Ahmad Khan Lodhi,** PLD 1972 Lah. 41, quoted the excerpt in the book by Craies C on, page 365 of his Book on Statute Law (Sixth Edition) held that-

> *"where two Acts are inconsistent or repugnant, the latter will be read as having impliedly repealed the earlier. Before concluding that there*

is a repeal by implication the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the later; imply the repeal of an express prior enactment i.e., the repeal must, if not express, flow from necessary implication."

The same principle was reiterated in the case titled **Mumtaz Ali Khan Rajban and Another v Federation of Pakistan and Others [PLD 2001 SC 169]** in the following terms:

*"... it is significant to note that the general rule is that no repeal can be implied, unless there is an express repeal of an earlier Act by the later Act, or unless it is established that the two Acts cannot stand together. However, a repeal by implication is possible, as laid down in **N.S. Bindra's Interpretation of Statutes**, Eighth Edition, page 829/830."*

Although the cases as interpreted were dealing with the Act of the parliament, nevertheless, the principles therein are relevant and applicable in the case at hand about the subsidiary legislation. Applying the above principle in the case at hand, it is clear that, the act of the President vide GN. No. 604 of 2022 declaring the area declared by the Minister vide GN. No. 421 of 2022 to be Pololeti Game Controlled Area, as a Game Reserve did not expressly state the cessation of the Game Controlled Area, it is instructive to find that, as the same area cannot be a Game Reserve and the

Game Controlled Area at the same time, by necessary implication the Game Controlled Area ceased to exist.

Given the circumstances of this case and based on the discussion and findings herein above, although the decision of the Minister, the subject of these proceedings has been faulted for the Minister's failure to follow the procedures for consultation, as rightly submitted by the learned Principal State Attorney, **Abdi Athuman & 9 Others vs. DC Tunduru & Others Consolidated** (supra), and **Festo Balegela & 784 Others vs. Dar es Salaam City Council,** (supra) and as held in the case of **Juma Yusuph vs The Minister of Home Affairs** [1990] TLR 80 regarding the powers of the court after issuing certiorari, that, while also relying on the excerpt from the book by **Prof. Wade " Administrative Law",** Clarendon Press Oxford, 2nd Edn. p. 48: held that;

> *"In sum, even though it is not an easy or simple matter to interfere with or quash a Minister's decision or order, courts have authority or power, even a duty, to quash them in proper and fitting cases. In doing so, of course, the courts are not acting as appellate bodies over the ministers' decisions or orders; they only investigate the legality or otherwise of a decision or order and make determinations on these accordingly. In other words, this power of the courts to review or investigate is not based on the merit, but on the legality, of the Minister's decision or order."*

Based on the authorities herein above, the remedy is to return the matter to the authority, (the Minister) so that can comply with the law by conducting the consultation. Now that the land has already been upgraded by a person higher than the Minister, and the order of the Minister has been impliedly repealed by the order of the President, and the order of the President is not the subject of these proceedings at the moment, then I find the order for certiorari against non-existing Government Notice No. 421 of 2022 to be just an academic exercise for we cannot return it to the Minister to follow the procedure while the land has already been declared the Game Reserve. As it is common knowledge that the Minister cannot invalidate the decisions of the President. If still interested, the applicants may challenge the existing order which is **Pololeti Game Reserve, GN. 604 of 2022** which repealed the **Wildlife Conservation (Pololeti Game Controlled Area) (Declaration) Order GN. No. 604 of 2022.**

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 19th day of Sept 2023

HIGH COURT OF TANZANIA

J.C. TIGANGA

JUDGE