



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.200 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE BREACH AND ENFORCEMENT OF THE RIGHT AND FUNDAMENTAL FREEDOM OF EQUALITY AND FREEDOM OF DISCRIMINATION AS PROVIDED FOR IN ARTICLES 27(4) OF THE CONSTITUTION OF KENYA WITH REGARDS TO SECTION 183 OF THE MINING ACT 2016 OF THE LAWS OF KENYA, THE MINING (PRESCRIPTION OF RAYALTIES ON MINERALS) REGULATIONS, THE MINING (COMMUNITY DEVELOPMENT AGREEMENT) REGULATIONS 2017, 2013 AND REGULATINS 38 AND 39 OF THE MINING REGULATIONS

AND

IN THE MATTER OF THE BREACH AND ENFORCEMENT OF THE RIGHT AND FUNDAMENTAL FREEDOM NOT TO BE DEPRIVE OF PROPERTY AS PROVIDED FOR IN ARTICLE 40(2) (B) OF THE CONSTITUTION OF KENYA AS READ WITH ARTICLE 27(4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE BURDEN OF TAXATIONS IS TO BE SHARED EQUALLY AS PROVIDED FOR IN ARTICLE 201(B) (I) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 109(1) OF THE MINING ACT 2016 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ILLEGALITY OF THE IMPOSITION FO THE MINING (PRESCRIPTION OF RAYALTIES ON MINERALS) REGULATIONS, 2013 AND THE MINING (COMMUNITY DEVELOPMENT AGREEMENT) REGULATIONS 2017 IN THE ABSENCE OF PUBLIC PARTICIPATION AS DEMANDED BY SECTIONS 2 AND 5(1) (A) OF THE STATUTORY INSTRUMENTS ACT 2013 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE INVITATION TO THE FORMATIN OF A CDA COMMITTEE FOR KASIGAU TOWN BY THE REGIONAL MINES OFFICER MINES AND GEOLOGICAL DEPARTMENT TAITA TAVETA REGION DAETD 11TH MARCH 2019

AND

IN THE MATTER OF THE SPECIAL MINING LEASE NO. 19 GRANTED ON THE 15TH AUGUST 1991 AND RENEWED ON THE 24TH AUGUST 2012 UNDER THE PROVISIONS OF SECTION 55 OF THE MINING ACT (CAP 306) OF THE LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF REPEALS AND SAVINGS OF SECTION 225 OF THE MINING ACT 2016 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE PRECAUTIONARY PRINCIPLE

AND

IN THE MATTER OF THE PRINCIPLE OF PROPORTIONALITY

BETWEEN

ROCKLAND KENYA LIMITED.....PETITIONER/APPLICANT

AND

THE CABINET SECRETARY IN THE MINISTRY

OF PETROLEUM AND MINING.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The petitioner through a Notice of Motion under Rules 23(1) and (2) and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 seeks the following orders:-

a) This Honourable Court do issue a conservatory order staying any further implementation of Section 183 of the Mining Act 2016, the Mining (*Prescription of Royalties on Minerals*) Regulations 2013 and the Mining (*Community Development Agreement*) Regulations 2017 pending the hearing and determination of the Applicant's Petition.

b) This Honourable Court do provide for costs.

2. The application is premised on several grounds on the face of the application running from (i) – (xi). It is further based on supporting affidavit by Hon. Senator Johnstone Muthama sworn on 24th May 2019.

3. The Respondents were served with both the application and petition on 23rd July 2019 as per Affidavit of service by Mr. Albert Mulindi of 6th September 2019. On 5th June 2019 the matter was set for mention before Hon. Judge handling this matter for directions. On 3rd July 2019 the matter was placed before Duty Judge who directed the matter be mentioned before the trial Judge on 17th September 2019. On 17th September 2019 both counsel for Petitioner and Respondents appeared, and directions for hearing both the application and petition were issued. The Respondents were granted 14 days to file their responses and serve within the same period as well as to file response to petitioner's submissions. That by 25th November 2019 when the matter came up for highlighting on submissions; the Respondents had not filed and served their responses nor submissions. The court after hearing both counsel and as there were only submissions on the Notice of Motion by the petitioner, set this matter down for ruling on 19th March 2019.

Analysis and Determination

4. I have considered the petitioner's petition and the Notice of Motion; which is unopposed and the petitioner's written submissions on the Notice of Motion dated 24th May 2019, dated 22nd November 2019. I further note no submissions have been filed on the petition and from the above the only issue for consideration is one being as follows:-

a) Whether conservatory order can issue staying further implementation of section 183 of the Mining Act 2016, the mining (*prescription of Royalties on minerals Regulation 2013 and the mining (Community Development Agreement) Regulation 2017 pending the hearing and determination of the Applicant's petition?*

5. In the instant petition there is no dispute that the petition is not opposed as the Respondents were duly served and directions given in presence of their counsel directing them to file response within 14 days and serve within the same period as early as 17/9/2019 and when this matter was set down for highlighting on 25th November 2019, close to 75 days from the date given to file response no response and no submission had been filed. The Respondent failure to file Reply is against clear provisions of Rule 15(1) and 16(1) of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013 provides:-

"15(1)The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.

16(1) If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent's absence."

6. I note what is before me is an application for conservatory orders. I have to consider whether the Petitioner/Applicant has met the threshold on condition precedent to warrant granting of the conservatory orders. The condition precedent to be satisfied were enunciated in the **centre for right Education and Awareness (Creaw) and 7 others vs Attorney General (2011) eKLR** where Hon. Justice Musinga held thus:-

"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

7. In **Centre for Human Rights & Democracy & 2 Others vs. Judge & Magistrates Vetting Board & 4 Others [2012] 2 KLR 603** a three Judge bench held:-

"That for Conservatory Orders the Court needs to consider:-a) The credentials of the Petitioner; b) The prima facie correctness or nature of information available to Court; c) Whether the grievances are genuine, legitimate, deserving and appropriate; d) Whether the Applicant has shown or demonstrated the gravity and seriousness of the dispute; and e) Whether the Petitioners have engaged in wild, vague, indefinite or reckless allegations against the Respondents."

8. In my view in an application for conservatory orders to issue pending determination of the main matter, the Applicant need only show or demonstrate that it has a valid *prima facie* case with a likelihood or chance of success and does not indeed need to show he will eventually succeed in the case at that stage and further need to show if the orders are not granted there is a real danger to suffer prejudice or there is a threat of violation of the constitution.

9. **Section 183 of the Mining Act** demands that the Applicant pays a royalty to the state whereas **section 183(2) of the Act**, gives the 1st Respondent power to determine the rates of the royalty, which power under **section 183(2) of the Act** is similar to the power granted in **section 92(1) (xviii) of the Mining Act (Chapter 306) (repealed)**. The mining (prescription of Royalties on mineral) Regulation 2013 is a creature of section 92(1) (xviii) of the Mining Act (*Chapter 306) (Repealed)* whose Regulations came into effect vide Legal Notice 187 of 2013 dated 16th August 2013. The Regulations has an effect on the business and interest of the Applicant, who has been in mining business since its inception in the year 1991. It is contended by the Applicant the introduction of the Regulations in August 2013 was in violation of the mandatory provisions of **section 5(1) of the Statutory Instrument Act 2013** which came into force on 25th January 2013. It is contended further by the Applicant as an holders of mineral licence, he was never consulted prior to the imposition of the provisions of the Regulations and section 183 of the Act.

10. It is further urged by the Applicant that the said Regulations are a statutory instrument and that the Applicant being a major stakeholders in the mining industry, the Regulations were introduced in contravention of the provisions of **section 5 of the Statutory Instruments Act**. **Section 2 of the Statutory Instruments Act** defines a statutory instrument as:-

"Means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."

11. The Applicant assert that the introduction of the aforesaid Regulation being an illegal introduction of the Regulations, it stands to be illegally deprived of its property which is a breach of its Fundamental Rights to property as enshrined under **Article 40 of the Constitution of Kenya, 2010**. It is further submitted the Regulations seek to deprive the Applicant its property for seeking to have the Applicant undertake to conduct projects that are the reserve of the National and County Governments. This is spelled out under **Regulation 8(3) of the Mining (Community Development Agreement) Regulation 2017**, under which the Applicant is supposed to raise income to fund projects and initiative that are the reserve of the National and County Governments.

12. The Applicant has demonstrated that being a person defined by the provisions of **Article 260 of the constitution**, the burden it has to carry by payment of a royalty and development programs stated in **Regulation 8(3) of the Mining (Community Development Agreement) Regulations 2017**, it is being unfairly discriminated. It is contended the Applicant being a company incorporated under the provisions of the Companies Act (*Cap 486) (Repealed)*, it is by virtue of the industry being discriminated by the said provision and Regulation as it is only companies which are holders of mining licences which are subjected to the added burden of taxation.

13. Upon considering the Applicant's application to which no Replying affidavit or grounds of opposition has been filed, I not only find the application unopposed but upon consideration of the application, I find the Applicant has demonstrated that it has a valid claim against the Respondents which deserves this court's discretion to issue it with the orders sought as I find denying the orders would result to the Applicant standing to suffer substantial loss and damages for its Fundamental Rights and Freedoms will be infringed and continue to be violated by the Respondents.

14. To that extent the Applicant's application dated 24th May 2019 is merited and is granted in the following terms:-

a) A conservatory order staying any further implementation of section 183 of the Mining Act 2016, the Mining (Prescription of Royalties on Minerals) Regulation 2013 and the Mining (Community Development Agreement) Regulation 2017 be and is HEREBY issued pending the hearing and determination of the Petitioner's/Applicant's petition.

b) Costs of the application is granted to the Applicant/Petitioner.

Dated at Nairobi this 19th day of March 2020.

Delivered on 29th day of April 2020

.....

J .A. MAKAU

JUDGE