



Korir v Karebe Gold Mining Ltd & another (Environment and Land Petition E001 of 2023) [2023] KEELC 21802 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21802 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND PETITION E001 OF 2023
MN MWANYALE, J
NOVEMBER 29, 2023
IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER THE
BILL OF RIGHTS OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA
AND
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS AND
THREATENED FURTHER CONTRAVENTIONS OF THE
CONSTITUTION UNDER ARTICLE 19,20,21,22(E),
23,24,28,40(1)(2) AND 43(1)(B) OF THE CONSTITUTION
OF THE REPUBLIC OF KENYA
AND
IN THE MATTER OF THE MINING (LICENCES AND PERMIT
REGULATIONS)2017

BETWEEN

CHESERET ARAP KORIR PETITIONER

AND

KAREBE GOLD MINING LTD 1ST RESPONDENT

EQUATORIAL LAND HOLDINGS LIMITED 2ND RESPONDENT



JUDGMENT

The Petition: -

1. The Petitioner Mr. Cheseret Arap Korir vide his petition dated 6th February, 2023 seeks the following prayers;
 - i) A declaration that the Petitioner's protected right to property has been violated by the Respondents' actions of trespass and subsequent gold mining activities.
 - ii) A permanent order of injunction restraining the Respondents, their agents, servants or any person acting under their direction from interfering with the Petitioner's ownership, possession and use of all that land comprised in parcel number Nandi/Chemase/974 and Nandi/Legmet/224.
 - iii) An order of compensation for the violation of the Petitioner's property rights over parcel number Nandi/Chemase/974 and Nandi/Legmet/224
 - iv) An order for mesne profits against the Respondent for use of the property known as Nandi/Chemase/974 and Nandi/Legmet/224 or indemnity to compensate the Petitioner for loss of use and loss of profits for the entire period of deprivation.
 - v) An order of costs of this petition by the Respondent.
 - vi. Any other relief that the Court may see fit to grant in redress to clear the violation of the Petitioner's right to property.
2. The legal foundation of the petition is on the following provisions of the Constitution of the Republic of Kenya;
 - i. Article 2(1) of the Constitution of Kenya pronounces the Supremacy of Constitution and provides that the Constitution binds "all state organs at both level, of government".
 - ii. Article 2(2) of the Constitution of Kenya prohibits any person from exercising authority except as authorized under the Constitution.
 - iii. Article 2(4) of the Constitution renders any act or omission in contravention of I Constitution invalid.
 - iv. Article 3 of the Constitution obligates every person to respect, uphold and defend Constitution of the Republic of Kenya.
 - v. Article 40 provides for the right to acquire and own property and prohibits arbitrary deprivation of a person's property.
 - vi. Regulation 23 of the mining license and permit Regulations of 2017 provides that application for a mining right shall be granted with the consent of the landowner.
3. The Petitioner avers that on the 12th day of June, 2009, he entered into a 10-year Gold Mining lease agreement with the 2nd Respondent on his properties known as Nandi/Chemase/974 and Nandi/Legmet/224 (herein after referred to as the suit properties) at a consideration K.shs. 4,000,000/=
2. The Petitioner avers that in June 2018 one year before the expiry of the said lease, he wrote to the Respondents informing them that he shall not be renewing the said lease agreement.



3. The Respondents who desired to have the lease agreement then filed a suit at the Eldoret High Court seeking to have the said lease renewed but the same which was, referred to arbitration was then dismissed by the court of Appeal in Civil Appeal (*Application No. 177 OF 2020*).
4. The Petitioner avers that prior to the determination of the court of Appeal the Respondent proceeded to mislead the Director of Mining and Geology to renew the mining license for a period of 25 years in relation to the Petitioner's land despite the fact that the Petitioner's consent had not been secured.
5. The Petitioner avers that the Respondent have since the expiry of their lease continued and still continue to carry out mining activities on the Petitioner's land without the Petitioner's consent.
6. That as a result of the Respondent's actions;
 - a. The Petitioner has been left in abstract poverty as he has no other means of earning other than on his property which has been destroyed by the Respondent's mining activities.
 - b. The Petitioner has suffered blood pressure due to the continuous strain that the Respondent have subjected him to including subjecting his children to unnecessary litigation processes.
 - c. The Petitioner has further suffered partial deafness due to the continuous blasting of rocks by the Respondents using explosives in the process of mining.
 - d. The Petitioner's House has further suffered wall cracks as a result of the blasts from the Respondents' activities.
 - e. The petitioner is unable to have peaceful enjoyment of his house due to the constant blasting and Gold mining activities being carried out by the Respondent below his house.
 - f. The Petitioner has been unable to educate his children as he has no other means of earning save from his land which has been greatly destructed by the illegal activities of the Respondents.
7. The petitioner avers that the Respondent harvests a substantial amount of Gold form his land without his consent and without paying him for the same and thus continues to unjustly enrich himself while he remains in poverty.
8. The Petitioner avers that he has learned that in securing the renewal of the license the Respondent failed to follow proper procedure in getting the National Environmental Authority (NEMA) License and thus their activities stand to cause harm to the environment including to myself.
9. The Petitioner contends that his Constitutional rights guaranteed under the Constitution of Kenya have as a result of the Respondents' aforementioned actions being violated, the particulars of violation being that;
 - i. His fundamental rights to acquire, own and enjoy his property has been violated and continue to be violated as he has not given the Respondents consent to engage in Gold mining activities on his land.
10. On the strength of the above the petitioner sought for the reliefs set out at paragraph 1 of this Judgment.
11. Simultaneous with the filing of the Petition the petitioner filed a Notice of Motion *application* (hereinafter referred to as the Application) that sought for temporary injunctive reliefs. In response to the Petition and the application the respondents filed a notice of preliminary objection dated 8th March 2023 (hereinafter referred to as the PO) seeking striking out of the petition and the Application on the grounds interalia that;



- i. the Application and the petition offends section 7 of the *civil procedure Act* as it was Resjudicata in view of Eldoret ELC Misc. Application No 15 of 2019 between *Cheseret arap Korir v Equitorial Land Holdings Limited* and;
 - ii. that the Application and the Petition were subjudice in view of the proceeding in Kapsabet ELC No. E009 of 2022 and the Respondents sought dismissal of the Application and the Petition.
12. Vide the Ruling dated 22nd June 2022 the court dismissed the PO noting that the same was not premised on pure points of law as envisaged in the Mukisa Biscuit case but that the issues of *Resjudicata* and subjudice raised in the said Preliminary Objection needed interrogation before application could be determined.
13. Upon delivery of the Ruling on the PO on 22nd June 2023 Miss Mudeshi Learned counsel for the Petitioner withdrew the pending Application and expressed desire to proceed with the petition. Miss Owino learned counsel for the respondents sought and was granted leave to file a response to the petition within 21 days and leave was equally granted to the petitioner to file a further affidavit if need be within 7 days of service of the replying affidavit.
14. The court directed the petition to proceed by way of filing submissions and the petitioner was granted 45 days from the said date to file and serve the written submissions while the Respondents were granted 60 days from the said date to file and serve their written submissions. The matter was thus slated for mention for compliance on 13/9/2023 which date fell on the August recess and the matter was scheduled for a mention on 19/9/2023
15. On 19/9/2023 the Respondents confirmed having filed their response to the petition and submissions but Ms. Kemunto Advocate who held brief for Ms. Mudeshi learned counsel for the petitioner sought time to file a further affidavit.
16. The court extended time 21 days for the petitioner to file the further affidavit as well as their submissions and slated the matter for mention on 11.10.2023 for compliance and to take a judgment date. The Respondents having already filed their submissions were granted leave to file a supplementary submission if they deemed fit to do so. Within 3 days after service of the submissions by the plaintiff.
17. On 11.10.2023 again Miss Kemunto Advocate held brief for Miss Mudeshi and sought time to file the Petitioner's submissions which miss Owino counsel for the respondents opposed. The court reserved the judgment for 27.11.2023 but allowed the petitioners to file their submissions within 7 days from 11.10.2023. On 27.11.2023 the Judgment was deferred to 29.11.2023 on which day Miss Muhanda learned counsel for the Petitioner indicated to the court that she had filed the further affidavit and her submissions which she implored the court to consider but which was opposed by Mr. Mango for the Respondents.
18. By this time on 27.11.2023 the judgment was partially written and later that afternoon the Court's attention was drawn to the Petitioner's further affidavit and submissions filed that morning (27.11.2023) out of time extended to him on 11.10.2023 and without leave of the court and hence the same were not considered.

The Respondents Case:-

19. The 1st Respondents filed a replying affidavit through, Mr. Jeremy Froome, a director thereof who deponed inter alia that;



- i). he was well versed with the facts and the matters pertaining to this case with authority to swear this affidavit, and such he is competent to do so on behalf of the company. He annexed a copy of the authority as JF 1.
- ii) the Petitioner only entered into a land lease agreement with the Respondents in the year 2009 for a period of 10 years to conduct mining activities in the land and when the lease agreement came to an end in 2019, the Petitioner declined to renew the lease agreement forcing the Respondents out of his land.
- iii) It is the deposition of the 1st Respondent through Mr. Froome in reply to the issue of the Petitioner's house, that the same was built in the 1940s and is believed to have been left by the Europeans who were prospecting and mining gold before independence. (Annexure JF-4 was a copy of the statement of Jackton Kipler, Kibisem Community member and former area chief towards this end). That the Petitioner's wife recalls moving into the house in the 1970s when it had already developed cracks as a result of non-maintenance, forcing them to re-locate to a house up the hill because it was inhabitable. Annexure JF 5 was a copy of the statement of Pauline Jeptoo Korir, first wife to the Petitioner and that the Petitioner's daughter was born in the year 1974 and she can recall having been brought up in the same house that already had existing cracked walls and the materials used in building the house were old and weary and the same cannot be as a result of blasting. (Annexure JF-6 is a copy of the statement of Elizabeth Chelagat, second born child to the Petitioner).
- iv). On the petitioner hearing impairment, the 1st Respondent deposes through Mr. Froome that the Petitioner's daughter could remember the Petitioner complaining of hearing impairment which became persistent as he was growing old and that the same could be also attributed to old age as the Petitioner is well over 90 years of age. Further the respondents deposes that the Petitioner's hearing problem developed after the Petitioner was released from prison and long before even he entered into lease agreement with the Respondent. (Annexure JF-7 is a copy of the statement of Pius Kiptanui Kogo, resident Chepyagan village and neighbour to the Petitioner).
- v) It is the Respondents' further deposition that during the said meeting which was also attended by a community member who could remember the house already having existing cracks and the Petitioner having been assisted to hear and follow proceedings of the said meeting. (Annexure JF-9 a copy of the statement of Willy Kipkosgei Koech, Kibisem Community member).
- vi) on the issue of the Petitioner's deposition of trespass by the Respondents. The 1st Respondent termed the same as a wild allegation that has neither been substantiated nor proved as the Petitioner has failed to provide any scintilla of evidence to support his claim that the Respondents have trespassed on the suit property, are conducting mining operations on the land and interfering with his ownership, possession and use of all that land comprised in Parcel Number Nandi/Chemase/974 and Nandi/ Lengemet/224.
- vi) the 1st Respondent deposed on the existence of a pending and related matter before this court at Kapsabet being Kapsbet ELC 009 of 2022; *Karebe Gold Mining & Another v Cheseret Arap Korir & Another* (herein after called 'the civil suit') wherein both parties have challenged their counterparts mining license where the Court has ordered that there be no mining in Nandi/Chemase/974 and Nandi/Legmet/224 pending the hearing and of determination of the suit. (Annexure JF-10 a true copy of the order.) and pursuant to the said suit it is actually the



petitioner instead who was found guilty of being in contempt of the Court orders issued on 18th October, 2022 in Kapsabet ELC 009 of 2022; Karebe Gold Mining & Another v Cheseret Arap Korir & Another, for carrying out mining activities in his land.

- vii) that the Petitioner had acknowledged that he was in contempt of the court order issued on 18th October, 2022 and to show his contrition and reparation, he filed an Affidavit dated 22nd March, 2023 in proof of purge at the superior court. (Annexure JF-II" a true copy of the Affidavit dated 22nd March, 2023) when he appeared before Court on 23rd March, 2023
- viii) the 1st Respondent further deponed that upon advise of his counsel on record He is well that the petitioner had not set out with a reasonable degree of precision of what he complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed; that a party seeking constitutional reliefs must clearly state not only the provisions of the Constitution allegedly infringed in relation to the rights violated but has also to state the manner of infringement and the nature and extent of the infringement and nature and extent of injury suffered (if any) hence the instant Petition therefore does not meet the specificity test for constitutional petitions as was established by the authority of Anarita Karimi Njen v Republic (1979) eKLR and that of Mumo Matemu v Trusted Society c Human Rights Alliance & 5 others with reasonable precision that their rights violated and in what manner thus falling short of the threshold set out in this case since;
- a) the Petitioner has made general and broad allegations of violation without specifying the precise provision of the constitution violated and particulars of the manner of the alleged infringement.
- b) it is clear that the instant petition as framed and the supporting deposition are inadequate for the court to conduct an inquiry necessary to reach any conclusions to determine whether the Petitioners rights have been violated as alleged.
- c) the Petition dated 6th February, 2023 falls below the required threshold of a constitutional petition and as such does not meet the competency threshold.
- d) the Petitioner has failed to prove a prima facie case to warrant grant of the injunctive orders sought.
- e) that no prima facie case has been established to grant injunctive reliefs as well issuance of mesne profits since mesne profits are the provisions of Under Order 21 rule 13 of the Civil Procedure Rules that mesne profits being special damages must not only be specifically pleaded but specifically proved.
- f) the Respondent thus deponed that from the foregoing, the Petition dated 6th February, 2023, is scandalous, frivolous and above all incompetent and sought for its dismissal with costs for being an abuse of the Court process.

Petitioner's Submission: -

20. As observed at a paragraphs 17 and 18 of this Judgment the petitioner filed his further affidavit and submissions out of time, and without leave and the court shall not consider the same.

Respondents' Submission:-

21. In their submissions the Respondents have framed two issues for determination and submitted on the said issues, to wit;



- a. Whether the petitioner has met the competency threshold of a constitution petition?
 - b. Whether the petitioner is entitled to the reliefs sought?
22. On issue number 1 the Respondents' submit that it is not enough to merely cite constitutional provisions. there has to be some particulars of the alleged infringements to enable the respondents be able to respond or answer to the allegations or complaints. In support of this limb of submissions the respondents have cited the decision in the case of *Annarita Karimi Njeru v Attorney General* for the proposition that a petitioner must plead with particularity that which he complains, the provision said to be infringed and the manner in which the particular right is violated.
 23. The Respondent submits that the gravamen of the petition is that the petitioner has not given his consent to the Respondents to undertake mining activities on his parcels of land and that the petitioner has not provided any evidence to support the alleged trespass and has not set out how his rights have been violated.
 24. The Respondents has cited the decision in the cases of *Annarita Karimi Njeru* and the decision in the cases of *Trusted Society for Human Rights Alliance v Attorney General and others* Nairobi High Court Petition No229 of 2012. as well as Civil Appeal No 290 of 2012 *Mumo Matemu v Trusted Society of Human Rights Alliance And 5 Others*. In the later decision the court of Appeal held inter alia

“...the petitioner before the High court referred to Articles 1,2,3,4,10,19,20 and 73 of the constitution of its title but provided little or no particulars as to the allegations and the manner of the alleged infringements hence did not meet the principle in the Annarita kirimi Njeru requiring the constitutional petitions be pleaded with reasonable precision”
 25. Further reliance was placed on the decision in Nairobi constitutional Petition No.101 of 2011 *Kenya Youth Parliament and 2 others v AG and another* and Petition No 257 of 2015 *Githunguri Dairy Farmers Cooperative Society v The Attorney General and 2 others* HCCP no 257 of 2015. On the strength of the above decisions and submissions the Respondents urges the court to find that the petition has not met the constitutional threshold.
 26. On issue number 2 the Respondent submits that since the petition did not meet the constitutional threshold, the petitioner is not entitled to the reliefs sought which are set out at paragraph 1 of this judgment. The respondents submit that the petitioner has failed to prove ownership of the suit properties by annexing copies of his titles to the suit properties hence the reliefs including the declaration as well as the permanent injunction, mesne profits as well compensation cannot issue as the said reliefs are pegged on ownership, so submits the Respondents.
 27. On the relief of compensation the respondent submits that on the strength of his replying affidavits that the cracks oh the petitioners house was as a result of old age the house having been built in the 1970s and relies on annexures JF4,5,6 being statements from the petitioners first wife Pauline Jeptoo, Elizabeth Chelagat the petitioners 2nd born and Jackson kiplle a community member hence the cracks cannot be attributed to the blasts. While the hearing impairment of the petitioner, submits the respondent, cannot also be attributed to the said blasts. The petitioner submits that no evidence was produced to support this and that in any event the petitioner has suffered hearing impairments from the time he left prison and the respondents rely on annexures JF 7,8, and 9 being statements of neighbours from the Kibesem community.



28. On the strength of the above the Respondents urge the court to dismiss the petition and award them costs which the respondents submit is at the discretion of the court under Rule 26(1) of the [Constitution of Kenya \(Protection of Rights and Fundamental freedoms\) Practice and Procedure](#) 2013.

Issues For Determination: -

29. Having considered the petition, the affidavits in support and in opposition, the submissions and the case law cited the courts frames the following as issues for determination:
- a. Whether the issues raised in this petition are also issues raised in the civil suit, to wit, Kapsabet ELC case *No 009 of 2022*; [Karebe Gold Mining and another v Cheseret Arap Korir and Another](#) rendering the petition subjudice?
 - b. Whether the petition meets the constitutional threshold of constitutional petition?
 - c. What reliefs ought to issue
 - d. Who bears the costs of the petition?

Analysis And Determination

30. Vide paragraphs 18 and 19 of the Replying affidavit of Mr. Jeremy Froome the respondents have exhibited before court orders issued in the civil suit, to wit Kapsabet ELC case. *No 009 of 2022* between [Karebe Gold Mining and another v Cheseret Arap Korir and the Cabinet Secretary Ministry of Petroleum and Mining](#). This was the same case alluded to in the Preliminary Objection alluded to at paragraphs 11 and 12 of this Judgment and the court called for the record of the said case. Upon perusal of the said record the petitioner herein who is the defendant in that case vide his statement of Defence and Counterclaim dated 4th November 2022 pleaded at paragraphs 4,5,7,10,15,25,26,27,30 and 31 the same issues of lack of consent and the illegal mining licences issued to the Respondents, the same issues of the consent and illegal mining are pleaded at paragraphs 12,13 and 17 of this petition. The reliefs sought in Kapsabet ELC *case number E009 of 2022* are similar to the reliefs sought in this petition, save for a prayer of a geophysics to undertake an investigation of the illegal mining that was pleaded in the counterclaim in the civil suit, to wit, Kapsabet ELC *No.009 of 2022*.
31. From the Plaintiff and the counterclaim in the civil suit, to wit, Kapsabet ELC *No. 009 of 2022* the issue for determination is the validity of the mining licences issued to the Respondents ostensibly without the consent of the Petitioner. The mining licences in issue was issued by the then Ministry of Petroleum and Mining yet the said Ministry is not a party to this petition but it is a party to the civil suit, to wit, Kapsabet ELC *No. 009 of 2022*. In this Petition the court has been deprived of vital input by the ministry on the processes leading to the issuance of the licences to the Respondents without the petitioners consent as alleged by the Petitioner in his petition.
32. The dispute herein and the dispute pleaded in the, civil suit, to wit Kapsabet ELC *009 of 2022* resolves around the issue of issuance of the mining licences by the ministry of Mining to the respondents in the absence of consent from the petitioner and shall to a large extent involve the interpretation of the [Mining Act](#) and the regulations made thereunder. Indeed, the petitioner has cited the [Mining Act](#) and regulations 23 in this petition. Hence this is a case that can be resolved with the interpretation and application of the [Mining Act](#) and the regulations made thereunder and the petitioner was right to plead a counterclaim in the civil suit, to wit, Kapsabet ELC *009 of 2022* but was ill advised to clothe the same dispute with a constitutional armour and present it as constitutional petition as he did in this petition during the pendency of the Civil suit. In arriving at the said conclusion this court is guided



by the decision of the Supreme court of Kenya *Communication Commission of Kenya v Royal Media Services* (2014 eKLR) whereat paragraph 256 the Supreme court held as follows;

“..... The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

33. Having made the finding that the issues raised herein are also the issues before this court in the civil suit, to wit, *kapsabet ELC 009 OF 2022* and re thus subjudice and noting that the dispute can be wholly resolved in the civil suit before this court since the ministry of Mining is a party to the civil suit and applying the principle of constitutional avoidance as summed up in the preceding paragraph, the inevitable fate is that the petition must fail and 2nd and 3rd issues for determination shall not be considered as this petition be and is hereby dismissed .

34. Each party shall bear its own costs.

DATED, DELIVERED AND SIGNED AT KAPSABET THIS 29TH DAY OF NOVEMBER, 2023.

HON. M. N. MWANYALE

JUDGE

In the presence of;

1. Mr. Lumumba holding brief for Mr. Orende for Respondents
2. Ms. Kemunto holding brief for Ms. Muhanda for the Petitioner

