



REPUBLIC OF KENYA



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**Kavii v Base Titanium Limited & 2 others (Environment & Land Petition
E002 of 2022) [2023] KEELC 18436 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION E002 OF 2022**

**AE DENA, J
JUNE 29, 2023**

BETWEEN

LEMMY MUTUA KAVII PETITIONER

AND

BASE TITANIUM LIMITED 1ST RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND
RESPONDENT**

COUNTY GOVERNMENT OF KWALE 3RD RESPONDENT

RULING

1. This ruling is subject of the 1st Respondent's preliminary objection dated November 25, 2022 and filed on November 28, 2022. The notice of preliminary objection raises the following grounds;
 - 1) This honourable court lacks the jurisdiction to hear and determine the Petition.
 - 2) The Petition offends the provisions of Article 159[2] of the *Constitution* of Kenya, 2010 as read with section 153, 154, 155 and 157 of the *Mining Act*, 2016.
 - 3) The Petition as lodged before this honourable court is an abuse of the court process.
2. Before delving into the merits of the preliminary objection, it is important to put into context the background of this petition. The petitioner Lemmy Mutua Kavii is the registered proprietor of property known as Kwale/Kidiani/164 [herein after referred to as the suit property] wherein he engages in both commercial and subsistence agricultural activities on the property. That the 1st respondent who engages in the business of mining, mineral exploration and extraction operates the said mining activities in a site adjacent to the suit property.



3. The petitioner avers the 1st respondents mining activities have caused severe environmental degradation as listed under paragraph 9 of the petition. That the said degradation has led to a massive negative impact on the environment and has hence infringed on the petitioners right to a clean environment as enshrined under Article 42 of the Constitution. The petitioner seeks for a declaration that the 1st respondent has breached his rights under Articles 10,27,28,31,35,40,42,43,47,48,69 and 70 of the Constitution, that the petitioner has further suffered damages that need to be compensated amongst other prayers as listed under paragraph G of the reliefs sought in the petition.
4. The preliminary objection herein is in response to the petition.

Submissions

5. Counsel agreed to canvas the preliminary objection by way of written submissions which they filed and exchanged. Parties were also given opportunity to orally highlight on the submissions which they did on April 12, 2023.

1st Respondents Submissions

6. The 1st Respondent submissions highlight two issues for determination. These are Whether an alternative forum exists for the resolution of the petitioner's grievances under the Mining Act and Whether this court has original jurisdiction to determine the issue pertaining to the compensation arising under the Mining Act.
7. It is submitted that the petitioner has failed to exhaust alternative remedies available to him under the law. That the petitioner's grievances ought to have been directed to the Cabinet Secretary pursuant to the provisions of sections 153,154,155 and 157 of the Mining Act. The 1st respondent submits that where an alternative forum exists for resolving a dispute, a party must first exhaust all the internal dispute resolution mechanisms set by the procedures of the respective administrative bodies before instituting their claim in court. The court is referred to the provisions of Article 159[2] of the Constitution and the Court of Appeal holding in Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others [2015] eKLR, Supreme Court of Kenya in Benson Ambuti Adega & 2 Others v Kibos Distillers Limited & 5 Others [2020] eKLR.
8. Counsel for the 1st Respondent submits that the petitioner's grievances revolve around allegations that the 1st Respondent's activities undertaken on the suit property over which it holds a mining licence under the Mining Act have allegedly caused loss and damage to the petitioner. That under Section 153[6] of the Mining Act, any dispute over compensation claimed by a party is to be referred to the Cabinet Secretary's jurisdiction. and therefore, the petitioners claim falls under the said. The court is referred to the holding in Peter Nzeki & 14 Others v Base Titanium Limited & 4 Others [2021] eKLR, Afro pride Limited Versus Zhongmei Engineering Group Ltd & Another [2019] eKLR, and Benson Ambuti Adega & 2 Others v Kibos Distillers Limited & 5 Others [2020] eKLR.
9. The 1st Respondent submits that although this court has original jurisdiction to hear and determine all matters affecting land, in the present case it is restricted to hearing appeals from the Cabinet Secretary as affirmed by the Supreme Court (supra).
10. It is further submitted that the petitioner did not file a complaint to the Cabinet Secretary and has decided to circumvent the procedure by seeking remedies before this court which is also premature. The 1st respondents urges this petition should be struck out with costs to the 1st respondent.



Petitioner's Submissions

11. The petitioner's submissions were filed on February 3, 2023 and discuss Whether Sections 153,154,155 and 157 of the [Mining Act](#) oust the jurisdiction of this court to hear this petition. It is stated that Section 154[a] of the [Mining Act](#) recognizes and acknowledges this court as the preferable avenue of adjudicating disputes arising out of mineral rights. That Section 155 of the same Act enlists the disputes that may be determined by the Cabinet Secretary and is not framed in mandatory terms.
12. The petitioner inquires as to whether the dispute before this court falls within the ambit of the matters described under the above-mentioned sections of the [Mining Act](#). It is submitted that the nature of the petition and the reliefs sought are beyond the scope of the Cabinet Secretary. That the instant case is a constitutional petition alleging violation of various rights. That the Cabinet Secretary is only empowered to redress the five disputes as itemized under Section 155 of the [Mining Act](#).
13. The petitioner submits that there is no denial that the violations of his rights as outlined in the petition emanate from mining rights under the Act and does not dispute that mining activities under the Act may be referred to the Cabinet Secretary. However, it is stated that under Section 154[c] of the Act, disputes can also be determined through a court of competent jurisdiction. The petitioner submits that where constitutional issues are raised the same goes beyond the scope of administrative officers.
14. On the argument by the 1st respondent that the provisions of Section 155 of the [Mining Act](#) are ouster clauses and that Section 157 thereof stipulates that this court can only determine appeals. It is submitted that this court has original jurisdiction to entertain redress of violation of human rights. Reference is made to the holding in [William Odhiambo Ramogi & 2 Others v AG & 6 Others \[2018\] eKLR](#) where the court held that alternative forums of dispute resolution would not preclude the High Court and courts of equal status from considering a matter in the first instance if the petition is centrally about violation of fundamental rights. Other cases cited to buttress this position are [East African Railways Corporation Vs Anthony Sefu \[1973\] EA](#), [Okuya Omtatab Okoiti v Commissioner General Kenya Revenue Authority & 2 Others \[2018\] eKLR](#), [Republic v Independent Electoral and Boundaries Commission & Another Exparte Coalition for Reform & Democracy & 2 Others \[2017\] eKLR](#).
15. The Petitioner lastly submits that this court has original jurisdiction vested by virtue of article 165(3) (d)(ii) as read with article 23(1) to redress violation of fundamental rights and freedoms even when the same stems from the [Mining Act](#). That the dominant prayer in the reliefs sought in the petition is a declaration that the petitioner has rights to a clean environment and which is also the substratum of the entire petition. The court is referred to the holding in [Mercy Wangari Buku v National Environmental Authority & 3 Others \[2021\] eKLR](#) and in [Peter Nzeki & 14 Others v Base Titanium Limited & 4 Others \[2020\] eKLR](#), [County Government of Kitui v Sonata Kenya Limited & 2 Others](#).
16. Consequently, the Petitioner prays that the preliminary objection be dismissed with costs.
17. The 1st respondent replied to the petitioner's submissions by way of supplementary submissions dated February 16, 2023. It is briefly submitted that the averment that the substratum of the petition is infringement of the petitioner's constitutional rights is hollow. That paragraph 4 of the petitioners' submissions reiterates that the petitioner's prayers are compensatory damages adequate to enable relocation and resettlement as envisaged in section 153 of the [Mining Act](#). Referring to paragraph 70 it is submitted that as early as December 14, 2020 the petitioner had instructed counsel to demand compensation and or relocation under the [Mining Act](#). That instead of submitting to the statutory mechanisms under the [Mining Act](#) the petitioner has resorted to the art and craft of raining multifaceted claims to oust the jurisdiction of the Cabinet Secretary as denounced by both the court of appeal and Supreme Court in the [Kibos Distillers Limited & 5 Others \[2020\] eKLR](#) case (supra).



Further that the Supreme Court therein settled the law on duty to exhaust alternative statutory remedies.

18. That even if the court were to hold that that there were valid issues relating to the violation of constitutional rights for it to determine, applying the Supreme court decision in *Kibos Distillers Limited & 5 Others* [2020] these proceedings should be stayed for the Cabinet Secretary to render a decision on the compensation/or relocation. Any emerging appeal would then be adjudicated upon alongside the constitutional issues thus affording a fair hearing under article 50 of the [Constitution](#).
19. Counsel for the 1st respondent pointed that the substantive judgement delivered in *Peter Nzeki & 14 Others v Base Titanium Limited & 4 Others* (supra) overturned its earlier position and held the aggrieved party had prematurely approached this court and cannot ignore the elaborate provisions in the [Mining Act](#).

Discussions and Determination

20. I have considered the pleadings, Preliminary Objection, rival submissions and the authorities cited by the respective parties, and I see the main issue for determination is whether the Court has jurisdiction to hear and determine this petition.
21. It is trite that jurisdiction is everything since without jurisdiction a court has no powers to proceed to entertain any matter before it and must be determined at the earliest opportunity. This is supported by the Court of Appeal decision in [Owners of Motor Vessel 'Lillian S' v Caltex Oil \(Kenya\) Limited \[1989\] KLR 1](#), which bears the following passage (Nyarangi, JA at p.14): 'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.'
22. It is now established that assumption of jurisdiction by Courts in Kenya is a subject regulated by the [Constitution](#), by statute law, and by principles laid out in judicial precedent - see Supreme Court of Kenya in the Matter of Interim Independent Electoral Commission [2011] eKLR. The 1st respondent's objection is that the petition offends the provisions of Article 159[2] of the [Constitution](#) of Kenya 2010 the ([Constitution](#)) as read with section 153,154,155 and 157 of the [Mining Act](#), 2016. (the Act).
23. Article 159 is on judicial authority and Article 159(2) lists the principles that shall guide the courts in exercising this authority. Relevant to this preliminary objection is the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution shall be promoted.
24. According to the 1st respondent the petitioners claim is for compensation and under section 153[6] of the Act and that any dispute over compensation claimed by a party is to be referred to the Cabinet Secretary's jurisdiction. It is contended by the 1st respondent that the [Mining Act](#) 2016 prescribes alternative forms of dispute resolution mechanism that should be deployed and which are set out under sections 153,154,155 and 157 of the Act.
25. Counsel for the petitioners admits that disputes arising from mining activities under the Act may be referred to the Cabinet Secretary. However, despite this admission they decided to file the present petition contending that under Section 154[c] of the Act, there is an option for disputes to be determined through a court of competent jurisdiction.
26. Section 154 is on general provisions on dispute resolution and provides as follows; -



Any dispute arising as a result of a mineral right issued under the *Mining Act*, may be determined in any of the following manners-

- a. By the Cabinet Secretary in the prescribed in this Act;
- b. Through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement or
- c. Through a court of competent jurisdiction

27. The above provisions are not drafted in mandatory terms. They are not obligatory but permissive. Unlike other statutes such as the Environmental Management & Coordination Act which provide alternative disputes resolution mechanisms and which must be followed, the *Mining Act* gives options to the claimants to select. In this case the petitioner chose to approach this court. It has been urged by the 1st respondent that section 153 ousts the jurisdiction of this court but in my view the option in section 154(c) may be deemed to preserve and or recognize the original jurisdiction of this court being a court of competent jurisdiction.

28. Additionally, the jurisdiction of this court is derived from Section 13 (1) of the *Environment and Land Court Act* which stipulates as follows:

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the the *Constitution*, the Court shall have power to hear and determine disputes
'(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
(b) Relating to compulsory acquisition of land;
(c) Relating to land administration and management;
(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No 12 of 2012, Sch.
- (6) Deleted by Act No 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including
 - (a) Interim or permanent preservation orders including injunctions;
 - (b) Prerogative orders;



- (c) Award of damages;
- (d) Compensation;
- (e) Specific performance;
- (g) Restitution;
- (h) Declaration; or
- (i) Costs.

29. The Petitioner alleges that as a result of the 1st respondent's activities, there is visible environmental degradation and which includes severe air pollution by the dust emitted from the mining activities, severe noise pollution occasioned by the use of heavy-duty mining equipment and damage of the road infrastructure. That all these activities have resulted in the infringement of the petitioners right to a clean environment. The Petitioner cites several articles of the Constitution which he states provide for protection of his rights and which have apparently been infringed upon by the 1st respondent actions. The same include the right to own property under Article 40, the right to a clean and healthy environment under Article 42 amongst others. This is the cause of action that has been pleaded. I therefore respectfully disagree with the 1st respondent submission that the petitioners desire abinitio has been compensation and which he was concealing by filing the present Constitutional petition.
30. In my view the issues raised by the petitioner pertain his rights to a clean and safe environment and which form the basis of the petition. The prayer for compensation is listed amongst the issues of protection of the petitioners right to use and ownership of property together with the protection of the environment. In my view, the provisions of the Mining Act do not oust the jurisdiction of this court to safeguard a person's right to a clean and healthy environment. In the case of Agatha Jeruto Kimaswai v Attorney General & 3 others [2021] eKLR MA Odeny J citing other persuasive decisions and which I find applicable to the present case stated thus; -

'The provisions of section 129 of the EMCA does not oust the jurisdiction of this court to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

The plaintiff's claim is for damage caused by the respondents to her house due to the quarrying activities. She also complains that she was not consulted to give her views on the likely impact to her house when the EIA was done. It should also be noted that the plaintiff seeks for a declaratory order that the 4th defendant's activities are in breach of her right to a healthy and safe environment which the court has jurisdiction to hear and determine.'

31. This court also finds support in Mombasa Civil Appeal No E004 of 2020 (Gatembu, Nyamweya & Lessit JJA) National Environmental Management Authority v Kelvin Musyoka (Minor Suing through mother and Best friend Scholastica Khalati Shikanga) & 16 Others consolidated with Civil Appeal No E032 of 2021 where the Court of Appeal in a recent judgement delivered on June 23, 2023 made the following findings on jurisdiction; -

40. It is also our view that section 129(3) of the EMCA cannot be used to arrogate to the NET specific powers given to the Courts under the Constitution, particularly the powers under Article 23(3) which provide for relief that can be granted in a claim for violation of constitutional rights as follows: (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-- (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any



law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review.

41. Section 13 (3) of the [Environment and Land Court Act](#) in this respect specifically grants the Environment and Land Court jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the [Constitution](#). It is notable that Article 70 of [Constitution](#) also provides that if a person alleges that a right to a clean and healthy environment under Article 42 has been, is being or is likely to be, denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. The Article provides for additional remedies that can be granted by a Court in this respect to include any order or directions it considers appropriate-- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

42. We therefore find no arrogation of jurisdiction by the Environment and Land Court either by judicial craft or arising from the pleadings before it, as the claim was one of violation of the rights to a clean and healthy environment and the remedies sought were well within its jurisdiction and powers, which powers are not specifically granted to the NET under EMCA.’

32. Based on the foregoing, the option given in section 154 of the [Mining Act](#) and considering the broad jurisdictional framework set out under Article 162 of the [Constitution](#) including Articles, 23 42, 43 and 70 as read together with Section 13 of the Environment & Land Court Act I do not agree with the contention that this court is not clothed with the requisite jurisdiction to hear this petition as it relates to the alleged violations herein as well as compensation arising therefrom. I make a finding that this court has jurisdiction to hear and determine this petition.
33. This court has been invited by the 1st respondent to stay these proceedings should it make a finding that there are valid issues relating to the violation of constitutional rights for this court to determine to enable the Cabinet Secretary determine the compensation and relocation for a fair hearing. Based on the above holding in Mombasa Civil Appeal No. E004 of 2020 I decline the invitation. The court has a duty to ensure that matters are concluded expeditiously. The constitutional underpinnings on timely disposal of matters are captured under Article 159[2][b] of the [Constitution](#) which provide that justice shall not be delayed.
34. The preliminary objection is hereby dismissed. Costs shall be in the cause.
- It is so ordered.

Delivered and Dated at Kwale This 29th Day of June, 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Asili for the Petitioner

Ms Onesmus for Respondents

Mr. Daniel Disii- Court Assistant.

