



**Washumbu (Directed Agricultural) Company Limited v Mbiriri & 4 others
(Environment & Land Petition 1 of 2024) [2025] KEELC 2873 (KLR)
(Environment and Land) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION 1 OF 2024
EK WABWOTO, J
MARCH 25, 2025
(FORMERLY MOMBASA ELC PET NO. E005 PF 2023)**

BETWEEN

**THE WASHUMBU (DIRECTED AGRICULTURAL) COMPANY
LIMITED PETITIONER**

AND

**JOSEPH KAMAU MBIRIRI 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF PETROLEUM &
MINING 2ND RESPONDENT
INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
NATIONAL ENVIRONMENT AUTHORITY 4TH RESPONDENT
COUNTY GOVERNMENT OF TAITA TAVETA 5TH RESPONDENT**

JUDGMENT

1. The Petitioner moved this court vide a Petition dated 21st February 2023 seeking the following reliefs:-
 - i. A declaration that the Respondents has jointly and severally violated their rights and fundamental freedoms enshrined in the bill of rights under Articles 10(2)(b), 26(3), 29(f), 42, 43(1)(d), 47, 69 and 232(1)(c) of *the Constitution* of Kenya.
 - ii. A permanent conservatory orders to compel the 2nd, 3rd, 4th and 5th Respondents to adopt the precautionary principle in environmental management with respect to preventing the pollution and environmental degradation of Wushumbu area, Taita Taveta County.



- iii. A conservatory orders to compel the 2nd, 4th and 5th Respondents to implement permanent restoration of the Wushumbu area, in Taita Taveta County and compel 1st Respondents to shut down polluters in so far as it relates to its mining activities that is unregulated.
 - iv. Any other relief that court may deem just and expedient in the circumstances.
 - v. That the costs of this Petition be borne by the Respondents.
2. The Petition was contested by the Respondents. The 1st Respondent filed a Replying Affidavit dated 10th March 2023 as well as a Further Affidavit dated 18th March 2024. The 2nd and 3rd Respondent filed a Replying Affidavit sworn by David Irungu Mwebu on 20th April 2025. The 4th Respondent filed a Replying Affidavit sworn by George Oyoro on 5th July 2025 while the 5th Respondent filed a Replying Affidavit sworn on 12th July 2024.

Directions of the Court

3. Pursuant to the Directions issued by this court on 5th June 2024, it was directed that the Petition be heard by way of viva voce evidence.

The Petitioner's case

4. The Petition dated 21st February 2023 was supported by the Affidavit of James Mwang'ombe Kinusa the Secretary General and Director of the Petitioner. The said affidavit was sworn on 21st February 2023.
5. It was averred that the 1st Respondent on 15th February 2023 with armed security personnel entered into the suit land, being LR. NUMBER 14206 – TAITA, with intentions to displace the local inhabitants without any public involvement and/or following due process for purpose of conducting a private mining exploration.
6. It was also averred that despite there being no community consent, the Respondent intends to forcefully undertake private activities on the suit land and locking out the members of the community.
7. That in its mining expedition in the suit land the 1st Respondent is using explosives and dangerous chemical compounds that is contaminating water sources and causing mental strain to the young and elderly citizens.
8. There is widespread cases of strange diseases of a respiratory and carcinogenic diseases as a result of the Respondent's poor management of the environment.
9. The suit land has Gemstones and mineral deposits and Petitioner's fear is that unless restrained the 1st Respondent will conduct a mining exploration whose aim is to deplete the limited resources rendering the application nugatory.
10. The 1st Respondents action being unregulated, the action of clearing bushes and scooping earth materials, means that there is a likelihood of massive degradation of the environment including environmental pollution by the 1st Respondent.
11. The Petition was also supported with a further supplementary affidavit dated 10th May 2023 and 15th July 2024 sworn by Jimmy Mwamidi the Chairman of the Petitioner. The Petitioner also filed an affidavit in response to the 1st Respondent further affidavit dated 18th September 2024.
12. During trial and the hearing of the Petition, Jimmy Mwamidi its Chairman testified on behalf of the Petitioner and was the sole witness for the Petitioner.



13. It was his testimony that the ranch has been in existence since 1974, the 1st Respondent is conducting mining activities in the area which has affected the land. He also stated that the 1st Respondent was never given any consent to participate and or undertake any activities. The Ministry of Mining had also stated that he does not have any licenses. It was also his testimony that he has been denied access to the premises by the 1st Respondent. He urged the court to grant the reliefs sought in the Petition.
14. Upon cross examination by Counsel for the 1st Respondent Mr. Gaita, he stated that the Petitioner's property is L.R No. 14206. The said land was acquired on 22nd August 2018. The land never belonged to Taita Taveta County Government. It has been leased from the National Government. Mineral rights are acquired in accordance with the law. If mining rights are acquired within the law they supersede the expiry of the lease. He also stated that he is not aware if the 1st Respondent acquired the land earlier in 1987 when he was given mining rights. He had seen a consent form from Taita Taveta County Council dated 12th November 1987. He had also seen the licences issued by the Ministry to the 1st Respondent but could not confirm on their authenticity. He had also seen receipts showing payments for several of the licenses by the 1st Respondent for the year 2022. He also stated that he was not aware of the Mombasa High Court Case No. 423 of 2017 in which the Petitioner was a party. He also stated that he used to attend court on the same but was not aware of its judgment. He also stated that the 1st Respondent had filed an appeal and stay of execution was granted. He also stated that the court had visited the site and the entire land is about 36,000 acres. The 1st Respondent is mining on an area less than 6 acres. Human settlements are about 20kms away. The 1st Respondent also had a license from NEMA.
15. On cross examination by Learned Counsel Mr. Penda for the 2nd and 3rd Respondents he stated that the Petitioner took action against the pollution by filing this Petition. He also stated that he was aware that NEMA issued an improvement notice. The notice does not mention any toxic chemicals. Neither does it mention any pollutants. He also stated that conservation can still be done even when there is mining going on. He also stated that his main issue was that the mining is unregulated. The permits issued have no legal standi. The Petitioner never gave any consent. He had not filed any specific documents for the toxic threats.
16. On cross-examination by Learned Counsel Ms. Mwajune for the 4th Respondent he stated that he did not present any samples of the water to any lab for testing. He had not brought an expert to testify on this.
17. When cross-examined by Learned Counsel Ms. Somba for the 5th Respondent, he stated that their property was initially private property and the County Government only came to be involved after commencement of devolution. He also stated that the County has no role in issuing of mining consents to the 1st Respondent. All minerals belong to the Government.
18. When re-examined by Learned Counsel Mr. Sang, he stated that there was use of explosives by the 1st Respondent. The NEMA license had conditions. They were never involved in issuance of any licenses to the 1st Respondent.

The case of the 1st Respondent

19. The 1st Respondent opposed the Petition vide a Replying Affidavit dated 10th March 2023 as well as a further affidavit dated 18th September 2024.
20. It was averred that the Petitioner is not affected by the mining activities since there was no habitation within a 20km range from the mining site. The 1st Respondent is duly licensed to conduct mining



activities in the area. He is a holder of permit 1970/1-10-19771-10. He has a valid single business permit issued by the 5th Respondent.

21. It was also averred that he has an Environmental Impact Assessment License Registration No. 0068654 issued on the 1st November 2021. He has all the necessary legal permits allowing him to carry out the mining activities.
22. During trial, their witnesses testified in support of the 1st Respondent's case. The 1st Respondent testified that he is a minor undertaking mining activities on the Petitioner's land. He also stated that he started prospecting and mining in 1976. He got interested in the area in 1987 and applied and obtained all the relevant documents. The local government being Council of Taita Taveta gave him consent to mine in 1987. He also stated that at that time the Council of Taita Taveta was the owner of the land. The mining location was in Riziki area.
23. He also stated that he has continuously engaged in mining activities since 1987. He is not a stranger to the 5th Respondent. He does not engage in unregulated mining activities. He has undertaken mining activities as per the law. He has an EIA license from NEMA and other approvals from the Ministry of Mining. He also has an explosive license which permits him to do blasting at the site. There is nothing harmful at the site. The nearest community habitation is between 17 to 20km from the mining site. He is not polluting the environment and any rivers. He has been in the suit land since 1987. He also stated that the Petitioner and the Respondents are well known to him. The Petitioner has not been banned from accessing the site. There are no environmental issues violating the Petitioner's rights. The Petition should be dismissed with costs.
24. On cross examination by Learned Counsel Mr. Penda for the 2nd and 3rd Respondents, he stated that he has between 20 – 25 workers at the site. NEMA has visited the site several times. He has not received any medical reports confirming the medical status of the Petitioner's members.
25. There is no dispute on environmental issues. There has not been any pollution.
26. Upon cross-examination by Learned Counsel Mr. Sang for the Petitioner, he stated that the mining activities stopped in March 2023 pursuant to a court order. He does not mine outside the permitted area. PAMLESO is a special purpose vehicle used for his mining activities. He is its director and has 100% shares. He does not have a borehole at the site. His mining rights have never revoked. There was a moratorium which was lifted in October 2023. His mining consent was issued in 1987 and he did not require a fresh consent.
27. When cross examined by Learned Counsel Ms. Somba for the 5th Respondent, he stated that the Petitioner owns the property. They have been owners since 2018. Their title was issued on 21st August 2018. He got his mining license from 1987. He did due diligence to confirm ownership of the property. The consent cannot have a termination clause. He is not a trespasser on the land.
28. When re-examined, he stated that he was not claiming ownership of the land. The Petitioner became owners of the land in 2018. He obtained consent in 1987 which consent does not change even when there is ownership on the land. The issue of mining rights is to be determined and is pending before the Court of Appeal. The mine has been inspected time from time by the Regulators. No adverse reports has ever been brought to its attention. He has never received any case on environmental pollution from the Regulators.
29. Venant Tama testified as DW3 and in support of the 1st Respondent's case. He stated that he stays about 15km from the site and that he can confirm that there is no pollution in the area. No person has



- been affected by cancer because of the mining activities. He also stated that PW1 stays at Wundanyi and he does not stay close to the mining site.
30. When cross-examined by Learned Counsel Mr. Penda he stated that he has been staying at Kasigau area since 1962. His residence is about 15km from the mining site. Nobody has ever contracted cancer from the mining activities.
 31. When cross-examined by Ms. Mwajune he stated that he was present when NEMA visited the site. No pollution issues were noted and NEMA just advised them on the safety measures to be undertaken.
 32. When cross-examined by Ms. Somba Advocate he stated that the 5th Respondent has never been to the site.
 33. When cross-examined by Learned Counsel Mr. Sang for the Petitioner, he stated that they use pipe water from the Hills. Their rivers are seasonal. The nearest river is about 10km from the site. The mine is at Kasigau area. The mining area is fenced so no wildlife can easily access the site.
 34. On re-examination, he stated that the nearest residents are about 15km away.

The case of the 2nd and 3rd Respondents

35. The 2nd and 3rd Respondents opposed the Petition by filing a Replying Affidavit sworn by David Irungu Murebu on 20th April 2024. It was averred that the 1st Respondent had been duly licensed and had obtained the necessary consent to undertake the mining activities in the area.
36. During trial, David Irungu Murebu testified on behalf of the 2nd and 3rd Respondents. It was his testimony that there has been a moratorium for issuance of mining permits. The 1st Respondent had the relevant consent and documents for undertaking the mining activities. The consent is issued only once as per the *Mining Act*. The 1st Respondent had also paid the requisite fees. The allegations that the 1st Respondent has been operating an illegal mine are not true. The County Government does not issue mining permits in Kenya.
37. Upon cross-examination by Learned Counsel Mr. Gaita for the 1st Respondent he stated that when a person has complied with the Ministry Regulations, the Ministry will consider him compliant. The said Applicant will still be considered as a valid miner in the mining cadaster. He further stated that the 1st Respondent appears as a miner in the cadastar. He is compliant.
38. On cross-examination by Ms. Majune Learned Counsel appearing for the 4th Respondent, he stated that he has worked at the Ministry since 2008. He is a Civil Engineer. He also stated that no chemicals were used at the 1st Respondent's location. The explosives used are always regulated.
39. Upon cross-examination by Mr. Sang Learned Counsel for the Petitioner, he stated that he had seen the letter from Mr. Chomba, the Inspector of Mines at the Ministry and the said letter did not demonstrate the current position of the Ministry. He also stated that Ammonium Nitrate is a chemical used in blasting and the same is not classified as a chemical in the blasting process. He also stated that PAMLESO is a 1st Respondent's company. He further stated that blasting is normally carried out during the day.

The 4th Respondent's case

40. The 4th Respondent filed a Replying Affidavit sworn by George Oyoo its County Director in opposing the Petition. The said affidavit was sworn on 5th July 2024. It was averred that the 4th Respondent had visited the mining site and made its report dated 4th April 2023. It was also averred that the 4th



Respondent had issued an EIA license No. 066854 in respect to gemstone mining in Location 1970 – 1977/1-1 within the Washimba Ranch, Buguta Area, Kasigau, Taita Taveta County.

41. It was also averred that the 4th Respondent has performed its duties in ensuring compliance with environmental standards and continues to ensure compliance on the part of the 1st Respondent.
42. During trial George Oyoo adopted and relied on his Replying Affidavit sworn on 5th July 2024 in his evidence in chief.
43. When cross-examined by Counsel for the 1st Respondent he stated that the 1st Respondent has been compliant with the environmental laws of the land. NEMA periodically conducts inspections on the site and they had not received any complaint of any pollution by the 1st Respondent's activities.
44. When cross-examined by Mr. Sang Learned Counsel for the Petitioner, he stated that the EIA license was issued to the 1st Respondent, the same had conditions. The County Government is in charge of noise and vibrations. No complaint on noise and excessive violations never came to their attention. PAMLESO was not issued with an EIA license.
45. When re-examined, he stated that the EIA license was issued on 1st November 2021. The Petition was filed on 1st February 2023. A site visit was undertaken before the EIA license was issued.

The case of the 5th Respondent

46. The 5th Respondent filed a Replying Affidavit dated 12th July 2024 sworn by Jimmy Mtawa, its Chief Officer, Lands Physical Planning Mining and Urban Development. It was averred that no consent has ever been issued to the 1st Respondent by the 5th Respondent. the 5th Respondent cannot be held liable for the facts and or omissions by the 1st Respondent.
47. It was also averred that vide its letter dated 24th October 2023 addressed to the Petitioner, the 5th Respondent had clarified that it had not given any consent to the 1st Respondent to undertake any mining activities in the Petitioner's land and that the *Mining Act* prohibits any person from undertaking any mining activities on a person's land without his or her consent.
48. During trial, Jimmy Mtawa testified on their behalf and relied on his Replying Affidavit in his evidence in chief.
49. When cross-examined by Counsel for the Petitioner, he stated that they had received various complaints on environment degradation.
50. On cross-examination by Counsel for the 1st Respondent, he stated that he joined the 5th Respondent on 17th March 2023. He knows PW1. He had seen the title deed of the Petitioner. It was issued in 2018. The land was earlier on designated as trust land and the Council of Taita Taveta was its trustee.
51. He also stated that mining was still being carried out on the said land before devolution. Section 37(3) of the *Mining Act* provided that Consent was to be valid as long as the mining and prospecting rights subside.
52. On cross-examination by Counsel for the 2nd and 3rd Respondents, he stated that the 5th Respondent has mining inspectors. He did not have any documents to confirm that they received any complaints.
53. When re-examined, he stated that the 5th Respondent relied on a letter from the Ministry of Mining in doing its response to the Petitioner's letter. He also stated that the consent issued to the 1st Respondent had been disputed. The Petitioner obtained proprietorship of the land on 22nd August 2018. The 1st



Respondent obtained mining rights in 1987. The consent ended on 20th April 2015 and the same was never extended.

The Petitioner's written submissions

54. The Petitioner filed written submissions dated 21st January 2025. Counsel submitted on the following issues:-
- i. Whether the 1st Respondent's activities is causing pollution.
 - ii. Whether the 1st Respondent's mining activities is regulated.
 - iii. What are the guiding principles in granting the orders sought.
55. It was argued that in the absence of a mining licence and not meeting the EIA license, the 1st Respondent's activities can be summed up as pollution.
56. It was also submitted that due to the non regulation of the 1st Respondent's activities, there has been massive environmental degradation of the environment. The case of Isaac Kipyego Cherop =Versus= Ministry of Water & 142 Others (2017) eKLR and the provisions of Article 69(1)(g) and Article 42 of [*the Constitution*](#) together with Sections 63 of the [*Water Act*](#) were cited in support.
57. On what are the guiding principles for grant of the reliefs sought, reliance was placed on the pollution and precautionary principles, the provisions of Section 2 of EMCA and the case of Export Processing Zone & Others =Versus= NEMA & Others (2024) eKLR.
58. The court was urged to grant the reliefs sought.

The 1st Respondent's written submissions

59. The 1st Respondent filed written submissions dated 7th March 2025. Counsel submitted on one singular issue being whether the Petition meets the threshold for granting the orders sought.
60. It was submitted that the 1st Respondent had been carrying its mining activities since 1987 and holds valid mining permits as envisioned by Section 106, 107 and 108 of the [*Mining Act*](#) of 2016. It was also submitted that he holds a valid EIA license issued by the 4th Respondent and further the Petitioner had not proved any pollution by him.
61. Citing the case of Kibos Distillers Limited & 4 Others =Versus= Benson Ambuti Atega & 3 Others (2020) eKLR, it was argued that the Petitioner has not offered any iota of evidence to prove their claim. The Petition does not meet the threshold for grant of the reliefs sought and the same ought to be dismissed with costs.

The written submissions of the 2nd and 3rd Respondents

62. The 2nd and 3rd Respondents filed written submissions dated 4th March 2025. Counsel submitted on the following issues:-
- i. Whether there is a violation of the environmental rights by the Respondents including pollution as alleged.
 - ii. Whether the court should hear and determine the accusations of illegal mining within the Petition.
 - iii. Whether the 1st Respondent hold a valid mining license as per the [*Mining Act*](#).



63. On the aspect of pollution, it was submitted that in the absence of any laboratory reports the accusations of environmental pollution are completely unfounded and ought to be dismissed.
64. On whether the court should hear and determine accusations of illegal mining within the Petition, it was argued that parties are bound by their pleadings, the Petitioner had not pleaded the same and as such this court should not consider it.
65. On whether the 1st Respondent holds a valid mining license as per the *Mining Act*, it was submitted that the land was originally Trust land held by the defunct County Council of Taita Taveta and held in trust on behalf of the community. The 2nd Respondent had confirmed that mining consent was issued by the Town Clerk on 12th November 1987 and pursuant to the provisions of Section 38 of the *Mining Act* the consent continues to exist despite change of ownership.
66. Counsel concluded his submissions by urging the court to dismiss the Petition with costs to the Respondents.

The written submissions of the 4th Respondent

67. The 4th Respondent filed written submissions dated 24th February 2025 and Counsel submitted on the following issues:-
 - i. Whether the Petitioner has discharged its burden of proof concerning allegations of environmental harm and resultant health risks.
 - ii. Whether the 4th Respondent violated the Petitioner's constitutional rights.
 - iii. Whether the questions on 'mining rights' and 'benefit sharing' are properly before this court.
 - iv. Whether the Petitioner's are entitled to the remedies sought in the Petition.
 - v. Whether the Petitioner has discharged its burden of proof concerning allegations of environmental harm and resultant health risks.
68. It was submitted that no medical or scientific reports have been produced and no medical expert was called to testify on behalf of the Petitioner to substantiate the claims of respiratory and carcinogenic illness in the community and as such the Petitioner has failed to prove the alleged pollution.
69. On whether the 4th Respondent violated the Petitioner's constitutional rights, it was submitted that the 4th Respondent undertook various site visits and also discharged its mandate as per *the Constitution* and EMCA. The case of Republic =Versus= NEMA Exparte Philip Kisia & City Council of Nairobi (2013) eKLR was cited in support.
70. On the issue of 'mining rights' and 'benefit sharing', it was submitted that the question of benefit sharing and mining rights came out during hearing but the same had not been specifically pleaded and as such the same is not properly before this court.
71. In respect to the reliefs sought, it was argued that the Petition ought to be dismissed for want of merit and evidentiary support.

The written submissions of the 5th Respondent

72. The 5th Respondent filed written submissions dated 14th February 2025. Counsel submitted on the following issues:
 - a. 1st Respondent's mining activities/degradation.



- b. Whether the 5th Respondent issued the 1st Respondent with consent to prospect on mine.
 - c. Whether the 1st Respondent was mining lawfully on the suit property.
 - d. Whether the Petition should be allowed as prayed.
73. On its first issue, it was submitted that while the Petitioner had not tendered any evidence to support and or prove the allegations of pollution, the principle of intergenerational equity should be considered and guide the court in determining whether the suit property is being subjected to environmental degradation.
74. On its second issue it was submitted that pursuant to Section 7(1)(i) and (m) 13(1)(4) and (7) of the Repealed *Mining Act*, the 1st Respondent ought to have obtained a consent from the defunct council which was to subsist for 1 year, in the case of prospecting rights and 10 years in the case of mining rights. It was further submitted that the 1st Respondent did not renew his consent with the 5th Respondent and as such with the promulgation of the *Mining Act*, 2016, the consent of 12th November 1987 did not subsist. The case of Titus Musau Ndome =Versus= Cabinet Secretary Mining (2017) KLR was cited in support.
75. On whether the 1st Respondent was mining lawfully on the suit property, it was submitted that the 1st Respondent had not duly complied by obtaining any consent and as such could not have obtained a valid EIA license which rendered his activities as unlawful.
76. The court was urged to dismiss the Petition as against the 5th Respondent.

Analysis and Determination

77. The court has considered the case put forward by the Petitioner and the Respondent's cases and has outlined the following issues as the salient issues for determination herein:-
- i. Whether the actions of the Respondents amounted to a violation of the Petitioner's rights.
 - ii. Whether the 1st Respondent were lawfully authorized to undertake any mining activities on the Petitioner's property.
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Issue No. (i) Whether the Respondents actions amounted to a violation of the Petitioner's rights

78. It was the Petitioner's case that it is the registered owner of the suit property known as L.R No. 14206 Taita which they engage in wildlife and environmental conservation.
79. It was also the Petitioner's case that the 1st Respondent on 20th January 2023 with armed security personal entered into the suit land being LR. NUMBER 14206 –TAITA, with intentions to displace the local inhabitants without any public involvement and/or following due process for purpose of conducting a private mining exploration.
80. It was also contended by the Petitioner that in its mining expedition in the suit land the 1st Respondent is using explosives and dangerous chemical compounds that is contaminating water sources and causing mental strain the young and elderly citizens.
81. Despite there being no community consent, the 1st Respondent intends to forcefully undertake private activities on the suit land and locking out the members of the community.



82. There is widespread cases of strange diseases of a respiratory and carcinogenic nature as a result of the 3rd, 4th and 5th Respondents' poor management of the environment by allowing the 1st Respondent to conduct unregulated mining activities in the suit land.
83. It was also the Petitioner's case that the suit land has gemstones and mineral deposits and Petitioner's fear is that unless restrained the 1st Respondent will conduct a mining exploration that is unregulated whose aim is to deplete the limited natural resource and leave pit holes dangerous for human and wildlife.
84. It was also contended that the 1st Respondents action being unregulated, his action of clearing bushes and scooping earth materials, means that there is a likelihood of massive degradation of the environment including environmental pollution by the 1st Respondent on the Petitioner's land.
85. A party who alleges It is trite law that whoever alleges must proof. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

‘Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.’

On evidentiary burden of proof, Sections 109 and 112 of the Evidence Act provide as follows:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

86. The court in considering this issue must be satisfied that the Petitioner has been able to demonstrate and prove that the actions of the Respondents amounted to a violation of the Petitioner's rights as was pleaded.
87. The Petitioner pleaded that there was a violation of several articles of the Constitution including Articles 42, 60 and 62(2) among others.
88. In respect to the 1st Respondent, PW1 testified that the 1st Respondent was undertaking mining activities illegally and the same had caused pollution affecting its members due to pollution. He also accused the 2nd to 5th Respondents of poor management of the environment by allowing the 1st Respondent to conduct unregulated mining activities.
89. During cross-examination of PW1, he conceded that he did not have any medical reports of any of its members or any scientific report to confirm that indeed the actions/activities of the Respondents had led to pollution of the environment nor did they call any medical doctor to testify on their behalf.
90. The 1st, 4th and 5th Respondent cited the cases of Kisumu Court of Appeal in Kibos Distillers Limited =Versus= Benson Ambuti Adega & 3 Others (2020) KECA 875 (KLR) where it was held that;

“ pollution is primarily proved by empirical, technical and scientific evidence and not by lay man opinion testimony or depositions. In the context of the statements by the learned Judge as stated above, I find that the Judge erred in deducing and arriving at conclusions of fact that



the three Appellants were responsible for river pollution without any scientific, empirical and sampling evidence to prove point pollute and the casual link to the Appellants.”

91. In making reference to the aforementioned case, I must state that while the Petitioner prayed the court to hold the Respondents accountable on account of pollution by invoking inter alia the precautionary principle, the same is misplaced considering that the Petition sought to make reference to alleged pollution that had occurred or was currently being witnessed. The said case would have been applied differently had the Petitioner’s sought to apply precautionary principle on activities which are yet to be undertaken and in such case there is no need to demonstrate or adduce scientific and technical evidence since a mere threat to the environment as warrants this court to intervene.
92. This court has also made reference to the site visit report that was undertaken by my brother Justice Naikuni on the 24th January 2024 and arrives at the conclusion that the Petitioners have not been able to prove any actions of pollution being undertaken from the activities by the 1st Respondent and the other Respondents.

Issue No. (iii) Whether the 1st Respondent was lawfully authorized to undertake mining activities on the Petitioner’s property

93. Before I address myself on this issue, it is important to point out that the Respondents had objected to the same in their submissions when they submitted that the court ought not to consider any issues in respect to mining rights for the reasons that the Petitioner did not plead the same but only pleaded pollution and environmental degradation.
94. In considering this issue it is important for this court to consider the entire petition as presented and filed by the Petitioner to this court.
95. Paragraph 8 of the Petition provided as follows:-

“In its mining expedition in the suit lands, the 1st Respondent is using explosives and chemicals compound that is contaminating water sources and causing mental strain to the young and elderly citizens.”

Paragraph 9 of the Petition:-

“Despite there being no community consent, the Respondent intends to forcefully undertake private activities on the suit land and locking out the members of community.”

Paragraph 10

“There is widespread cases of strange diseases of a respiratory and carcinogenic nature as a result of the 3rd, 4th and 5th Respondents poor management of the environment by allowing the 1st Respondent to conduct unregulated mining activities in the suit land”

Paragraph 11

“The suit land has gemstones and mineral deposits and Petitioner’s fear is that unless restrained, the 1st Respondent will conduct a mining exploration that is unregulated whose aim is to deplete the limited natural resource and leave pit holes dangerous for human and wildlife.”

96. At paragraph 12, the Petitioner pleaded that the 1st Respondent actions were unregulated. In respect to the foregoing, the Petitioner also sought inter alia conservatory orders compelling the 1st Respondent to shut down pollution in so far as it relates to mining activities that are unregulated. In view of the



foregoing, the contention by the Respondents that the issues relating to mining activities, consents, licensing etc was not pleaded and or raised by the Petitioner are misplaced. Further it is worth noting that the said issue featured prominently during trial and as such this court is bound to consider the same.

97. While the Petitioner contended that the 1st Respondent's activities were unregulated, did not have the requisite licenses and approvals it had a duty to prove and demonstrate the same.
98. The 5th Respondent and the Petitioner in submitting on this issue urged the court to find that no valid consent was ever issued and or obtained by the 1st Respondent prior to commencement of the mining activities by the Respondents.
99. In response to the above, the 1st to 4th Respondents took the position that the mining activities being undertaken by the 1st Respondent was duly licensed, approved and had been consented to. It was also contended that the 4th Respondent had also issued an EIA license in respect to the activities that were being undertaken by the 1st Respondent.
100. From the evidence that was tendered, it was noted that the 1st Respondent has been carrying out mining activities since the year 1987 and has heavily invested in the mining venture. It also emerged that the 1st Respondent obtained mining consent issued by the then Town Clerk dated 12th November 1987 a copy of which was produced in evidence. It also emerged that after receiving the said consent, he received mining permits from the 2nd Respondent on mining location numbers 1970 – 1977/1-10 at Buguta Area, Kasigau Division, Voi Sub County. It also emerged that he received an environmental impact assessment license from the 4th Respondent on 1st November 2021.
101. The Petitioner and the 5th Respondent contested the consent and EIA license that was issued to the 1st Respondent. According to the 5th Respondent, it was submitted that the mining consent has expired and that the 1st Respondent ought to have obtained a fresh consent under the *Mining Act* 2016.
102. The 5th Respondent placed reliance on Section 7(1)(i) and (m) of the Repealed *Mining act*, 1940 Cap 306 which was applicable then and the said provision stipulated as follows:-

- “7. Lands excluded from prospecting and mining
1. The following classes of land are (save where otherwise in this Act provided) excluded from prospecting and mining –
 - (l) Trust land, except with the consent in writing of the County Council within whose area of jurisdiction the land is situated.
 - (m) Private lands, except with the consent of the owner thereof.”

103. The 5th Respondent also relied on Section 37 and 38 of the *Mining Act* 2016 which stipulated that where consent is granted prior to any change in land ownership, such consent shall continue to be valid for as long as the prospecting and mining rights continue to subsist.
104. The court has considered the said provisions and the evidence that was tendered. David Irungu Murebu, Chief Inspector of Mines who testified as DW4 confirmed that the 1st Respondent had the relevant consent and approvals to undertake the mining activities in the area. It was also his testimony that the consent permits even when there is change of ownership in the land and further that the allegations that the 1st Respondent has been operating an illegal mines are untrue.



105. George Oyoo who testified as DW6 also confirmed that the 1st Respondent had a valid EIA license to undertake the mining activities in the area.
106. It is worth noting that the 2nd and 3rd Respondents witness together with the 4th Respondent's witness testified as experts in their respective fields. This evidence was equally not controverted by the Petitioner. The status of experts' evidence was dealt with in *Shah and Another vs. Shah and Others* [2003] 1 EA 290 where the Court expressed itself as follows:

“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in Court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the Court, but is considered together with other relevant facts in reaching a final decision in the case and the Court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the Court. Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the Court to reach its own opinion.”

107. However, when all is said and done, as was held by the Court of Appeal in *Juliet Karisa vs. Joseph Barawa & Another* Civil Appeal No. 108 of 1988, expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it, as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.
108. On the weight a Court of law should attach on expert opinion, the Court in the case of *Stephen Kinini & Another v The Ark Limited* [2016] eKLR held that,

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for Court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the Court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a Court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account.”



109. This Court concurs that expert evidence should not trump all other evidence and, that it should not be considered in a vacuum, but the same should be evaluated in the context of other evidence. This is to say that even though experts are called upon to assist the Court to evaluate complex matter, the said evidence is not compelling on its own.
110. In view of the fact that the Petitioner and 5th Respondent did not adduce any evidence before this court confirming that indeed the 1st Respondent's consent had expired and as such it is the finding of this court that the 1st Respondent had a valid consent which was lawfully obtained on 12th November 1987 and the same subsist to date since consent once issued continues to exist despite the change of ownership of the land.

Issue No. (iii What are the appropriate reliefs to grant herein

111. The Petitioner sought for various reliefs as enumerated in its Petition. However as the court has addressed itself earlier on the issues that were outlined while determining this Petition, it is the finding of this court that the Petition has not been proved to the required standard and as such the said reliefs as sought by the Petitioner are not for granting.

Conclusion

112. In conclusion, it is the finding of this court that the Petition has not been proved to the required standard, the same has not met the threshold for grant of the reliefs sought and this court proceeds to issue the following final orders:-
- i. The Petition is hereby dismissed.
 - ii. Each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY/OPEN COURT AT VOI THIS 25TH DAY OF MARCH 2025.

E. K. WABWOTO

JUDGE

In the presence of: DIVISION -

Mr. Sang for the Petitioner.

Mr. Gaita for the 1st Respondent.

Mr. Ponda for the 2nd and 3rd Respondent.

Ms. Majune for the 4th Respondent.

Mr. Oketch for the 5th Respondent

Court Assistant: Mary Ngoira

