



REPUBLIC OF KENYA



**Peter v Cabinet Secretary, Ministry of Petroleum and Mining & 7 others (Environment & Land Petition 24 of 2021) [2023] KEELC 20126 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20126 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 24 OF 2021  
NA MATHEKA, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**JAMES KYALO PETER ..... PETITIONER**

**AND**

**THE CABINET SECRETARY, MINISTRY OF PETROLEUM AND  
MINING ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR AND  
COORDINATION OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**DAVID I MUREBU, REGIONAL MINES OFFICER, TAITA  
TAVETA ..... 3<sup>RD</sup> RESPONDENT**

**DAMARIS KIMONDO, DEPUTY COUNTY COMMISSIONER, MWATATE SUB-  
COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**GLADWELL WANGUI KINYANJUI ..... 5<sup>TH</sup> RESPONDENT**

**MOSES KINYANJUI WANJIRU ..... 6<sup>TH</sup> RESPONDENT**

**ELIZABETH WANJIRU KINNJUI ..... 7<sup>TH</sup> RESPONDENT**

**BARAKA MINING AND MINERALS LTD ..... 8<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner is a member of Mwatate Small Scale Miners Self Help Group, and he is engaged in mining at a delineated area known as No. MP/ 2018/0241, Mwatate in Taita Taveta County. The Petitioner is affected by the actions of the Respondents and in particular the impugned decisions made by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents in respect to the mining area known as No. MP/ 2018/0244, which decision have been made to extent to the Petitioner's mining area, which are two different locations as such the said



actions by the Respondents are not only unlawful, but also 'ultra vires unreasonable and unwarranted and indeed interfere with the freedom of contract espoused under the law, hence meddling into private citizenry matters. gems tone except diamond within delineated area known as No. MP/ 2018/2041 measuring 5043104 and more in particular as stated in the agreement entered between the Petitioner and the 5<sup>th</sup> to 8<sup>th</sup> Respondents who are the owner of the mining location No. MP/ 2018/0241 Mwatate Sub-County in Taita Taveta County and the aforesaid self- help Group holds the mining licenses and permits over the aforesaid mining area No. MP/ 2018/0241 amongst others. The decision by the Respondents to order for the forcible eviction is not only illegal but also mala fides as it is aimed at using the uncouth method to drive the Petitioner out of his business after many years of toiling in the said mines and on discovery of Tsavorite in his mining area.

2. On 21<sup>st</sup> December 2021 the Petitioner wrote to the 1<sup>st</sup> Respondent complaining on the harassment meted on him by the 3<sup>rd</sup> Respondent and the eminent danger of eviction, which Letter was not responded to date. On 18<sup>th</sup> January 2021 the 5<sup>th</sup> Respondent through the 8<sup>th</sup> Respondent wrote a letter to him titled notice to vacate and cease illegal mining in location No. MP/ 2018/0244 and further gave him 14 days to vacate the mining area, however he has no relationship whatsoever related to the cited location, hence the intention is to illegally force him out of his mining area being No. MP2018/0241. On 2<sup>nd</sup> February 2021 received a letter from the 6<sup>th</sup> Respondent, which letter was in response to b he 5<sup>th</sup> Respondent's one date 18<sup>th</sup> January 2021 and whose effect was that he was legally on his mining site and the same showed the choreographed infighting in the running and management of the 8<sup>th</sup> Respondent's affairs, which he is not part of. The 1<sup>st</sup> to 4<sup>th</sup> Respondents are being used by the 5<sup>th</sup> to 8<sup>th</sup> Respondents to threaten to evict the Petitioner from leased mining area known as No. MP/ 2018/0241 using illegal processes.
3. The Petitioners contend that on account of the foregoing actions and omissions on the part of the Respondents, have deprived, threatened and or interfered with the Petitioner's freedom and rights guaranteed under Articles 20 (1) and (2) 24 (1) 29 (f), 31 R 40 / 50 (1) of the Constitution of Kenya, 2010. They discriminated against the Petitioner by allowing the 1<sup>st</sup> Interested Party to continue with mining activities despite stopping the Petitioners herein from doing the same contrary Article 27 c) of the Constitution of Kenya, 2010. Have violated the Petitioners right to administrative action that is efficient, lawful, reasonable and procedurally fair guaranteed under Article 47 of Constitution of Kenya, 2010. That the aforementioned acts and the consequences arising from the 1<sup>st</sup> to 4<sup>th</sup> Respondents negates the rights and values as enshrined in Chapter IV of the Constitution under which the Petitioner is entitled to protection.
4. Petitioner prays that this Honourable Court be pleased to declare the impugned acts and/or omissions above cited unconstitutional and grant the following declarations and orders of redress: -
  1. A declaration that the Respondents have violated and/or are likely to relate the constitutional rights of the Petitioner and in particular Articles 10, 27, 47, 48, 60, 61 and 64 of the Constitution of Kenya.
  2. An Order to quash the 3<sup>rd</sup> and 4<sup>th</sup> Respondents decision as contained in their letters titled "notice to vacate mining location no. 10/2018/0244' and "notice to vacate illegal Mining Location No. IQ/2018/0244' dated 10<sup>th</sup> December 2020 and 8<sup>th</sup> February 2021 respectively to the Petitioner.
  3. An Order Prohibiting the Respondents or their agents or any other person acting on their instruction from interfering in whatever manner with the Petitioners mining location known



as Location No. as spelt out in the lease agreement dated 27<sup>th</sup> October, 2020 between the Petitioner and 5<sup>th</sup> to 8<sup>th</sup> Respondents.

4. General damages for breach of Petitioner's constitutional rights be borne by the Respondents.
5. The Respondents state that Baraka Mining and Minerals Limited (the 8<sup>th</sup> Respondent) is the owner of mining permits number MP/2018/0241 and MP/2018/0244. Copies of the Mining Permits are annexed herewith and marked DIM 1 (a) and (b). That the mining permits confer upon the 8<sup>th</sup> Respondent exclusive rights to carry out mining operations in the area specified in the permits No. 30 MP/2018/0241 and MP/2018/0244. 5<sup>th</sup> Respondent states that she is a Director of and for and on behalf of Baraka Mining Limited, a Limited Liability Company incorporated and registered in Kenya under the Company Laws (no. 07114), from whence she derives the authority to appear, plead and act in these proceedings. Baraka Mining has been named as the 8<sup>th</sup> Respondent. That the Company holds a Mining Licence and Permit obtained under *Mining Act* No. 12 of 2010 and the *Mining (Licence and Permit) Regulations*, 2017 and covers about 0.5085 sq. Kilometers for a period of five (5) years and allows the Company exclusive rights to carry out mining in the specified area as further elaborated in the license. Annexed and marked as "GWK 3" is a copy of the Mining License. That further the said mining permit allows for the Company to enter the Specified Area and take all necessary measures to carry out the approved mining and processing operations. That around about December 2020 and January 2021, it was realized that a group of people had started to undertake illegal mining activities in the said Specified Area without the authority of the Company who are the license holders and whose responsibility it is to ensure proper mining standards are adhered to and duty of care. That initially when the Company approached them and notified them of the illegalities taking place, they were met with hostility and threats and that is when they notified the Department of Mining and the OCS Mwatate Police Station. The Company also issued the illegal miners, the Petitioner being one of them with a notice dated 18.01.2021 to vacate. That shortly after the Notice was sent out and copied to the relevant Ministry, the Regional Mining Officer stopped all mining within the Specified Area as it carried out its investigations into the allegations the Company had raised and also called for a consultative meeting. The Letters from the ministry cautioned the Petitioner from continuing to mine in the Specified Area and also the ministry was clear that no mining activities should take place whilst the dispute was ongoing. Annexed and marked "GWK 5" is a copies of the letters from the Ministry official dated and 3<sup>rd</sup> February 2021 and 8<sup>th</sup> February 2021.
6. That after several meetings with the Ministry officials and the police in a bid to solve the issues arising out of the illegal activities it realized that they had entered into illegal mining contracts with her brother Moses Kinyanjui Wanjiru (named as 6<sup>th</sup> Respondent) who is not of Sound mind and Capacity and that he had mischievously entered into contract with the illegal miners which contracts were not in accordance with the Company regulations. Annexed and marked GWK 6" are hospital records evidencing his impaired condition. That Moses Kinyanjui had indeed entered into contracts with the Petitioner and others had signed a Contracts but they had not been properly executed as is expected and in accordance with their Memorandum and Articles of Association. Annexed and marked as GWK 7" is an excerpt of the Memorandum and Articles of Association of Baraka Mining Limited. That in full understanding of the chicanery that had occurred, the Company then decided to reach out to the said illegal operators and work towards an amicable solution by signing new agreements with them. Annexed and marked as "GWK 8" is a copy of minutes of Meeting held on 16<sup>th</sup> December 2020. That in meeting them they agreed to sign new agreements with the illegal miners so as to make all Agreements valid, which they did in the meeting of 19 March, 2021 and they were free to continue mining once they inspected their mines and made sure that they were standardized for safety and in line with all regulations. The Petitioner declined to meet and regularize his contract. Annexed and marked as GWK



9" is a copy of the minutes of meeting held on 19<sup>th</sup> March 2021. • That the Petitioner declined to Sign an Agreement with them and therefore they were not bound to allow him within their mining area which is MP/2018/0244. That they have no relationship with the Mining area MP/2018/0241. That the Petitioner was actually mining within their Specified Area and that is the only reason they have evicted him because he did not have a proper contract. He has also clearly participated in their meeting where Moses Kinyanjui, her brother confessed to signing the contracts illegally. Annexed and marked as "GWK8" are minutes of the said meeting of 16<sup>th</sup> December 2020. That his mine is not in accordance to the proper specification and as such they can therefore neither allow him to continue, agree to, regulate or report his activities. Annexed and marked as GWK 9" are photos showing the area he is mining which falls under their licensed mining area.

7. This court has considered the Petition and the submissions therein. It is the Petitioner's case that he is a member of Mwatate Small Scale Miners Self Help Group and is engaged in mining of gemstones at a delineated area known as No. MP/2018/0241 in Mwatate. The said self-help group is said to hold mining licences and permits over the mining area, pursuant to the agreement dated 27<sup>th</sup> October 2020 with the 5<sup>th</sup> to 8<sup>th</sup> Respondents the owners of the leased mining location. The Petitioner averred he has been mining peacefully in the said area until the 3<sup>rd</sup> and 4<sup>th</sup> Respondents ordered for his forceful eviction on the ground that he was carrying out illegal mining. The Petitioner contended that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' decision of evicting him are not only unlawful but also ultra vires, unreasonable and unwarranted and interfered with his freedom of contract. He further maintained that he held a lease agreement with the 5<sup>th</sup> to 8<sup>th</sup> Respondents' over the location known as MP/2018/2014 and not location MP/2018/0244 as alleged by the 3<sup>rd</sup> Respondent in his notice to vacate dated 3<sup>rd</sup> February 2021 and the 4<sup>th</sup> Respondent's notice to vacate dated 8<sup>th</sup> February 2021. He maintained that the notice to vacate MP/2018/0244 issued by the 3<sup>rd</sup> Respondent ought not to affect his business since he does not mine in the said location but in MP/2018/2014. He argued that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' decision of suspending mining activities in the area is ill intended to drive him out of business since he has discovered Tsavorite in the mining area. He urged court to find that the said actions are unconstitutional and find the Respondents have violated his Constitutional rights enshrined in Articles 10,27,47,48,60,61 and 64 of the *Constitution*, quash the decision of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents contained in their letter dated 10<sup>th</sup> December 2020 and restrain the Respondents from interfering with his mining activities as stated in the lease agreement dated 27<sup>th</sup> October 2020 as well as grant damages for breaching his constitutional rights.
8. The threshold for a Constitutional Petition was set out in *Anarita Karimi Njeru v The Republic* (1979) eKLR, it was held that;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

9. Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, emphasised the principles set out in *Anarita Karimi* and held that;
- “The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this



principle. What Jessel, M.R. said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars. We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (*supra*). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.”

10. The Petition and has made reference to several Articles of the Constitution including articles 1, 2, 3, 10, 19, 20, 21, 26, 27, 28, 29, 40, 47, 48, 50, 60, 61, 64, 69, 258 and 259 of the Constitution of Kenya. The Petitioner has claimed that the actions of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents of suspending mining in the mining location No. MP/2018/0244, which is different from his supposed mining location MP/2018/2014 has disrupted his livelihood and those who depend on him and an infringement of his Constitutional rights. Despite making reference to several Articles of the Constitution in his Petition, the Petitioner has not met the threshold set out in *Anarita Karimi* (*supra*) and *Mumo Matemu* (*supra*). The Petitioner has not demonstrated to the required standard how this rights and fundamental freedoms were violated, infringed or threatened by the Respondents. The Petitioner has failed to establish how the actions of the Respondents have violated the said Constitutional provisions.

Lenaola J (as he then was) reiterated the principles in *Anarita Karimi* in *Stephen Nyarangi Onsomu & another v George Magoha & 7 others* (2014) eKLR, where he stated,

“In answer to that issue, this Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation of constitutional rights have presented their cases. As a basic minimum, a Petitioner is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See *Anarita Karimi Njeru v Republic* (1976-1980) 1 KLR 1272. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. This basic rule has been affirmed by the Court of Appeal in the *Mumo Matemu* Case.”

11. Though Article 22 (1) of the Constitution grants every person the right to institute court proceedings claiming that a right of fundamental freedoms enshrined in the bill of rights has been denied, violated, infringed or threatened; this right should not be abused. The Petitioner’s claim is of a commercial nature which can be brought under substantive law and not under the Constitution. To seek Constitutional relief in the absence of the principles laid down in *Anarita Karimi* and emphasised



in Mumo Mutemi, in my view is a misuse and abuse of the court process. The Petitioner has clearly stated in his affidavit in support of the Petition that the actions of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents of suspending mining MP/2018/0244 was an interference with the freedom of contract and meddling into private citizens' matters. This is another indication that the Petitioner's claim is that of commercial nature and to be specific common law right ie contract law. It is only fair, convenient or constructive use of the court's time for the Petitioner to have filed a claim of a commercial nature for the vindication of his rights. Since the Petitioner claims to have a mining right as a result of the agreement dated 27<sup>th</sup> October 2020 entered with the 5<sup>th</sup> to 8<sup>th</sup> Respondents, he ought to address his grievances through the procedure laid down in Section 156 of the *Mining Act* 2016 which has a prescribed clear procedure for seeking redress whenever a person has any grievance arising as a result of a mining right. The Petitioner's attempt to give this grievance a constitutional complexity, by arguing that his rights, equality and freedom from discrimination, right to fair administration action and right to access justice have been violated has failed.

12. The court is of the view that this Petition does not reveal any special or unique features that would make a Constitutional relief more efficacious or suitable than the redress that would be found in a normal suit before this court. This court finds that this Constitutional Petition is an abuse of the court's process and I do dismiss the entire Petition with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

