



REPUBLIC OF KENYA



KENYA LAW
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**Mbiriri v Kigo & 2 others (Environment & Land Case 423 of 2017)
[2023] KEELC 17615 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 423 OF 2017**

LL NAIKUNI, J

MAY 25, 2023

BETWEEN

JOSEPH KAMAU MBIRIRI PLAINTIFF

AND

ROBERT KIWUWA KIGO 1ST DEFENDANT

AGNES NDUNGE KIWUWA & ASSOCIATES 2ND DEFENDANT

WASHUMBU (D.A). RANCHING CO LTD 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. This is a Judgement pertaining a suit commenced vide a Plaint-multi track dated 17th November 2017, the Plaintiff – Joseph Kamau Mbiriri against the 1st, 2nd and 3rd Defendants herein. Upon extracting and effecting service of the Summons to Enter Appearance dated 27th November, 2017 together with pleadings thereof onto the Defendants. On 28th September, 2020 the 1st and 2nd Defendants herein while on 13th July, 2021 the 3rd Defendant entered appearance and filed their Defences accordingly.
2. Subsequently, the case management direction and Pre – Trial Conference were held in consonance with the provisions of Order 11 of the Civil Procedure, 2010 and the matter was set down for full trial which commenced in earnest on 15th February, 2021.

II. The Plaintiff's case

3. According to the Plaintiff, since the year 1987 he had been a licensed miner of precious and semi-precious minerals and operating at Riziki mining location situated at Pamleso, Kasigeu located at Voi Sub - County in Taita Taveta. The area was publicly unadjudicated and he initially had to enter



deliberations with the local community. He stated that at the time of filing suit he was the holder of licenses to mine eight (8) locations exclusively and had invested heavily in research and exploration.

4. On 10th September 2017, upon visiting the location the Plaintiff discovered a camp had been erected at his locations and he found out that the 1st Defendant had commenced mining activities under purported consent of 3rd Defendant. The 2nd Defendant had applied and obtained mining consent given by the 3rd Defendant. The claim by the Plaintiff is against the three Defendants whereby he sought for an order of injunction restraining them from trespassing and carrying out mining activities in his allocated mining location. On 15th February, 2021, the Plaintiff summoned three (3) witnesses and who tendered their evidence in Court as follows.

Examination in Chief of PW – 1 by Mr. Gaita Advocate

5. PW – 1 sworn and testified in Kiswahili language. He identified himself as Joseph Mbiriri Kamau. He was the Plaintiff in this case. He recorded and a witness statement dated 17th November, 2017 and filed in Court on 20th November, 2017, together with a list of documents. He also filed a further list of documents dated 24th September, 2020 on 29th September, 2020. He produced them as his evidence in chief and were marked as Plaintiff Exhibit Numbers.....
6. PW – 1 stated that he had been a miner from the year 1984. He had mines with the Counties of Taita Taveta and Kwale. He was licensed under the provisions of the *Mining Act*, Cap. 306. In the year 1987, he picked an area situated in Kisagau Sub - Location, Voi Sub - County of Taita Taveta District. He acquired the relevant documents and informed the area Locational Chief about it. The Chief issued him with a letter introducing him and informing the County Council of Taita Taveta of his plans and intentions to undertake the prospecting of minerals within that location. He was referred to the letter dated 9th November, 1987 (No. 8 in the second list of documents). Based on this, the County Council of Taita Taveta then gave him a Mining Consent as the land was Trust Land. That was on 12th November, 1987. (See documents No. 7) being the said Consent by the County Council of Taita Taveta. From the said Consent, PW – 1 was referred to as the miner. He submitted the documents to the mines and Geology Department who then issued him with the mining titles which he was enlisted as Riziki 1 – 8. The Mines and Geology issued him with the mining Certificates.
7. He noted that they were numbered as 1 - 8 but the department numbered them as 1389 to 1896. Those numbers changed in the year 2007. He informed Court that the department changed these numbers into cadastral system. The new numbers issued were numbers 1970 - 1977. He stated that his mining titles was paid for upto the year 2021. He attached some of the documents, including a bunch of payment receipts. He would be exploring the mining all through and caused a lot of development on site. He had been mining over many years. For instance, he had been mining - Spinnet one of the deposits known in the world
8. However, PW – 1 informed that sometimes in the year 2017, he got information that there were some intruders within his mining locations. Upon receiving this information, he visited the area and found a new camp and people already mining there. He inquired who they were and whether they had any documents of which they stated being were miners. Also, they a consent letter issued to them by Washumbu D.R. Ranch Co. Limited - the 3rd Defendant herein. The consent was in the name of one M/s. Agnes Kivuva, the 2nd Defendant, although the people he found on site informed him having been sent by one Mr. Robert Kivuva, the 1st Defendant herein. They never produced any other documents. They agreed to his request to write down their names. He found out that only one of them, a Mr. Ali Yaa was of Kenyan nationality. He presented the names to court.



9. Pursuant to that, he reported the intrusion to the area Geologist at Wundanyi. He summoned Mr. Robert Kivuva, a former area Locational Chief to meet in his office. Mr. Kivuva obliged where he attended office along with some five other people whom PW – 1 later on learnt were the directors of the 3rd Defendant. After some deliberations, Mr. Kivuva asked PW – 1 to give him some soft landing because he had Investors from Tanzania and whom he had taken some money from them. A report dated 11th October, 2017 was prepared by the Regional Geologist and signed by Mr. Edward Omido who was a witness in this case. The letter was dated 11th October, 2017 and annexure as Number ‘5’ in the affidavit of Joseph Kamau Mbiriri.
10. A date was set when all the parties were to go to the ground. While at the ground, it was confirmed that the mining territory was for PW - 1. Further, they found close to 200 people on the ground. As a result, the Geologist thought it was not safe to continue transacting any further business then. He directed the team to the offices of the area Chief. Upon getting to the Chief’s office, they found other people/villagers who had issues with the 3rd Defendant. Hence, the matter was never resolved. PW - 1 felt threatened and he reported to the area DCC. The DCC also summoned the 3rd Defendant and PW - 1 presented his documents. The DCC was satisfied that the mining area was for the PW – 1. As a result, PW – 1 went back to the site. However, the threats continued and thus he decided to institute this suit.

PW – 1 reiterated that he moved into the suit land in the year 1987 and obtained consent from the relevant authorities. It was not true that he was roaming around the land. He was mining in an area with specific co - ordinates through a cadastral held by the Ministry. He insisted that his rights subsisted even if the ownership of the land changed. He stated that the Land owners never conferred mining rights to any one, These rights were conferred by the mining department. He urged to be granted the reliefs sought from the Plaintiff. He produced the original documents in all his lists of documents as marked as Plaintiff’s Exhibits No. 1, 2, 3, 4, 5 and 6 respectively. He had documents No. 1-4 in the Lists of documents marked for identification as PMFI - 1 to 4 to be produced by the makers..

Cross Examination of PW – 1 by Mr. Amadi Advocate

11. His interest was on the mining rights. He had no claim over the suit property. He never got consent to mine from the local authority. By that time, it was not a requirement. In year 2017, he found the Defendants trespassing on the suit land at the location where he had been mining. He had submitted a list of nine (9) names. When he found the people, they did not inform him who the land owner was. He produced a document with name of 3rd Defendant. He never conducted a search to know who was the land owner. He never went to the lands office to interrogate the ownership of the suit land.

PW – 1 stated that he agreed with the 1st Defendant and arrived an agreement on soft landing. They had a meeting at the offices of the DCC. It was a security meeting. He informed Court that on 25th October, 2017, his property was vandalized and he reported the matter to the police. None of the Defendants were charged because he showed them a Court order. Hence, treated the matter as Civil and not of criminal nature as such. He had not produced the evidence of the hearing that took place at the DCC’s offices nor the investments he claimed to have undertaken on site. Item 6 from the Plaintiff’s second list of documents was a Certificates of Registration issued on 11th June, 2007. It was only valid for period of one year from 4th July, 2007. It was accompanied by receipts.

12. Some people invaded his property over the weekend. He could not identify them. The 1st and 2nd Defendants were not there. He prospected for scheme V Gemstones/some Precious stones. When he applied it was non precious minerals. But from the documents he was mining precious. The mining license was for a period of three (3) years which was renewable and issued by the Government of Kenya.



He was seeking for an injunction orders from Court. By applying for permanent injunction it did not mean he denies the owner the rights to the land.

Cross Examination of PW – 1 by Mr. Gekonde Advocate.

13. PW – 1 stated some people came and claimed they were granted permission by land owners. He had not seen any copy of the title held by the 3rd Defendant. According to the title dated 22nd August, 2018. According to the title deed, the registered owner was Washumbu Ranching Limited, the 3rd Defendant. When he met the people, they introduced themselves as being the owners of Washumbu Ranch Limited. He had the mining titles. He renewed it every year.

14. At first he never went to the police. He only reported the matter later on. He had documents from the County Council of Taita Tavetta issued in the year 1987. PW – 3 did not agree that he was roaming on the land prospecting for minerals. He had a letter from the Locational Chief who said he had no objection.

Then he went to the offices of the Mines and Geology. He was allotted the mining locations by the Commissioner of Land in Nairobi. He came to court to get protection. He was seeking an order of permanent injunction, declaration that the Defendants were not seized of the pre - requisite authority to apply for grant and/or the mining rights onto the said location. He also sought for general damages. He had not undertaken an official search to know if he was within the Washumbu Ranch. The Court could grant him a declaration that he was the owner. He had been there since the year 1987. There was a procedure they followed. He was not a trespasser. He was not challenging ownership of the land but protecting his mining rights.

15. His application for the licence was not there. He moved into the area in the year 1987. He put the application to the Ministry of Geology for the licence. It was not annexed there. They had to get a prospective rights and paid a deposit of a sum of Kenya Shillings Two Thousand (Kshs. 2,000/=) at Mombasa and had to take to the County Government. The local government would have to issue a consent. After obtaining the consent one had to go to the ground and mark the area and submit the co - ordinates.

16. He called the place called RIZIKI. Now Riziki was a forest. It had wildlife animals. There were many animals. For one to undertake mining there was no requirement that one sought permission from the forest Department. He had applied for NEMA for approval. He wrote letters for protection. He did not know whether it was a heritage area. He did not know that as he had legal documents for mining and prospective. He had a valid licence for Mining and Prospective licence. He paid royalty to the County Government and which they use for community service. There was a feasibility study to show how the mining was done. He was neither sure nor aware that the mining prospects would contaminate water from the Kazigawa river.

17. There was a letter to show that the mining was not illegal and that he understood mining well. He knew the registered owners of the land though he only came to know that fact when they gave the licences to other parties to mine. He filed the case in the year 2017. He saw their title deed in Court. He had and protected his rights on the mines. Minerals belonged to the National Government. The owner needed to follow the proper procedure before giving the mineral rights to 3rd parties.

Re - Examination of PW – 1 by Mr. Gaita Advocate

18. PW – 1 had sought for a declaration that the Defendants could not claim owning the mining rights that he owned. He was not claiming the land, but his mining rights. Mining rights were not affected by the change of ownership. He got a letter from the area location Chief as there was no objection from



the community. He did not claim ownership of the land, but mining rights. His mining permits were still in force upto the year 2021. They were renewed every year. He was upto date with all his payments. He was only protecting his mining rights as provided for by law.

19. He was mining in an identified area. He had been on the ground since the year 1987 to date. He had been doing mining all these years. Mining entailed prospecting minerals natural development, minerals, special gemstones, one of the best deposits. He was seeking for protection from the Court. He knew the 3rd Defendant had been the proprietor to the suit land. They had now given the consent to other new people. He did not have their consent. Its Government of Kenya through the Ministry of Mines that had that authority of giving Consent for mining.
20. On 24th November, 2021 he received information from his workers that there were people who had interfered with his property. Further, that they had damaged the property and the camp was completely destroyed. Some people had been calling his members of staff. It was not a forest. He did not require any permission from forest. When he started mining prospecting, NEMA was not a requirement. But now it was and he had the NEMA license. He obtained consent from the County Government of Taita Taveta.
21. PW -1 sought for Court to grant him permanent injunction reliefs for purposes of his mining rights and that there were huge investment on the suit land – as pleaded in the Plaintiff.

Examination in Chief of PW – 2 by Mr. Gaita Advocate.

22. PW – 2 was sworn and testified in English language. He identified himself as Mr. Edward Olale Omitwa. He was a Geologist. His qualification were that he was a graduate from the University of Nairobi and a holder of a Bachelors of Science degree in Geology. He worked with the Ministry of Petroleum stationed at Voi Mineral Centre. He know the Plaintiff. He knew him as a Miner in Voi. He had been a Miner for a long period. He found him mining having done so as from early 1980's.
23. On 25th September, 2020 he recorded a witness statement and the attached documents. He wished to rely on it as his evidence in support of his case. He produced documents which had been marked for identification as Plaintiff Exhibits Numbers 7, 8, 9, 10 and 11 respectively. He informed Court that They issued Mining Permits to small scale farmers. He testified on the procedure and the requirements to be followed for one to be granted the permit. These were they would look at the area and the Consent of the owner of the land; the feasibility study and mining work plan and E.I.A. report. One had to provide proof of having the financial capability. One applied online to the Ministry and get the feedback. PW – 2 stated that the Plaintiff complied and was issued with the licences. This was as far as the new permit was concerned. Before one would only need to get a mining location. of 250 X 100 metre

In this case, he got 8 locations to mining permit – from the old to the new permits. The department did not deny the land owner land rights. Mr. Mbiriri had fully complied and he had paid up all the statutory fees. The mining area was identifiable with beacons. He was within the area. They carried out supervision.

As a Ministry they insisted on the compliance and the mining was allowed for five (5) years. The Miners have to make returns.

The Plaintiff was a bona fide miner.

Court:-

If the land changed hands, the land owner would have to inherit the miner who was already on the land.



Cross Examination of PW – 2 by Mr. Amadi Advocate

24. The Plaintiff was in compliance with the Mining requirements. This was a statement not a technical report. He had no documents to support his statement on the compliance. Item No. 5 were payment receipts. These documents were valid upto 25th September, 2020. From the statement, he held that the Plaintiff was the legal owner. The permit was renewed every 5 years. He had not attached any document to show he was the legal owner to the said Mining location.
25. He was aware it was the 3rd Defendant who had the title deed to the suit land.

Cross Examination of PW – 2 by Mr. Gekonde Advocate

26. In the year 1987, PW – 2 was in school. He completed education in the year 1999. He was employed at the County of Taita Taveta from the year 2009. He did not have a letter to show he was the one In - charge of the station. He did not have record on the Plaintiff in court. He was not from Wundanyi. He did a letter requesting him to come and testify in court.
27. He was a lecturer. The Mining license holders were Gazetted. PW – 2 handled so many Miners. He had been in the mining site. It was classified as a ranch. It was not his duty to scrutinize the Miners. The minerals the Plaintiff was dealing with was the Gemstones, a precious stones. It was among the best in the world; Gemstones were classified differently.
28. It was the 3rd Defendant who was the registered owner of the suit land. Under the provision of Section 7 (3), the new owner would inherit it when a consent was granted.

Re - Examination of PW – 2 by Mr. Gaita Advocate

29. They were in the area – mining location to mining permits transacting from. There were records. He consulted the Government of Kenya records before coming to testify in Court. He was aware there were summons for the Director of Mines to come and testify. But he was the one who was asked to come instead. There was a requirement for the Gazettement of the Mining Locations. For the permits and the Mining process was still on going. It was never revoked. That was all.
30. In the Course of his testimony, PW - 1 produced the following documents in support of his case:-
 - a. Copy of single business permit for the year 2017 dated 9th November 2017;
 - b. Copy of a general map showing the location of Riziki deposit.
 - c. Copy of Chief's letter and consent dated 9th and 10th November 1987.
 - d. Copy of licenses.
 - e. Copies of letters.
 - f. Letter from the County Geologist dated 11th October, 2017.
 - g. Letter from the County Commissioner by community
 - h. Letter from the Chairman of the National Lands Commission dated 17th November, 2016 to the Governor.
 - i. Letter from office of the Chief Kasigau to the Chairman Nationals Lands Commission dated 6th June, 2016.
 - j. Consent from Washumbu Ranch to Agnes Ndunge Kiuwa



- k. Bunch of initial renewal certificates over the years.
 - l. Researchers report showing worldwide comparison of the Riziki deposit at Palmeso dated 14th March, 2017.
 - m. Feasibility report by Dr. Cedri Simonet dated 7th October, 2020
 - n. Map showing the Riziki Mining locations
 - o. Court case documents for Washumba & others.
 - p. Current payment of receipts for mining permits 1970-1977
31. The Plaintiff prayed for judgment against the 1st, 2nd and 3rd Defendants for the following prayers reproduced herein verbatim; -
- a. An order of permanent injunction restraining the three Defendants from entering, trespassing upon carrying out mining and/ or mineral exploration within the Plaintiff's allocated location identified as 'Riziki'
 - b. A declaration that the three Defendants jointly and severally are seized of requisite authority to apply for grant and /or confer mining rights on location identified as 'Riziki'
 - c. General damages
 - d. Exemplary damages
 - e. Costs of suit.

III. The 1st Defendant's Case

32. The 1st Defendant refuted the Plaintiff's allegations and specifically admitted to being the 2nd Defendant's husband, who had been conducting mining activities in the area for a duration of four years. The 1st Defendant further contended that the lawsuit lacked merit, deeming it frivolous and an abuse of the court process. As a result, the 1st Defendant prayed the court to dismiss the suit and award costs against the plaintiff. They testified on 4th May, 2022.

Examination in Chief of DW – 1 by Mr. Sang Advocate.

33. DW – 1 sworn and testified in the Kiswahili language. He identified as Mr. James Mwangombe Kinusa for the 3rd Defendant. He was a holder of the Kenyan national identity card bearing numbers 8619591. His date of birth was 1.1.1965. He was the secretary to the Washumbu Ranch Limited. He was very conversant on the matters of the Company and the suit land. The 3rd Defendant was an incorporated company with the Registrar of Companies. They were the registered owners of the suit land being land Reference Numbers 14206 at the County of Taita Tavetta. It was a private land. He recorded a witness statement on 12th July, 2021 and filed in Court on 13th July, 2021. It was produced and admitted as part of his evidence.
34. DW – 1 represented the company and kept the records. He had not known the Plaintiff earlier. He only got to know him when the suit was filed against them. There was no consent given to him nor any contract in existence between them. He was a trespasser onto the land and illegally undertaking mining on the land. They had complained to the police and the staff for the Plaintiff were arrested. The County Government of Taita Tavetta had no control over the private land. They only gave consent for Mining to the 1st and 2nd Defendants herein. He produced the documents in List of documents



dated 12th July, 2021 and filed in Court on 13th July, 2021. They were admitted and marked as Defence Exhibit numbers 1 to 8. He prayed that the case be finalized and all the persons on the land to come out of it and reapply afresh.

Cross Examination by Mr. Gaita:-

35. DW – 1 was referred to the title dated 22nd August, 2018. He admitted that when they got the title deed it was a lease. That was before they were given it by the Government. By the year 1987 it was for Washumbu Ranch. They had a Certificate of incorporation. There was nothing else to show the land belonged to Washumbu Ranch Co. Limited.
36. As far as he was concerned it belonged to the government and it did not matter where they were found. There was a letter dated 4th May, 2015 and Agreement for consent. Prospecting right to mine dated 24th September, 2012. They entered in agreement in year 2017. The prospecting of mineral could take up to 12 years. But they had no other agreement. There was no mineral certificate shown or provided by the lessees. There had been previous cases pertaining to the land. Many of them have been criminal cases. For instance, there was ELC No. (Number not provided for). They sued them as they were claiming ownership and they sought for their eviction from the suit land.
37. They had a problem with the Plaintiff as they found him on their land without their consent. They did not know him until now. They had never seen any of the documents that gave the Plaintiff mineral rights.

Cross Examination of DW - 1 by Mr. Amadi Advocate:-

38. He knew Mr. Robert Kimwuwa Kilio and Agnes Ndunge Kiwuwa – the 1st and 2nd Defendants herein. They entered into an agreement with them. He stated that Washumbu Ranch Limited had been there since the year 1974. We have been in occupation from 1974. But they had been there from the year 1960's dealing with livestock keeping.

Re - Examination of the DW – 1 by Mr. Sang Advocate

39. They were given the certificates of lease in the year 2018. Before then, they had a Letter of Allotment which they surrendered to be issued with the Certificate of Lease. They had been in occupation of the land all this time. As the Secretary of the Company, he was not involved in the Plaintiff being issued with the Mining licence.
40. The only people they recognized were Mr. Robert Kiwuwa Kilio and Agnes Ndunge Kiwuwa. There was a procedure for allowing people to conduct mining prospecting. They had a right to evict anyone from their land for not adhering to the Mining Rights. They participated in Corporate Social Responsibility (CSR) activities.

The 3rd Defendants produced the following documents in support of their case.

- a. Certificate of Titles CR. No. 71927 (Title No. 142064).
- b. Survey Plan No. 424634.
- c. Consent of Mining dated 4th May, 2015.
- d. Agreement for Consent to mine dated 21st August, 2017.
- e. NEMA report dated 18th August, 2017 to the 1st and 2nd Defendants.
- f. Certificate of Incorporation dated 22nd February, 1974.



- g. Letters dated 2nd 6th and 7th November, 2017 from the 3rd Defendant.

Examination in Chief of DW – 2 by Mr. Amadi Advocate.

41. DW – 1 was sworn and testified in the Kiswahili language. He identified himself as Mr. Robert Kilio Kiwuwa. He was a bearer of the Kenyan national identity card bearing numbers 5349879. His date of birth was 14th August, 1953. He was a farmer. He recorded a witness statement on 29th September, 2020.
42. His wife Agnes Ndunge Kiwuwa, the 2nd Defendant here had contacts with Washumbu Ranch Limited. She requested for consent for prospecting of mines from the Ministry. They also entered into an agreement. While this was going on the Plaintiff came and demolished their camp in the year 2017. The camp was for the 1st and 2nd Defendants herein. He met the elders in the year 2015 and he advised his wife to approach the Washumbu Ranch. They were given the Consent for the Mining activities on the suit land. They had been there for two (2) years until they met the Plaintiff. They had never met him before. They never received any letter from him. The owner of the mine found us and he was shown the consent.

Cross Examination of DW - 2 by Gaita Advocate

43. DW – 2 was involved in the getting the consent - in the discussion in the year 2015. Referred to Prospecting Rights – dated 24th September, 2013 but it was subject for renewal. From his written statement, it showed that the last renewal they paid was on 9th October, 2014 vide a receipt for a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=). It didn't matter whether we had receipt or not. They had brought land before and they would conduct an official search which indicated the ownership. However, for this one, they never conducted official search. They relied on information from people.
44. They got a permit in the year 2015. Thereafter there were no Prospecting Right Permit. He did not have it. They were there from the year 2015 to 2017. Mining involved digging. They only got samples for spinner which were not for sale depending on the colour. He did not have the samples as they had left them behind. He never benefited from the Prospecting. It was from this territory where Plaintiff had been. He would not be having any documents from the Government. That is all.

Cross Examination of DW – 2 by Sang Advocate.

45. There is no case but he reported us at the mining office Voi.

Re - Examination of DW – 2 by Mr. Amadi Advocate:-

46. DW – 2 stated that they only occupied one location of the suit land. It was interesting that the Plaintiff never saw them for the 2 years they were there.

IV. Submissions

A. The Written and Oral Submissions by the Plaintiff

47. The Plaintiff, represented by the Law firm of Gaita and Company Advocates, filed their submissions dated 27th May, 2022. Mr. Gaita Advocate commenced both his written and oral submissions by providing a brief background of the matter being the Plaintiff's and the Defendant's cases. He stated that the Plaintiff was a holder of Mining Permit from No. 4070 1 to 10. He acquired the Mining right from the then County Government of Taita Taveta under Section 37(3) of the *Mining Act* 2016 (Refer). The Plaintiff's Mining rights subsisted and unprotected. His consent had been properly



- acquired. The evidence was that they were mining area and they were interfering with the right of the Plaintiff. While looking at the submission by the 3rd Defendant, they had referred to a Kenya Gazette which was adduced during the hearing and more so it does not refer to the area not the Mining Permit hence its irrelevant. Section 37(1)(c) of the Act. They had cited the authority of John Gitonga Kihara – Versus – Kasingau Ranching DA, 1994” - the right had expired. The facts from that case were different, as in the cited case the consent would not be granted.
48. The Learned Counsel then provided an indepth legal expose on matters of Mining in Kenya. He commenced by holding that the provisions of Article 62 (1) of *the Constitution* of Kenya, 2010 held that Public Land included all minerals and Mineral oils. That Section 6 of the *Mining Act*, 2016 provided that every mineral in its natural state under the land in Kenya was vested in national Government in trust for the people of Kenya. Further to this, the Learned Counsel referred Court to the provisions of Section 37 of the *Mining Act* in as far as providing the procedure and obtaining of the consent for Mining and prospecting Kenya was concerned. He argued that the 3rd Defendant, as the landowners of suit land measuring about 14, 000 acres were not deprived of enjoying their rights as ranchers and rearing of their cattle graze on mining land as provided for under the provision of Section 152 of the *Mining Act*. This section allowed landowners to continue grazing livestock or cultivating the land, provided it does not interfere with mining operations or pose a danger to livestock or crops.
 49. The Learned Counsel further contended that the 1st and 2nd Defendants were legally liable to the Plaintiff, as there was undeniable evidence of their engagement in mining activities within the Plaintiff's territory without having proper Mining prospecting rights. He cited the provision of Sections 10, 36 (b) and 139 (1) of the *Mining Act* of 2016 to support this argument. These provisions of the Law emphasized that individuals must obtain permits or licenses to engage in mining operations and that the holders of mining permits have exclusive rights within the specified area.
 50. The Learned Counsel averred that the Plaintiff had established themselves as the holder of the Mining rights known as Riziki and according to the aforementioned provisions, no one else could be allocated mining rights there. Therefore, , relying on provisions of Sections 202, 203 and 204 of the *Mining Act* 2016, the Learned Counsel argued that they were entitled to compensation from the 1st, 2nd and 3rd Defendants. He argued that there was no right without a remedy and hence the Plaintiff was entitled to compensation from the 1st, 2nd and 3rd Defendants for the illegal infringement of the Mining rights. To buttress on this point he cited the case, “Meru High Court Civil Appeal 48.A of 2020, involving Kenya Wildlife Service – Versus - Abraham M'ngai M'itumit”, was referenced to support the claim that there should be a remedy for the wrong suffered.
 51. Thus, in a nutshell he asserted that the Plaintiff was entitled to both general and exemplary damages being a sum Kenya Shillings One Million (Kshs. 1,000,000.00/=) against the Defendants. Additionally, it was highlighted that the injunctions sought under Section 142 of the *Mining Act* provide for the renewal of mining permits for the remaining life of the mine. He urged Court to provide the Plaintiff protection for as long as he remained Licensed to carry out Mining activities. He pleaded that the Honorable Court to allow the suit as prayed.

A. The Written and Oral Submissions by the 3rd Defendant's Case

52. On 27th June, 2022 the Learned Counsel for the 3rd Defendant herein represented by the Law firm of Messrs. Chege & Sang Company Advocates, filed written submissions in opposition to the application. Mr. Sang Advocate started the submission by providing the brief background and facts. The Learned Counsel crystalized his submission into two broad legal issues. These were as follows. Firstly, whether the holder of Mining right would continue Mining activities where a consent had never been issued and/or withdrawn by the land Owner. The Learned Counsel then argued that the Applicant's claim to



carry out mining or prospecting activities on the interested party's land without the owner's consent was illusory and unsupported. To buttress that point he cited sections 36 and 37 of the *Mining Act* 2016, referring to the case of “Titus Musau Ndome – Versus - Cabinet Secretary, Ministry of Mining & 2 others [2017] Eklr as precedent. They further relied on the cases of “Kasiagu Ranching (D.A) Ltd – Versus - John Gitonga Kihara & Others and John Gitonga Kihara & Others – Versus - Kasigau Ranching, where a passage from Salmond on Torts, 17th Edition, was cited to support the argument that a bare license does not confer any property interest and can be revoked at the licensor's will.

53. Additionally, it was submitted that the Commissioner, under the provision of Section 79 of the *Mining Act* 2016, never had the power to renew a prospecting or mining license by simply notifying the landowner of the intention to renew. The case of “Muthoni Kihara & Another – Versus . Commissioner of Mines and Geology & Another [2017] Eklr was referenced to support this claim. The Learned Counsel contended that the Commissioner acted beyond their powers and violated the provisions of Section 7(1)(m) of the repealed *Mining Act*.
54. Secondly, what were the rights of land Owner in respect to Mining rights issued to 3rd Parties. The Learned Counsel also argued that the rights of the Defendant are protected under sections 24, 25(1), and 26 of the *Land Registration Act* No. 3 of 2012. They cited the case of “Elizabeth Chemutai Chepkwony – Versus - Janeth Chepkoech & Another [2019] Eklr to support this assertion. Based on these reasons, the application was requested to be dismissed with costs. The 3rd Defendant, in their statement of defense dated 12th July, 2021, asserts that the claims made by the Plaintiffs are baseless. They claim to be the rightful owner of the property in question, while the Plaintiff was merely an explorer and had no legal rights over the 3rd Defendant's property.
55. According to the 3rd Defendant, on or around 4th May, 2015, after discussions with the 1st Defendant, consent was given for mining activities on the property, and a corresponding agreement was signed on 21st August, 2017.
56. Additionally, the 3rd Defendant argued that the suit property was privately owned land and not government property, contrary to the Plaintiff's claims. They believe that these reasons justify the dismissal of the lawsuit, and they request that the court awards costs in favor of the 3rd Defendant.

Analysis and Determination

57. I have keenly assessed and considered all the issues from the filed pleadings, both the oral and documentary evidence adduced by all the summoned witnesses, the written and oral submissions by all the parties herein, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and statutes.
58. For the Honorable Court to reach an informed, just, equitable, reasonable and fair decision in the matter, it has crystallized the subject matter into the following three (3) salient issues for its determination. These are:-
 - a. Whether the suit instituted by the Plaintiff herein vided a Plaint dated 20th November, 2017 and from the evidence adduced by parties has any merit at all?
 - b. Whether the parties herein are entitled to the reliefs sought from the filed suit.
 - c. Who will bear the cost of the suit.



Issue No. a). Whether the suit instituted by the Plaintiff herein vided a Plaint dated 20th November, 2017 and from the evidence adduced by parties has any merit at all?

Brief facts

59. Before embarking on the issued under this Sub heading, the Honorable Court feels it imperative to first and foremost extrapolate on the brief facts of the case herein. Based on the facts contained in the pleadings, both the documentary and the oral evidence adduced by all the parties, the Plaintiff Mr. Joseph Kamau Mbiriri held that he was a male adult of sound mind and understanding. He was a licensed miner registered under the Ministry of Mining from the year 1987. He was currently undertaking mining of Spinel minerals at a place called Riziki Mining Location, 1970 t0 1977 situated at Pamleso, Kasigei Location Voi Sub - County of Taita Taveta. He displayed his single business permit for the year 2017 and a general map for the location. He asserted that he moved to the location for mining purposes from the year 1978 after seeking consent from the local community. He was issued with a letter from the Locational Chief for this purpose. He complied with all the relevant government and departmental requirements and was issued with a Mining Registration Certificate for eight (8) mining locations duly registered as Numbers 1389 to 1396 all inclusive. As already indicated above, he christened the Location “Riziki”.
60. According to him, sometimes in the year 2007 the registration location underwent changes and new numbers namely 1970 to 1977 were issued. He stated that due to the high potential insecurity within the place, he had never resided there but had always maintained his workers on site. He had invested heavily in exploration, actual mining and research leading to intervention recognitions wherein the deposit had been cited as Third known deposit in with the continent of Africa closely after Tanzania and Madagascar in ranking and that order. Sometimes in the year 2017, he averred that the 1st and 2nd Defendants illegally and wrongfully got into his mining location and took possession. As a result, a dispute between them ensued. The Defendants claimed to have been given a consent by the 3rd Defendant, allegedly as the legal owners of the suit land where the mine sites were situated to mine from there. The disagreement escalated and eventually was taken before the District and Regional Geologists and the District County Commissioner to resolve it. The Plaintiff holds that it was eventually determined to his favour.
61. Nonetheless, despite of the successful decision, they were urged to enter into an agreement - the 1st Defendant and the Plaintiff whereupon the 1st Defendant was offered some benefits and advised to withdraw from the area. The Plaintiff states that still the 1st Defendant declined. Instead they forcefully entered into the location. As a result, this altercation between the Plaintiff and 1st Defendant has been going on for a while. On 2nd November, 2017 the Plaintiff received a letter copied to him by the officials of the 3rd Defendant instructing the Director of Mines to cancel and remove all information entered into the Cadastral Portal in favour of the Plaintiff on allegation that he lacked their consent to mine in the area.
62. Thereafter, on 7th November 2017 the Plaintiff received a letter from the Director of Mines asking him to respond to the above letter by the 3rd Defendant’s Officials. Vide a letter dated 14th November, 2017, the Plaintiff obliged. On 20th November, 2017, based on all the surrounding facts, the Plaintiff decided to institute this suit seeking a relief in form of permanent injunction restraining the Defendants from entering trespassing upon carrying out mining and/or mineral exploration with the Plaintiff’s allocated location identified as “Riziki” a declaration that the Defendants were not seized of requisite authority to apply for grant and/or confer mining rights on the location identified as “Riziki” and costs.



63. On the other hand the 1st and 2nd Defendants claim to have received a consent on 4th May, 2015 to mine on the suit location from the 3rd Defendant the legal and absolute registered owners of the mines of the suit land. They had been prospecting and mining in the location from the year 2011. They claim to have cleared the bush and established a camp for the workers and continued with the mining for 6 years without any interruption by anybody including the Plaintiff. According to them, as they continued with the prospecting of minerals it became important that they formalized their relationship with the 3rd Defendant. Thus, on 21st August, 2017 they entered into a formal and duly executed agreement upon making payment for a sum of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/=) to the 3rd Defendant as mining fees. The 1st and 2nd Defendants stated that they would be making the payment fees for prospecting rights of minerals to the County Council of Taita Taveta and then later on with the promulgation of *the Constitution* of Kenya to the County Government of Taita Taveta. They had a well recognized and well established business having been in compliance with the land. This required them to put information in the Kenya mining Cadastral Portal Home – Map bearing co - ordinates 3.57 33.8 and 38.45.25 East. In the course of time, in September, 2017 that the Plaintiff appeared from nowhere having heard of the mining prosperity and progress achieved by the 1st and 2nd Defendants, claiming that the mining holes they had been working on for 6 years having invested heavily and they were forcibly chased and the mining sites taken up by the Plaintiff. They lodged a complainant with the Voi Police and the Plaintiff was arrested for trespass and destruction of property. He was later released and never charged. The 1st and 2nd Defendants alleged that the Plaintiff who could not explain where he had been all these years since 2011 seem to have a well - choreographed scheme with the support of Mr. Omito of Mines and Geology Taita Taveta to drive them away from the mines sites so as to easily and without expense enable the Plaintiff commence harvesting mineral discovered by the Defendants after sacrificing almost all the entire life savings.

64. They claimed that the Plaintiff had no valid and operational licence as to warrant the claim and/or support from mines and Geology Department and the only valid document he had namely Annual Business Licence from the County of Taita Taveta was obtained in November, 2017 only for purposes of this case.

During the pendency of the hearing of this case on 3rd November, 2021, the Defendant filed an application seeking injunction orders to stop the Plaintiff from further mining or carrying out any related activities on the mines sites pending the hearing and the finalization of the hearing of this case. That is adequate on facts of the case.

65. Now turning to the issues under this Sub – heading. It is instructive to note that the Plaintiff sought for an order of permanent injunction restraining the three Defendants from entering, trespassing upon carrying out mining and/ or mineral exploration within the Plaintiff's allocated location identified as 'Riziki'. For that reason, as a matter of precedence, the Honorable Court deliberate to some extent and consider whether its plausible to issue these mandatory injunction orders from the surrounding inferences and the given circumstances of the case. The main issue to ponder here is whether the Plaintiff is entitled to be granted the said orders restraining the 1st, 2nd and 3rd Defendants and their agents onto the suit property.

66. To begin with, I need to state that unlike temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different. They are perpetual in nature and ordinarily issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction



under the provisions of Sections 1A, 3 & 3 A of the Civil Procedure Rules, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances. In the cases of: Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma [2020] eKLR and “Malier Unissa Karim – Versus - Edward Oluoch Odumbe (2015) eKLR Court held as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Limited -Versus - Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

67. Further the same Court of appeal in the case of:- “Jay Super Power Cash and Carry Limited – Versus - Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

68. The Court also reaffirmed its decision in the case of:- Shariff Abdi Hassan – Versus - Nadhif Jama Adan [2006] eKLR where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

69. Additionally, the law on Mandatory Injunctive Orders was laid down in the case of “Civil Appeal 19 of 1998, Andrew Kamau Mucuha – Versus - Ripples Limited. The Court of Appeal in the latter held as follows:

“A Mandatory Injunction ought not be granted on an Interlocutory Application in the absence or special circumstances and then only in clear cases either where the court that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a Mandatory Interlocutory Injunction, they had to feel a higher degree of assurance that at the trial it would appear that



the Injunction had rightly been granted that being a different and higher standard than was required for a Prohibitory Injunction.”

70. Similarly, in the case of:- Nation Media Group & 2 others – Versus - John Harun Mwau (2014) eKLR, the Court of Appeal said:-

“It is trite law that for an Interlocutory Mandatory Injunction to issue, an Applicant must demonstrate existence of special circumstances. A different standard higher than that in Prohibitory Injunction is required before an Interlocutory Mandatory Injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated a Temporary Injunction can only be granted in exceptional and in the clearest of cases.”

71. From these elaborate and plethora precedents, the Court is fully convinced that graphically the 1st and 2nd Plaintiffs/Applicants herein have proved there was:

- i) Existence of special circumstance.
- ii) Exceptional and clearest of cases.
- iii) Whether the Defendant is trying to steal a march against the Plaintiffs.

The special circumstance to warrant the issuing of Mandatory Injunction is in form of the facts of the case herein. Essentially, the main substratum of this case revolves mining and mining rights of minerals whereby a dispute has arisen between the Plaintiff one side and the 1st, 2nd and 3rd Defendants on the other part over who has the legitimate right to be undertaking the exploration and extraction of the minerals at a particular place known as “the Riziki location – 1970 - 1977” ideally owned by the 3rd Defendant. From the very onset, the Court wishes to point out that the dispute is not on the ownership of the suit property. Nay. Far from it. Thus, its critical and inevitable for the Honorable Court to venture into the concept of mining in Kenya so as to directly respond and apply the said principles into the instant case.

72. As the Learned Counsel for the Plaintiff puts it, I fully concur that Mining is a heavy capital intensive operation that is meant to benefit the Country by earning much needed foreign revenue. Therefore it imperative that there be strict adherence to procedures and the stringent requirements and also the protection of the Miners who intended to venture into Mining prospecting in this County. Additionally, the ownership of land that contains minerals is a complex issue that requires a thorough examination of constitutional provisions and relevant legislation. In this case, the 3rd Defendant claims ownership of the suit land where mining activities took place, while the Plaintiff asserts their rights as a miner on the land. To determine the ownership of land with minerals, it is necessary to analyze *the Constitution* of 2010 and the *Mining Act* 2016. In order to make a decision whether there exists any special circumstances to warrant being granted the orders of permanent injunction here as prayed the Honorable Court would need to critically assess a few fundamental issues here below.

73. Firstly, from the facts adduced, it is not doubt that the 3rd Defendant, a duly incorporated Company trading in the names and style of “The Washumbu (Directed Agricultural) Company Limited” under the *Companies Act* and a holder of a Certificate of Incorporation bearing numbers 12/74 issued on 22nd February, 1974, was the legally registered and absolute owners to the suit land measuring one four five nine one (14, 591 HA) being the holders of the Certificate of Title Deed under the *Land Registration Act*, No. 3 of 2012 issued on 22nd August, 2018. Prior to that they held a Letter of Allotment issued by the Municipal of Taita Taveta and subsequently a Certificate of Lease. In the given circumstances as provided for under the provisions of Article 40 (1) and (2) of *the Constitution* of Kenya, 2010,



Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012, which vests in the legal proprietor of land as the 3rd Defendant herein the indefeasible rights, interest and title vested in law on them. The Honorable Court will be deliberating further on these issues at a later stage of this Judgement.

74. Secondly, it is not disputed that the Plaintiff was a seasoned and avid Miner and Prospector of minerals and mineral deposits for numerous years going back to the years 1987. The only bone of contention is how the acquisition of the mine location and its operations of the mining thereof. To begin with, its is fact that the Plaintiff approached the Locational Chief who issued him with a letter dated 9th November, 1987 addressed to the Clerk to the County Council of Taita Taveta Marked as Plaintiff Exhibit Number.....entitled “Mining Consent” and which read thus:

“Kindly attend the Mr. Joseph Mbiriri Kamau who has interest in prospecting within this area. As far as this office is concerned...has no objection”.

Thereafter, the Plaintiff proceeded to obtain single business permit and approvals from the County Council of Taita Taveta taking that the land was Trust land under the County Council regime then as stipulated under the provisions of Sections 117 to 119 of the former Constitution of Kenya (now reviewed) and the Department of Geology and Mining at Voi. Perhaps the assumption here all along was that this was Public land. Be that as it may, the permit expired on 31st December, 2017. There was no prove of a renewed Business Permit being issued. Indeed, the PW – 2 the Geologist from the Geology and Mining Department failed to produce any Mining report or Mining Permit that was allegedly issued to the Plaintiff.

75. Further to this, he obtained eight (8) Certificate of Registration for the Riziki 1 to Riziki 8, all corresponding to the lode locations numbered 1970, 1971, 1972, 1973, 1974, 1975, 1976, and 1977. The specific Certificate of renewal of registered mining location permits and licenses required for mining activities were issued from the year 1991, indicating their status as a miner. However, the last Certificates of Registration seem to have been issued on the same date on 11th June, 2008 and with sequential serial numbers from 11802, 11803, 11804, 11805, 11806, 11807 and 11809. They were only valid for a period of one (1) year from 4th July, 2008 hence to end on 4th July, 2009. The Single Business Permit issued by the County Government is for one year to expire on 31st December, 2017. There has been no further evidence of neither issuance of any other Certificate of Registration nor business permits nor licenses for undertaking any mining activities on the suit land from the year 2017 todate when the Plaintiff claims their mining rights were infringed.
76. Thirdly, it is instructive to note that from the year 2015 or thereabout, the Plaintiff decided to vacate the Mining Site for a period of two (2) years. He claims to have left his members of staff behind a defence the Court finds it rather difficult to fathom as it was during this period that the 3rd Defendant got into a contractual relationship with the 1st and 2nd Defendants and who commenced the Mining activities. Clearly, if at all the staff members were physically present they would never have missed it and hence reported immediately to their master. This never happened. When he came back after the sabbatical on 10th September, 2017, the Plaintiff got engaged in a flurry of activities and which Court wishes to flesh out. To begin with, he got into an altercation with the workers for the 1st and 2nd Defendants, he reported the matter to the Chief and the Mining and Geology Department. These officials made a very wise decision to all visit the site. Unfortunately, the visit could not be possible as they were met with protestation by over two hundred (200) community members which made the Geologist call off the visit. Instead they re – routed to the offices of the DCCC whom after hearing the issues verbally permitted the Plaintiff to proceed on with the mining activities. Furthermore, at the same time, the 3rd Defendant lodged a complaint with the police which led to the arrest of the Plaintiff. From all these



surrounding facts, the Honorable Court is of the view that there is no enabling environment for the Plaintiff to continue mining and prospecting of minerals from the suit land.

77. Fourthly, for some no apparent good reason or justifiable cause despite of the land being private and the 3rd Defendant bearing “prima facie” conclusive evidence of ownership to the land, no consent was ever obtained from them. From the evidence adduced in Court, the Plaintiff never undertook any official search to establish the owner of the suit land. Indeed, he claimed to have seen the Title Deed for the 3rd Defendant in Court. Additionally, the Plaintiff and the 3rd Defendant only came into contact after the arrests of the Plaintiff and his staff took place on allegations of trespass and destruction of property belong to the 1st and 2nd Defendants. Paradoxically, the Plaintiff instead of inculcating any relationship with the 3rd Defendant, he decided to institute this suit against them. From the surrounding facts and inferences herein and more legal reasoning to be adduced by the Honorable Court herein below, it has declined to grant the permanent injunction orders sought by the Plaintiff as the prayer lacks any basis, merit and foundation at all in law.

Issue No b). Whether the parties are entitled to the reliefs sought from the filed suit

78. Under this sub heading, taking the main substratum of this Case between the Plaintiff and the 1st, 2nd and 3rd Defendants herein being the Mining prospecting in Kenya, the Honorable Court feels it significant to expend a little bit more on the issue. According to the provision of Article 61 of [the Constitution](#) of Kenya, 2010, land in Kenya is classified into three categories – Public, Community and Private. the legal substratum on the law of Minerals and Mineral Oils. The Minerals and Mineral Oils as defined by Law constitute public Land under the provision of the Article 62 of Constitution of Kenya. The legal framework governing the mining sector includes the [Gold Mines Development Loans Act](#), the Continental Shelf Act and the [Mining Act](#) 2016 which governs the prospecting for and mining of minerals and gives effect to the provisions of Articles 60 to 62 (1) (f), 66 (2), 69 and 71 of Constitution of Kenya.
79. The provision of Article 62 (f) specifically designates land containing “...minerals and mineral oils defined as public land. Furthermore, Article 62 (3) holds that “...Public land classified under Clauses (1) (f) to (m) shall vests in and be held by the national government in trust for people of Kenya and shall be administered on their behalf by the National Land Commission”. Accordingly Articles 63 and 64 makes provisions for Community – land held by an identified community and private land – being freehold or Lease tenure held by individuals. These constitutional provisions establish that land with mineral resources is owned by the National government and held in trust for the people of Kenya.
80. The [Mining Act](#) 2016 further clarifies the ownership of minerals. The provision of Section 6 of the Act states that all minerals in their natural state, whether on land, in water bodies, or in exclusive economic zones, are the property of the Republic and are vested in the national government in trust for the people of Kenya. This provision asserts the ownership of minerals by the national government, irrespective of any right or ownership of the land on which the minerals are found.
81. It is important to note that the national government exercises control over the minerals vested in it through the provisions of the [Mining Act](#). The Act provides guidelines and procedures for the administration and regulation of mining activities, including the granting of licenses and permits for mineral-related operations.
82. In order to make progress, it imperative that we all appreciate the matter from both the view point by the Plaintiff and the Defendants. Prior to the grant of a mineral right, the Licensing and permit regime requires an application be made to seek approval from National Land Commission in the case of Public Land or the relevant state authority where the mineral rights is on public land.



83. In the case of private land mineral rights may only be granted with the consent of the registered proprietor under the provision of Section 37 of the [Mining Act](#). Section 37 provides:-

37 (1) “A prospecting and Mining rights shall not be granted under this Act with respect to private land without the express consent of the registered owner, and such consent shall not be unreasonable withheld.

(2) For the purposes of sub – section (1) consent shall be deemed to be given for the purposes of this Act where the owner of private land has entered into:

- a. A legally binding arrangement with the applicant for prospecting and mining rights or with the government, which allows for the conduct of prospecting or mining operations; or
- b. An agreement with the applicant for the prospecting and Mining rights, rights concerning the payment of adequate compensation.

(3) 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 subsists.

84. With respect to community land, the consent for mining rights it made to the appropriate authority. The obligation by law in relation to the administration of community land is required whereas in the case of unregistered community land the National Land Commission may give the requisite consent section 38 of the [Mining Act](#) No. 12 of 2016.

Under Part I – Preliminary Provisions Mineral Rights are defined as:-

- a. A prospecting Licence,
- b. A retention Licence
- c. A Mining Licence
- d. A Prospecting Permit
- e. A mining Permit and
- f. An artisanal Permit

Under Part VI General Provision on Mineral rights, defines “Consents” as stated under the provision of Section 37(1) Mineral rights on private land (Refer above).

85. In the present case, the Plaintiff presented certificates of renewal of registered mining locations for various years and certificates of registration of lode locations dating back to year 1987. This evidence indicates that both the 3rd Defendant and the Plaintiff were aware that the area in question contained minerals, as evidenced by the mining agreement between the third defendant and the 1st and 2nd Defendants.

86. Considering the constitutional provisions, the [Mining Act](#) 2016, and the evidence presented, it is apparent that land with minerals is owned by the National government and managed through the National Land Commission. In the case of the suit premises with a total area of 14,591 hectares, it has been specified that only certain specific lode locations within that area contain minerals. These lode locations are referred to as Riziki 1 to Riziki 8, corresponding to the lode locations numbered 1970, 1971, 1972, 1973, 1974, 1975, 1976, and 1977.



87. However, it is important to consider the specific permits and licenses required for mining activities. The plaintiff, second defendant, and first defendant all claim to be small-scale miners. Under Section 32(3b) of the [Mining Act](#) 2016, small-scale miners are required to obtain prospecting permits or mining permits. The Plaintiff has presented various licenses and permits from as early as the year 1991, indicating their status as a miner. However, there is no evidence of permits or licenses for the year 2017 when the Plaintiff claims their mining rights were infringed. The 1st and 2nd Defendants also did not provide evidence of licenses or permits under the repealed Act or the [Mining Act](#) 2016. Therefore, none of the parties have the requisite documents under the [Mining Act](#) 2016 to carry out mining in the specific areas.
88. It is also important to consider the issue of mineral rights on private land. Based on the evidence provided, it is clear that the third defendant is the owner of the suit premises. However, it is also evident that acquiring mineral rights in Kenya requires obtaining the necessary permits or licenses as outlined in the [Mining Act](#) 2016.
89. Section 10(1) of the [Mining Act](#) states that a person shall not search for, prospect, or mine any mineral in Kenya without being granted a permit or license. The acquisition of mineral rights is subject to certain requirements, including technical capacity, expertise, experience, and financial resources, except for artisanal and small-scale mining operations wholly owned by Kenyans.
90. Furthermore, a company seeking mineral rights must meet specific criteria, such as being registered and established in Kenya, not being in voluntary winding up or court-ordered winding up, and not being in liquidation. While Section 37 of the [Mining Act](#) does allow for the acquisition of mineral rights on private land with the approval of the landowner, Section 10 clearly states that the private landowner, whether an individual or agent of a company, must also seek mining rights from the relevant authorities. This is because all minerals in Kenya are owned by the people of Kenya.
91. In this case, the 3rd Defendant, as the owner of the property in question, has not obtained the necessary documents for mining rights. Therefore, despite being the owner of the land, the third defendant has not fulfilled the requirements for acquiring mineral rights.
92. Considering the above analysis, it is evident that none of the parties involved have the necessary permits, licenses, or consent to carry out mining activities on the specific areas in question.
93. The Court concurs with the Learned Counsel for the 3rd Defendant to the effect that the Commissioner for Mines, under the provision of Section 79 of the [Mining Act](#) 2016, had no powers or legal mandate to renew a prospecting or mining license by simply notifying the landowner of the intention to renew. The case of “Muthoni Kihara & Another – Versus . Commissioner of Mines and Geology & Another [2017] Eklr was referenced to support this claim. The Learned Counsel contended that the Commissioner acted beyond their powers and violated the provisions of Section 7(1)(m) of the repealed [Mining Act](#).
94. According to the 3rd Defendant, on or around 4th May, 2015, after discussions with the 1st Defendant, consent was given for mining activities on the property, and a corresponding agreement was signed on 21st August, 2017. Additionally, the 3rd Defendant argued that the suit property was privately owned land and not government property, contrary to the Plaintiff’s claims. Indeed, the Honorable Court has noted that the Plaintiff has sought some refuge under the provisions of Sections 6, 10, 39, 136, 142.....of the [Mining Act](#), 2016. It is my view that these provisions would only be applicable once the letter and the spirit of the Law and procedure was adhered with strictly. Indeed, Indeed, the evidence by PW – 2 – the Geologists was critical in providing this procedure. He stated that an applicant would have to look out for the appropriate location for mining; Obtain the consent of the owner of the land,



in case it was private land in accordance with the provision of Section 37 (1) and (2) of the [Mining Act](#), 2016; prepare an Environment Impact Assessment (EIA) Report by the national Environment & Management Authority (NEMA) under the provisions of Section 58 of the Environment and management Act, of 1999; Undertake a feasibility study and prepare a Mining Work Plan and finally to provide proof of Financial Capability. I discern that none of these steps were undertaken by the Plaintiff. At least no evidence was produced to that effect by the Plaintiff. Failure to this, the situation within the Mining industry would be so chaotic as graphically described by the English Philosopher Thomas Hobbes, “Nasty, Short & Brutish”. Therefore, to avoid all this from occurring, I insist that all Mining and Prospecting in Kenya, including the instant case, must happen within the precincts of law for any operations to resume whatsoever. Thus, it is for these reasons that the reliefs sought by the Plaintiff cannot be granted. The suit must fail outrightly.

Issue No Who shall bear costs of the Suit

95. It is well established that the issue of Costs is at the discretion of the Court. Costs mean the award granted to a party at the conclusion of legal action, process and proceedings. The proviso of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the event. By event it means the result of the legal process. See these principles stated in the Supreme Court case of “Jabir Rai Singh – Versus – Tarchalans Singh (2014) eKLR and the Court of Appeal cases of “Republic – Versus - Rosemary Wairimu Munene, Ex - Parte Applicant – Versus - Ihururu Dairy Farmers Co - operative Society Ltd and Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) (2016) eKLR .
96. However, it is important to note that the principle of costs follow the event is not meant to penalize the losing party but rather to provide compensation to the successful party. In this case, since none of the parties have succeeded in obtaining the reliefs sought, it is reasonable for the court to exercise its discretion and order that each party bear their own costs. This means that the parties will be responsible for their own legal expenses and no additional costs will be awarded to any party.

V. Conclusion & Disposition

97. Consequently, upon undertaking such an elaborate and comprehensive analysis of the framed issues herein, on a preponderance of probability, this Honourable Court finds that the Plaintiff has failed to adequately establish its case from the facts and principles of law. For avoidance of doubt, specifically the Honorable Court makes the following orders:-
- a. That Judgement be and is hereby entered that the suit filed by the Plaintiff through a Plaint dated 20th November, 2017 is unmeritorious and hence dismissed hereof.
 - b. That a declaration be and is hereby made for the mining area known as Riziki mines in locations 1970 to 1977 under the cadastral map system within suit premises belong to the National Government of Kenya in trust of the people of Kenya and shall be administered on their behalf by the National Land Commission in accordance with the provisions of Article 62 (1) (f) (3) and (4) of [the Constitution](#) of Kenya, 2010 and Sections 37 (1), (2) and (3) of the [Mining Act](#), of 2016.
 - c. That an order of the Court be issued that for any Mining activities to be undertaken on to the said Riziki Location, the 3rd Defendant has to make appropriate application to the Ministry of Mining, Blue Economy and Maritime Affairs in accordance with the specific provisions of the law and in particular the provision of Section 37 (1), (2) and (3) and 38 of the [Mining Act](#), of 2016.



- d. That in the meantime, the temporary orders granted by this Court on 17th November, 2020 and 9th February, 2022 having lapsed by effluxion of time now stand vacated and/or discharges under Order 40 Rules 6 & 7 of the Civil Procedure Rules, 2010 in essence meaning there shall be no mining activities to be undertaken on the suit property until the above directions are fully complied with by the operation, spirit and letter of the Law.
- e. That each party to bear their own costs of the suit.

IT IS SO ORDERED ACCORDINGLY

**JUDGEMENT DELIVERED THROUGH MICRO SOFT TEAM VIRTUAL MEANS, SIGNED
AND DATED AT MOMBASA THIS 25TH DAY OF MAY 2023**

.....

HON. JUSTICE MR. L. L. NAIKUNI, (JUDGE)

ENVIRONMENT & LAND COURT AT

MOMBASA

Judgement delivered in the presence of:

- a. M/s. Yumnah, the Court Assistant.**
- b. Mr. Gaita Advocate for the Plaintiff.**
- c. Mr. Amadi Advocate for the 1st & 2nd Defendants.**
- d. Mr. Sang Advocate for the 3rd Defendant.**

