REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 195 OF 2014 (FORMERLY MISC.

APPLICATION NO. 298 OF 2013 (JR)

IN THE MATER OF SECTIONS 17, 27 AND 56 OF THE MINING ACT, CAP 306 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 40 AND 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

BETWEEN

CORTEC MINING KENYA LIMITED …….....…… APPLICANT

VERSUS

THE CABINET SECRETARY MINISTRY OF MINING.....1ST RESPONDENT

ATTEORNEY GENERAL.....2ND RESPONDENT

NATIONAL ENVIRONMENTALMANAGEMENT

AUTHORITY (NEMA).....1ST INTERESTED PARTY

BASU MINING LTD.....2ND INTERESTED PARTY

KENYA FOREST SERVICE.....3RD INTERESTED PARTY

NATIONAL MUSEUMS OF KENYA.....4TH INTERESTED PARTY

MSHENGA VUYAA RUGA.....5TH INTERESTED PARTY

BENSON KIOKO MULANGILI.....6TH INTERESTED PARTY

MUTHEAUS MUTINDA MUTUA.....7TH INTERESTED PARTY

COUNTY GOVERNMENT OF KWALE.....8TH INTERESTED PARTY

JUDGMENT

Introduction brief facts and background

The present proceedings were commenced before the Judicial Review Division of the High Court by the Exparte Applicant**, Cortec Mining Kenya Limited**. Before the Exparte Applicant's Notice of Motion for Judicial Review could be heard and determined the 1st interested party, **National Environment Management Authority** (hereinafter referred to as **"NEMA")** filed a Notice of Motion dated 16th December, 2013 seeking orders that the High Court lacked the jurisdiction to hear and determine the matter and for the suit to be struck out.

Odunga J heard the 1st interested party's said application and rendered a ruling on 18th February 2014 declining the 1st interested party's application but at the same time holding that the Environment and Land Court was better placed to hear and determine the matter having regard to the issues raised in the instant case. On that account the Judge directed that the matter be heard and determined before this court. This court became seized of the matter on 4th March 2014 when the parties appeared before it for mention for directions.

The matter before the court for determination is the Exparte Applicant's Judicial Review application by way of Notice of Motion dated 9th September 2013 expressed to be brought under section 8(2) of the Law Reform Act, Cap 26 of the Laws of Kenya and Order 53 rule 3 of the Civil Procedure Rules 2010. Leave to bring the application was granted on the 2nd September 2013. The Notice of Motion seeks the following orders that:-

1. An order of certiorari be and is hereby issued to remove into this court and quash the entire decision of the 1st and 2nd Respondents made on the 5th day of August, 2013, purporting to revoke the Exparte Applicant's Special (mining) License Number 351 issued on the 7th day of March 2013 and appointing a Task force to undertake a review of the Ex-parte Applicant's licence.

2. An order of prohibition be and is hereby issued against the 1st and 2nd Respondents, their servants, agents, employees or any person(s) acting under their authority from taking any further step or action in furtherance of the purported decision to revoke the Ex-parte Applicant's Special (mining) License Number 351 issued on the 7th day of March, 2013 and appointing a Task Force to undertake a review of the Ex-parte Applicant's License.

3. The costs of this Application be paid by the 1st, 2nd Respondents, the 1st, 2nd, 3rd and 4th interested parties jointly and severally.

The application is supported on the grounds set out on the body of the application and by the statutory statement dated 15th day of August, 2013, the verifying Affidavit duly sworn by DAVID ANDERSON on 15th day of August 2013 and the Supplementary Affidavit sworn by JACOB JUMA on the 30th day of August 2013. The following grounds are set out in support of the application.

1. On the 5th day of August 2013 the 1st and 2nd Respondent made a public announcement on National Television Stations purporting to revoke the Exparte Applicants Special (Mining) Licence Number 351 issued on the 7th day of March, 2013 and appointing a task force to undertake a review of the Exparte Applicant's License.

2. The 1st and 2nd Respondents actions and decision is unconstitutional as the decision was made unlawfully, was unreasonable and was not procedurally fair as required by Articles 40 and 47 of the

Constitution.

3. The 1st and 2nd Respondents' actions and decision contravenes the express provisions of sections 17 to 56 of the mining Act, Cap 306 as a revocation of a license must be preceded with proof of breach of the terms and conditions of the licence and failure by the licence to show adequate cause upon receipt of notice of breach and to show cause in respect thereof from the Commissioner of Mines. The actions and decision is therefore, ultravires.

4. The 1st and 2nd Respondents actions and decision was arbitrary as there were no reasons or grounds at all to warrant the taking of the decision.

5. The 1st and 2nd Respondents actions and decision contravenes the rules of natural justice as the Ex-parte Applicant was not heard before the making of the decision.

6. The 1st and 2nd Respondents actions and decision was irrational as the purported taskforce is intended to review matters in respect of which a decision has already been made and thereby meant to retrospectively validate the action and decision of the 1st and 2nd Respondents.

7. The 1st and 2nd Respondents actions and decision failed to take account of the Exparte Applicant's legitimate expectation, the Exparte Applicant having heavily, invested in the prospecting of the mining resources in respect of which the licence was issued and put in place infrastructure to commence the mining.

8. The 1st Respondent's actions and decision was actuated by and based upon ulterior motives.

9. The ends of justice demand that the decision of the 1st and 2nd Respondents be quashed by an order of certiorari and any further action pursuant thereto and detrimental to the Exparte Applicant's interests by the said 1st and 2nd Respondents be prohibited by an order of prohibition.

The 1st and 2nd Respondents oppose the Ex-parte Applicants application for Judicial Review. The 1st Respondent filed a replying affidavit sworn on 19th August 2013 by **Dr. Ekal**. The 2nd Respondent did not file any affidavit but filed grounds of objection and submissions. The several interested parties who were enjoined to these proceedings opposed the application by the Exparte Applicant on varying grounds which I will discuss later in this judgment.

Before the Exparte Applicant's application could be heard **Basu mining Co. Ltd** filed a separate application for Judicial Review against the Commissioner of Mines and the Attorney General as the 1st and 2nd Respondents vide **HC. JR NO. 359 of 2014**. **Cortec Mining Kenya Ltd** the Exparte Applicant in the present application was named as the 1st interested party in the case by **Basu Mining Co. Ltd.**

The application by **Basu Mining Ltd** sought to have the special Mining License NO. 351 issued to **Cortec Mining Kenya Ltd** by the 1st Respondent quashed on the grounds that it was unlawfully and illegally issued. As similar issues arose in both applications the parties sought directions on the hearing of the two applications and the court on 27th May 2014 though it did not order consolidation of the two suits directed that the two matters be heard together as it was expedient to do so. This judgment however relates solely to the suit by **Cortec Mining Kenya Limited.**

<u>The Applicant's Case – Cortec Mining Kenya Ltd</u>

The statutory statement filed by the Exparte Applicant on 15th August 2013 and the verifying affidavit by its Managing Director **David Anderson** sworn and filed on 15th August 2013 and the supplementary affidavit sworn by **Jacob Juma**, a director of the Exparte Applicant sets out in considerable detail the grounds and facts in support of the applicant's Application.

As per the verifying affidavit the Applicant is a Limited liability company incorporated under the companies Act, Cap 486 of the Laws of Kenya and whose core business is mineral prospecting,

exploration and mining. The Applicant states that on the 4th of April, 2008 it was issued with special prospecting license Number 256 for a term of 2 years for 1,180 square Kilometres in Kwale District which license was renewed and further renewed on 25th November 2011 as per the newed Special Mining License exhibited as "**DWA-4**" for a term of 3 years with effect from 1st December 2011. The Applicant avers that it undertook the prospecting and exploration works in terms of the License and fully complied with the terms and conditions therein.

The Applicant states that as at 5th August 2013 it had completed the prospecting and exploration in terms of the prospecting licenses and had identified commercially viable deposits of Niobicom and Rare Earths Elements at cost of about Kshs.475,000,000/- and has annexed various documents to the verifying affidavit marked "**DWA-5**" to **DWA-18"** to support this assertion. In particular the Applicant states that as at 5th day of August 2013 it had obtained the necessary approvals from Kenya Forest Service, County Council of Kwale and the National Museums of Kenya and as annexed various letters and documents marked **"DWA"-36"** to **DWA-43"** from these institutions in support of this averment.

Under paragraph 13 of the verifying affidavit by David Anderson the Applicant states:-

> **13. That as at 5th day of August 2013 the Applicant had special (Mining) License November 351 issued on the 7th day of March 2013 and Gazetted on the 22nd March 2013 to undertake the mining works on an area of 142.159 hectares, being a variation of the Special Prospecting License Number 256 earlier issued to the Applicant. The Applicant had earlier in September, 2012 supplied a satisfactory final feasibility study Report to the mines and Geology Department in September 2012. Exhibited herewith and marked as "DWA-44'' "DWA-45" "DWA-46" and DWA-47'' respectively, are true copies of the license, the gazette notice, the land cadastral survey map of the area to be mined and the final Feasibility Study Report.**

The Applicant contends that as at the 5th day of August 2013 it had completed all the necessary steps and obtained all the necessary licenses and approvals and had set up necessary infrastructure to enable the commencement of the mining of Nobium and Rare Earths Elements in terms of the license issued to it and thus avers that the 1st Respondent revocation and/or cancellation of its mining license Number 351 issued on 7th day of March 2013 was null and void. The 1st and 2nd Respondents on the 5th day of August, 2013 made a public announcement on National Television stations purporting to revoke the Applicant's special (mining) licence Number 351 issued on the 7th day of March 2013 and to appoint a task force to undertake a review of the Applicant's license. Annextures **"DWA-48"** to "**DWA-52**" show the form in which the 1st Respondents decision was communicated. The 1st and 2nd Respondents decision was widely reported and published in all the Local Daily Newspapers on the 6th, 7th and 8th August 2013 as per annextures "**DWA-53**" to **DWA-61".**

The Applicant avers that the 1st Respondent took the action and made the impugned decision after the Applicant's refusal to accede to his demand for a bribe, a matter the Applicant states has since been reported to the Ethics and Anti-corruption commission of Kenya vide a letter annexed and marked **"DWA-62**". The Applicant avers that the 1st and 2nd Respondents action and decision is unconstitutional as the decision was unlawful, was not procedurally fair as required by articles 40 and 47 of the constitution and further that the 1st and 2nd Respondents action and decision was in contravention of the express provisions of sections 17 to 56 of the Mining Act Cap 306 of the Laws of Kenya.

The Applicant further averred the 1st and 2nd Respondents' action and decision was arbitrary, irrational and breached the principles of natural justice as the Applicant was not afforded a hearing before the decision was made. The Applicant asserts that the 1st and 2nd Respondents failed to take account of the Applicant's legitimate expectation that the Applicant having invested in the prospecting of the mining resources and having been issued with the mining license the Applicant was entitled to see its investment bear fruit. The Applicant contends that it had fully complied with all the provisions of the law before being issued with the special (Mining) Licence NO. 351 on 7th March 2013 and that the issuance of the same was not in contravention of any provision of the Mining Act (Cap 306) specifically of section 17(2) (b) under which the license was issued. The Applicant avers the 1st Respondent's action and decision was actuated by and based upon ulterior motives and not on the law and asserts that an order of certiorari

to quash the said decision is merited.

The Applicant through the supplementary affidavit sworn by **Jacob Juma** on 30th August 2013 responded to the replying affidavits sworn on behalf of the 1st Respondent and the various interested parties.

1st Respondent's case. The Cabinet Secretary Ministry of Mining

The 1st Respondent opposes the Applicant's application and relies on the replying affidavit sworn on 19th August 2013 by **Amb. Dr. Richard Titus Ekal,** the principal Secretary, Ministry of Mining. The Deponent states that as per the Ministry's records one **Harie Kinotshe Ndungu** holder of prospecting Rights 8258 of 15/5/2007, on 22/5/2007 lodged an application for an Exclusive prospecting Licence claiming to represent the Applicant, **Cortec Mining Kenya Ltd**. Copy of the application is annexed and marked "**RTE-1**". The 1st Respondent avers that in the application for an Exclusive Prospecting Licence the said **Harie Kimosthe Ndungu** falsely represented that he was acting as Agent of "**Cortec Mining Kenya Ltd"** when as at that time **Cortec Mining Company Ltd** had not been incorporated and could therefore not have appointed any agent. Annexed and marked "**RTE-2**" is a copy of the certificate of incorporation of **Cortec Mining Kenya Limited** which shows the Company was incorporated on 4th July 2007. The prospecting Right **NO. 8258** annexed and marked **"RTE-3**" indicates the same was made to **Harie Kinotshe Ndungu** on his "own account" for one year.

The 1st Respondent argues that the Applicant having not been incorporated at the time the prospecting Right was issued could not have satisfied the necessary requirements for issuance of the prospecting Right and the prospecting Right was neither transferred or assigned to the Applicant. The 1st Respondent avers that the Applicant was pursuant to an application for a prospecting licence in **Kwale District** vide a letter dated November 2007 from the Commissioner of mines and Geology annexed and marked **"RTE-4''** informed that the application was under process for Gazettment but that the area to be covered under the licence would exclude the **Mrima Hill Nature Reserve**. The Applicant was issued with special license NO. 256 on the 4th day of April 2008 subject to the provisions of the Act in so far as applicable.

Inter alia the special conditions of the special licence provided:-

(i) **Special condition 3-** The right, liberty and licence to prospect and explore for in or on the Area all Minerals as presently defined in the Act,

(ii) **Special condition 14-** The licensee was required to observe all the provisions of the Forest Act NO. 7 of 2005 and any regulation thereunder in so far as they are applicable to its operations.

(iii) The licensee was required under special condition 15 of the license to observe all the provisions of the Environmental Management and coordination Act, NO.8 of 1999 and any regulations there under in so far as they are applicable to its operations.

(iv) **Special condition 16-** The licencee was required to ensure compliance with the provisions of the Wildlife (conservation and Management) Act, Cap 376 Laws of Kenya.

(v) **Special condition 23-** The licensee upon successful application for grant of a special mining lease required to satisfy the requirements of Section 12 of the Trust Land Act, Cap 288 Laws of Kenya to pay to the Commissioner of Lands such sum as may be required to meet the compensation payable for the land set apart for the project.

(vi) **Under special condition 7** of the special licence the Applicant was required to execute a performance Bond renewable on or before each anniversary of the licence.

The 1st Respondent further depones that the special licence issued to the Applicant was renewed on 16th April 2010 for a further term of 2 years with effect from 1st April 2010 on terms that:-

(a) That in respect of exploration at **Mrima Hills Nature Reserve,** the Applicant was restricted to explore the existing pits" **and that opening of new pits will be subject to undertaking an Environmental impact Assessment".**

(b) That the Applicant would undertake **"regular updates of the prospecting activities to the Kenya Forest Service, the National Museums of Kenya and the Kenya Wildlife Service".**

The Respondent further depones that the renewal of the licence was consequent to the letter from the permanent Secretary Ministry of Forestry & Wildlife dated 25th January 2010 annexed as RTE-8" to the Applicant to prospect for minerals within **Mrima Hill Forest** for **"one year"** and a further letter dated 19th February 2010 from the National Museums of Kenya annexed as **"RTE-9**" which stated that the Applicant's activity" **was only exploration and prospecting and no licence had been given for actual mining".**

The 1st Respondent contends that the permanent Secretary authority allowing prospecting within **Mrima Hill Forest** was not extended and neither did the National Museums of Kenya authorize any mining to be undertaken at the Nature Reserve. The Applicant applied vide a letter dated 25th October 2011 for an early renewal of special licence NO. 256 over a reduced area to enable them to seek funding. Renewal of special licence NO. 256 was issued on 25th November 2011 for a term of 3 years with effect from 1st December 2011 **"Subject to the provisions of the Mining Act, Cap 306 of the Laws of Kenya and subject further to the special conditions contained in the original licence and variation thereafter".**

The 1st Respondent further states the Applicant shortly afterwards on 10th January 2012 applied for a special Mining License over an area of 614.3 Sq. KM for a term of 21 years which application the 1st Respondent avers was incomplete for the reasons that:-

(a) It did not include an Environmental Impact Assessment.

(b) It did not include an authorization from Kenya Forest Service.

(c) It was not approved and/or authorized by the National Museums of Kenya.

(d) The Land had not been set apart.

The 1st Respondent states that the Commissioner of Mines and Geology by a letter dated 27th January 2012 rightly rejected the application and as per the record this decision was not the subject of any appeal by the Applicant. In what the 1st Respondent describes as "**Completely strange turn of events**" the Commissioner of Mines and Geology on 7th March 2013 purported to issue a special (Mining) Licence NO. 351 to the Applicant for a period of 21 years. The 1st Respondent states that the issuance of the Special (mining) Licence NO. 351 was strange and peculiar for the following reasons:-

(i) There was no application from the Applicant seeking a Special (mining) Licence.

(ii) No similar licences to the one issued to the Applicant existed, and the licence stands on its own.

(iii) The licence was issued during the week that the country was awaiting results of the Presidential and National elections that were held on 4th March 2013.

(iv) To the knowledge of the Commissioner of Mines and Geology, a decision had been made on 31st January 2013 to revoke the Applicants special licence NO. 256 for prospecting and exploration. Copies of the agenda and minutes annexed as "**RTE-13**".

(v) The licence violates various statutes which expressly prohibit mining activities in a Nature Reserve and/or forest.

(vi) The decision whether or not to grant a licence should have been deliberated upon by the Ministry's

prospecting and Mining Licencing Committee.

The 1st Respondent states that at the date the Special (Mining) Licence NO. 351 was issued the National Environmental Management Authority had not issued a **NEMA** Licence for that activity and in the absence of such **NEMA** licence, the licence issued by the Commissioner of Mines and Geology to the Applicant was void ab initio. The licence, having in the 1st Respondent's view been issued in violation of various statutory provisions, the 1st Respondent contends that the Applicant cannot seek redress from the court founded on its own violation of the law.

The 1st Respondent further states that the issue of minerals and their exploitation is a matter of national interest and concern and in dealing with the issue, the wider public interest must always be a consideration. The 1st Respondent states he sought advice from the Attorney General and upon receiving the advice the Government decided to revoke a total of 43 prospecting and Mining Licences which had been issued in dubious circumstances and that the Applicant's disputed licence was one of such licences. The 1st Respondent avers that the issuance of the prospecting and Mining Licences had generated widespread public complaints and that in particular the Applicant was using its licence to promote its commercial interest raising the value of its shares which ultimately it could sell at a profit.

The 1st Respondent contends it would be against public interest to allow the Applicant to misuse the mineral resources on the basis of a mining licence which was obtained in a clandestine and illegal manner.

The 2nd Respondent's Case- The Attonery General

The 2nd Respondent filed grounds of opposition and submissions to the Exparte Applicant's application. The 2nd Respondent states that following the promulgation of the Constitution 2010 all the existing laws were supposed to be reviewed and aligned to be in conformity with the Constitution. Article 262 of the constitution provides for transitional and consequential provisions and provides that the transitional and consequential provisions set out in the sixth schedule shall take effect on the effective date.

Section 7 of the sixth schedule provides as follows:-

> **7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.**
>
> **(2) If, with respect to any particular matter-**
>
> **(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular state organ or public officer, and**
>
> **(b) a provision of this constitution that is in effect assigns responsibility for that matter to a different state organ or public officer,**
>
> **The provisions of this constitution prevail to the extent of the conflict.**

The 2nd Respondent states that the provisions of the Mining Act Cap 306 Laws of Kenya as existed on the effective date of the Constitution should be read and construed in line with the Constitution so that the provisions of the Act are aligned to the Constitution. The 2nd Respondent acknowledges that the 1st Respondent sought advice from the 2nd Respondent and that the Attorney General furnished the 1st Respondent with a legal opinion on 5th August 2013.

The 2nd Respondent takes the view that section 27 of the Mining Act does not require the Minister to give a notice to a licensee and on that basis the Attorney General advised the 1st Respondent to review

the licences that were issued during the transition period and act accordingly under section 27(2) of the Mining Act. The 2nd Respondent avers that the constitution embodies the doctrines of public trust, public participation, precautionary principle and sustainability of the environment such that in the exercise of their authority public officers are enjoined to act responsibly and within the confines of the law and the constitution. The 2nd Respondent argues that the Cabinet Secretary on the basis of the information that was before him, he was justified to make the decision that he did revoking and cancelling the Exparte Applicant's special Mining licence.

The 2nd Respondent further contended that the Exparte Applicant ought to have appealed the decision of the Cabinet Secretary under section 93 of the Mining Act rather than taken out Judicial Review proceedings that were not available to the Exparte Applicant. At any rate the 2nd Respondent further argues Judicial Review applies to public law claims and the instant matter involves public interest which supercedes all other interests.

The 1st interested party's case- NEMA

NEMA opposed the Application by the Exparte Applicant through the replying affidavit sworn by its Director General **Prof. Geoffrey Wahungu** on 7th October 2013. The 1st interested party avers that it is mandated by the Environmental Management and Coordination Act NO. 8 of 1999 (hereinafter EMCA) to inter alia process Environmental Impact Assessment (hereinafter EIA referred to as) Reports with a view of mitigating and controlling environmental degradation and ensuring a clean and healthy environment for all.

The 1st interested party states that the letter of approval conditions dated 8th July 2013 relied on as an approval from **NEMA** by the Exparte Applicant is not an EIA licence under the law and avers that **NEMA** drew attention of this fact to various commercial Banks clarifying the distinction between a letter of approval conditions and an EIA License. Copies of letters in this regard are annexed and marked "**PGW1**". NEMA further states it had vide an earlier letter dated 22nd March 2013 annexed and marked "**PGW2**" refused expressly to license the exparte applicant's proposed project and had advised the Exparte Applicant to seek an alternative site. The full content of the letter dated 22nd March 2013 addressed to **Cortec Mining (k) Ltd** is reproduced hereunder for ease of reference:-

Cortec Mining Property (k) Ltd

P.O. Box 67846-00200

NAIROBI **Date: 22nd March, 2013**

RE: Environmental Impact Assessment Study report for the proposed Mrima Hill niobium and associated rare Earths Mining Project, Msambweni, Kwale County

The National Environment Management Authority (NEMA) in consultation with the relevant Lead Agencies, District Environment Committee and stakeholders has reviewed the Environmental Impact Assessment (EIA) report of the above mentioned project. The following observations have been made:

1. The proposed project will be implemented within Mrima Forest which is Gazetted as a Nature Reserve, Forest Reserve and a Natural Monument. The Forest Act, 2005 section 31 (3) prohibits extractive uses of nature reserves other than for research. The National Museums and the National Heritage Act, Part 4 Section 25, 2006 provides that only the Minister can gazette an area as a National monument and degazette and in reference to the proposed project, Mrima Hill has so far not been degazetted by the respective minister to pave way for the proposed project. The Forest Act, 2005 condemns mining in such areas in section 41 (1).

2.The proponent has failed to identify an appropriate site for the processing plant and

undertake a consequent Environment Impact Assessment for the same. In relation to this, the proponent has not been able to carry out a baseline Radiation Study for the area between the Mining Site and the processing plant.

3. In relation to '2' above, the proponent is not in a position to comprehensively propose a reliable source of large amount of water for use in the processing plant. The extensive abstraction of underground water may interfere with the accessibility of portable water by the local community.

4. The project will lead to massive destruction of Forest followed by loss of biodiversity.

5. The project will interfere with sites of cultural significance within the proposed project site.

6. There are archaeologically significant sites within the project area.

In view of the above grounds and in light of the provisions of the Environmental Management and Coordination Act, 1999 the Authority is of the view that the proposed project will not enhance sustainable and sound environmental management. Consequently, the Authority is unable to issue an Environmental Impact Assessment Licence under the Act. You are hereby advised to explore alternative site.

PROF. GEOFFREY WAHUNGU

DIRECTOR GENERAL

This letter quite clearly and unequivocally advised the Exparte Applicant that no consent/approval for the project would be given as no EIA Licence had been obtained by the Applicant and there were as it were serious environmental concerns.

NEMA further states even though the Exparte Applicant had submitted an EIA report it was yet to obtain a **NEMA** EIA Licence as required under the law which license had to precede the issuing of the Special Mining Licence/lease. It is NEMA's position that being the proponent of a project is mandatorily required to apply for and obtain an EIA licence before financing and commencing the execution of the project notwithstanding the issuance of any other approval under EMCA or any other law.

NEMA contends that the Exparte Applicant as the proponent of the proposed mining activity it required to be issued with an EIA Licence before commencing any mining activities which it was not issued with and thus had no justification to engage in the activities that it claims would expose them to adverse economic and financial loss should the special mining license stand cancelled and/or revoked. **NEMA** in the premises supports the decision by the 1st Respondent of cancelling the Special (Mining) License NO. 351 maintaining that the project had been going on illegally.

NEMA avers that the state through its various agencies is duty bound to ensure the constitution is observed by all and that **NEMA** for its part is expected to play its part of ensuring a clean and healthy environment for all Kenyans through the protection of biological diversity, indigenous knowledge, genetic resources and culture of local communities. **NEMA** is pursuant to the mandate donated to it under **EMCA** expected to put in place measures that eliminate processes that are likely to endanger the environment and to enhance the utilization of the environment in a sustainable manner for the benefit of the people of Kenya. **NEMA** denies any of the Exparte Applicant's rights under article 40 and article 47 of the constitution have been violated.

2nd interested party's case – Basu Mining Limited.

The 2nd interested party (**Basu Mining Limited**) is the Exparte Applicant in **HC ELC NO. 359 of 2014 (Basu Mining Limited –vs- Commissioner of Mines & others) formerly H.C JR Misc. application NO. 331 of 2013**. The 2nd interested party applied and was allowed to be enjoined to this suit as an

interested party vide its application dated 19th August 2013. The court directed that the two suits though not consolidated to be heard together since the subject matter in the two suits is the same being the special (Mining) License which the Exparte Applicant herein challenges the revocation and/or cancellation thereof by the 1st Respondent while in the **BASU Mining Limited** case **Basu Mining Limited** is challenging the issue of the special (Mining) License NO. 351 to the Exparte Applicant and seeking for its cancellation and/or revocation.

The 2nd interested party's case is that the Exparte Applicant does not hold a valid Special (Mining) Licence as the License issued to them on 7th March 2013 was not issued in compliance with section 7 of the Mining Act, Cap 306 of the Laws of Kenya. The 2nd interested party avers that under section 7 of the Mining Act before such a License is issued, land owners, County Government, persons who have earlier been issued with mining prospecting license and incase the land is a trust consents must be obtained from all the affected persons. The 2nd interested party states that the Exparte Applicant did not obtain the requisite consents from Kwale County Government and from the 2nd interested party in whom the land was vested by virtue of a lease that had been granted to Basu Mining Limited by the Kwale County Council. The 2nd Interested Party further states that it held exclusive prospecting or mining rights over the area in respect of which the special (Mining) License was granted yet no consent was sought or obtained from them by the Exparte Applicant.

The 2nd interested party contends that the license to the Exparte Applicant was issued in breach of section 7 and 17 of the Mining Act and was issued fraudulently and without any basis and is therefore illegal unlawful and invalid. The Exparte Applicant thus never had a valid licence to deserve any protection under the law and there could not have been any violation of the Exparte Applicant's Constitutional rights under Articles 40 and 47 of the Constitution as alleged.

Case for the 3rd Interested Party – the Kenya Forest Service

The Kenya Forest Service opposes the Exparte Applicant's application and relies on the affidavit sworn by **David K. Mbugua**, Director Kenya Forest Service on 19th August 2013. The position of the 3rd Interested Party is that the Exparte Applicant never got and/or obtained any approvals from the Kenya Forest Service for mining in **Mrima Hill Forest** as is required under the Forest Act, 2005. The 3rd Interested Party avers that the Exparte Applicant was pursuant to their request vide letter of 30th April 2010 only allowed limited access to the forest reserve to carry out exploration restricted to old exploration sites. The Kenya Forest Service letter dated 20th May 2010 granting the authority set out the conditions that were to be observed. The Kenya Forest Service further states that the Exparte Applicant was only granted authority to access the forest Reserve for prospecting purposes only and not for mining. The letters granting authority dated 5th April 2011 and 24th January 2012 annexed and marked "**DKM 4(a)"** and **"DKM 4(b)"** carried conditions and were restricted to prospecting purposes and did not grant any authority/consent for mining. The Kenya Forest Service avers that licenses for mining within a forest reserve are granted under the provisions of section 42 of the Forest Act 2005 and states that no mining license approval has been granted by Kenya Forest Service under the Act to the Exparte Applicant.

The case for the 4th Interested Party- National Museums of Kenya

The 4th Interested party filed a replying affidavit sworn on 30th August 2013 by **Idle Omar Farah**, Director General of the National Museums of Kenya. The 4th Interested Party states that it manages several Museums, sites and monuments of National and international importance alongside priceless collections of Kenya's living cultural and natural heritage including the area that is the subject of this suit being **Mrima Hills**. The 4th Interested Party asserts that the land the subject of the present suit is a gazetted National Monument and enjoys the protection of section 7(1) (kk) of the Mining Act, Cap 306 and it is mandatory for a party seeking to carry out any prospecting or mining activities in the said areas to obtain a consent from the 4th Interested Party. The 4th Interested party states that it has never issued any consent to the Exparte Applicant but had given to the applicant conditions to be adhered to by the Applicant before such consent could be given. The 4th Interested Party vide a letter dated 5th February 2013 annexed and marked "10-2" carrying the conditions that the Exparte Applicant needed to satisfy proposed that a meeting be held to discuss the matter but avers that before any further discussions were

held the Exparte Applicant obtained the impugned Special (Mining) License without the consent and/or approval of the 4th Interested Party.

The case for the 5th, 6th & 7th Interested Parties.

By a Notice of Motion application dated 10th January 2014 M/S **Mshenga Vuyaa Ruga, Benson Kioko Mulangili** and **Mutheaus Mutinda Mutua** applied to be enjoined in these proceedings on their own behalf and on behalf of the entire community of Kwale County. Although the court granted leave for the applicants to be enjoined the said applicants did not take any further part in the proceedings and neither did they file any further pleadings. It is probable that following the entry of the 8th Interested Party to the proceedings who appeared to represent the same interest as that sought to be represented by the 5th, 6th and 7th interested parties they did not see the need to continue with the proceedings. The court will therefore in this judgment not have any regard to the interest presented by the 5th to 7th interested parties.

The case for the 8th Interested Party- Kwale county Government

The Kwale County Government, the 8th Interested Party herein oppose the substantive application by the exparte applicant on the grounds contained in the replying affidavit sworn by **M.M. Mwavo** the County Secretary, Kwale County Government on 11th April 2014 and filed in court on 14th April 2014. The 8th interested party avers that the Special (Mining) License issued to **Cortec Mining Kenya Ltd** related to the Mining of rare earth and niobium minerals of commercial value in the **Mrima Hills** area which is in Kwale County. The 8th Interested party contends that the special (mining) license issued to **Cortec Mining Kenya Ltd** was illegal and unconstitutional as the same did not address key issues relating to revenue sharing between the National Government, the County Government of Kwale and the Investor and neither did it articulate what benefits were to accrue to the Local community within the area in which the mining was to take place. Further the 8th interested party avers there was no sufficient and/or any public participation before the issuance of the Special License as required under the Constitution and that rendered the License illegal and unconstitutional. The 8th interested party further avers that the special license was issued to **Cortec mining Kenya Ltd** in utter disregard of legal procedures and processes in that there was no compliance with the Forest Act, the Mining Act and EMCA and that in the context in which the License was issued, it was patently illegal, null and void and of no effect.

The Applicant's Response-Cortec Mining (K) Ltd

The Applicant in responding to the various affidavits filed by the Respondents and the interested parties filed a supplementary affidavit sworn by **Jacob Juma** on 30th August 2013. The Applicant explained that one of the major shareholders of the Applicant, **Cortec (PTY) Limited** was incorporated in the United Kingdom on 13th March 2007 and that it was introduced to **Harie Kinosthe Ndungu**, a geologist on 15th March 2007 by the them Commissioner of Mines for purposes of applying for a licence. The said **Ndungu** applied for an exclusive prospecting license in the name of the Applicant (though not yet incorporated) but the license was not issued in the Applicant's name but in **Mr. Ndungu's** name. The Applicant states the prospecting right NO. 8258 issued by the Commissioner of Mines on 15th March 2007 to **Mr. Ndungu** has never been transferred or assigned to the Applicant and that the Applicant does not claim any right or interest under it.

The Applicant's position is that it applied for a special license in its name after it had been incorporated and its application was Gazetted on 30th November 2007 and was issued with a special license number 256 on 4th April 2008 after no objection was raised. The Applicant states the renewal of special license number 256 on 16th April, 2010 allowed the exploration within the **Mrima Hill** Nature Reserve and the Applicant maintains that the Ministry of Forestry and Wildlife vide their letter of 25th January 2010 consented to the Applicant prospecting for minerals in **Mrima Hills Forest.** The Applicant further avers the National Museums of Kenya vide its letter of 5th February 2013 affirmed that they were ready to grant a letter of no objection to the proposed mining project by the Applicant subject to meeting of the conditions set out in the letter which conditions the Applicant has met and/or was in the process of meeting.

The Applicant further states it applied for a Special Mining License in terms of the application annexed and marked as **"JJ20**" and asserts that a **NEMA** license is issued only after the issuance of a Mining License and not before and it is for that reason the special mining licence number 351 issued to the Applicant on 7th March 2013 required at condition 20 thereof the Applicant to observe the provisions of the Environmental Management and Co-ordination Act, NO. 8 of 1999 of the Laws of Kenya in the exercise of the rights given under the license. The Applicant further observes that the National Museums of Kenya does not license, approve or authorise the issuance of mining licences and only allows access to areas under its jurisdiction. The Applicant states he paid for the application for the mining license and satisfied all the conditions necessary before the license was issued on the 7th March 2013.

The Applicant in response to the replying affidavit by **Prof. Geoffrey Wahungu** of **NEMA** maintains that no **NEMA** license is issued before a mining license is issued and that the **NEMA** approval and license is only necessary before actual mining is commenced. The Applicant further states it had on 21st February, 2013 submitted to **NEMA** an environment study report and made payment of the sum of Kshs.250,000/- towards the issuance of the approval and license and in furtherance thereof **NEMA** on 7th June 2013 published a notice inviting issuance of the License. No objections were received within the period allowed and thus **NEMA** should not be heard to complain about the license issued to the Applicant.

The Applicant in response to the replying affidavit by **David K. Mbugua** of the Ministry of Forestry and Wildlife maintained that the ministry had vide the letter of 25th January 2010 given authorization which was annual and renewable upon payment of the requisite fees which payments the Applicant had made for the period 2012-2013. The Applicant further states that the special license number 256 as renewed on 16th April 2010 expressly allowed the Applicant to open new pits for prospecting which the Applicant states it did and in the process incurred expenses in excess of Kshs.470,000,000/-. The Applicant further contends that Kenya Forest Service does not issue mining licenses and only gives authority to access forest areas. The Applicant states the renewal of the license on 25th November 2011 was conditional upon the Applicant complying with the provisions of the Forest Act, Cap 306 of the Laws of Kenya which the Applicant has complied with.

The Applicant in response to the affidavit sworn by **IQbal Bayusuf of Basu** Mining Company Limited denies that Basu Mining Ltd has any rights whatsoever over the area in respect whereof the Applicant was issued with the Special Mining License number 351 on 7th March 2013, averring that only the Commissioner of Mines and Geology is empowered to give a Mining lease and/or license and he has not issued any such lease and/or license over the area claimed by **Basu Mining Company Limited**. The Applicant to the contrary avers that the Kwale County Government has given the Applicant consent to undertake mining in the area covered under the Special License number as per the annextures marked **"JJ23"-JJ28".**

The Applicant further states that **Basu Mining Company Ltd** had not been incorporated by 18th May 2008 when it claims to have applied for a special prospecting license as a search at the companies registry revealed **Basu Mining Company** Ltd was incorporated on 21st May 2008. At any rate the Applicant states that the area in question had already been committed by the Commissioner of Mines and Geology to the Applicant and was not available for allocation as confirmed by the Commissioner's letter of 21st March 2013 to **Basu Mining Limited**. Further the Applicant states that the Kwale Government has denied that the lease agreement dated 28th September 2008 on which **Basu Mining Company** Limited opposes the Applicant's application is not authentic. The Applicant avers that **Mr. Joseph Mahinda** who it is claimed executed the lease agreement on behalf of the then County Council of Kwale has denied ever executing the lease and thus the alleged lease is a forgery and incapable of conferring any rights or interest to the **Basu Mining Ltd.**

<u>The Parties Submissions</u>

The parties filed written submissions as directed by court to ventilate their respective positions in regard to the application by the Applicant. The submissions in the main reiterated the facts as set out in the parties respective affidavits and canvassed issues of law from the parties respective perspectives. The

parties highlighted their written submissions before me on 16th September 2014 and 18th October 2014.

On behalf of the Applicant **Mr. Havi Advocate** submitted that the Special Mining License Number 351 issued by the Commissioner of Mines and Geology on 7th March 2013 was validly issued in accordance with Section 17 of the Mining Act, Cap 306 of the Laws of Kenya. The license was duly Gazetted on 22nd March 2013 and the area in respect of which it was issued was appropriately notified in the Gazette Notice. **Mr. Havi** submitted that the special mining License was issued subject to various conditions and inter alia two of the conditions were:-

1. The license was subject to compliance with any requirements set out under the Forest Act, and

2. The license was issued subject to any conditions set out by the National Environmental Management Authority (NEMA) pursuant to the provisions of the Environmental Management Co-ordination Act (EMCA).

The Applicant submits that the decision the subject of the challenge in these proceedings arose from the events of 5th August 2013 when the 1st Respondent made a public announcement on National Television stations, purporting to revoke all licenses (prospecting, Exploration and Mining) issued between 14th January, 2013 and 15th May 2013, a period he called the "**Transition Period**". The 1st Respondent by the same announcement intend a Task Force to undertake a review of all the licenses issued from January, 2013. The justification for the actions by the 1st Respondent was that he had received complaints from members of the public notably from the Kenya Chamber of Mines who had complained to the President that the License issued to the Applicant had contravened Article 71 of the Constitution that required public participation and that no Environmental Impact Assessment had been carried out before the issuance of the license to the Applicant.

Mr. Havi submitted that the 1st and 2nd Respondents have taken the position and view that the Minister had summary powers to revoke the license as he was acting in the public interest and that in case the Applicant was aggrieved by the decision of the Minister the avenue open to the Applicant was to lodge an appeal and not to approach the court by way of Judicial Review, a view that the Applicant disagrees with and asserts that the Minister had no business in acting in the manner he did and that his decision was amenable to Judicial Review.

Mr. Havi further submitted that the 1st, 2nd and 3rd interested parties position that the issuance of the Special Mining License to **Cortec Mining** Kenya Limited was not in public interest is unjustified since the Applicant had satisfied all the conditions for the grant and/or issuance of the license. The 1st, 2nd and 3rd interested parties challenge of the license issued to the Applicant is based on the grounds that:-

(a) There was no approval and license issued by **NEMA** before the issuance of the Mining License.

(b) There was no approval and/or consent issued from the Forest Service.

(c) There was no approval and/or consent issued from the National Museums of Kenya.

Mr. Havi submitted that this being a Judicial Review the court is only concerned with determining whether the process leading to the making of the decision impugned in the proceedings was fair and not with the merits or demerits of the decision and urged the court to interrogate the decision making process in the instant case. It was his submissions that the minister had no role to play under Section 27 of the Mining Act and that it was the Commissioner of Mines who has the power to require a holder of a license to show cause why the license should not be revoked. In consequence there has to be failure to show cause and/or insufficient cause is shown before the decision to revoke the license is made. Section 27 of the Mining Act is of key consideration in this matter and it is necessary to reproduce the same here for ease of reference.

> **27. In the case of any breach by the holder of a prospecting right or an exclusive prospecting licence or by any attorney of or manager employed by such holder or any of the terms and**

conditions of his license or of any of the provisions of this Act or of any of the regulations, it shall be lawful for the Commissioner to call upon the holder of the right or license to show cause, within a time specified by the Commissioner, why his right or license should not be revoked, and, should he fail to comply with such order within the time specified or should the cause shown not be adequate in the opinion of the Minister, the Minister may summarily revoke the right or licence, and there upon all privileges and rights conferred thereby or enjoyed thereunder shall as from the date of such revocation cease.

Provided that such revocation shall not in any way affect the liability of such holder in respect of the breach of any provision of the terms and conditions of his licence or of this Act or any of the regulations committed by him before such revocation.

The Applicant contends the Minister's decision to revoke the Applicant's licence was in contravention of section 27 of the Act which renders the Minister's decision unlawful and unconstitutional and therefore liable for quashing.

The Applicant in response to the Respondents submissions that the Applicant ought to have appealed against the Minister's decision pursuant to the provisions of section 93 of the Mining Act submits that the Respondents have misconceived the provisions of section 93 and argues that the appeals provided for under the said section are from the decision of the Commissioner under section 93 (1) to the Minister and from the Minister under section 93(2) to the High Court. The Applicant submits no decision was made by the Commissioner in respect of which they would have appealed to the Minister and further no report was made by Commissioner to the Minister in regard to the notice to show cause by the Applicant to lead the Minister to make the decision to revoke the Applicant's license. The Applicant argues the Minister could not have made a decision under section 27 since the Applicant had not been invited by the Commissioner to show cause and failed to do so and/or show insufficient cause. The Applicant therefore submits there was no valid decision by the Minister under section 27 against which the Applicant would have preferred an appeal and maintains the option available to the Applicant was to apply by way of Judicial Review to quash the Minister's decision.

Mr. Fred Ngatia Advocate highlighted the 1st Respondents submissions dated 24th September 2013. **Mr. Ngatia** submitted that the prospecting license **NO. 8258** issued to one **Ndungu** who had purported to act as agent of the Applicant was made before the Applicant was incorporated and would therefore be of no relevance to the Applicant. **Mr. Ngatia** further submitted that the Commissioner of Mines on 27th January 2012 rejected the Applicants application dated 10th January 2012 for a Special Mining License and that on 7th March 2013 when the Commissioner purported to issue the Special Mining License NO. 351 to the Applicant there was no pending application before the Commissioner in respect to which he could have issued the Licence. The 1st Respondent submits that following complaints regarding the issuance of the Special Mining Licence notably from the Chamber of Mining the 1st Respondent sought and received advice from the Attorney General as per the Attorney General's opinion dated 5th August 2013 and acting on the advice he revoked the Applicant's special Mining license to safeguard the wider interest of the public.

The 1st Respondent submitted that he revoked a total of 43 licences that he considered may have been issued irregularly and maintains that the Applicant was not singled out but rather that the decision was aimed at rectifying any irregularities and/or anomalies that may have been occasioned by the issuing of the various licences. The 1st Respondent maintained that the special Mining Licence had unlawfully been issued as the Applicant had not been issued with **NEMA** approval and license to undertake mining activities; that the area in respect of which the licence was issued was within a Gazetted Forest area and no approval and consent had been obtained from the Kenya Forest Service, and no approval and/or consent had been obtained from the National Museums of Kenya as required under the law considering that the mining activities were to be carried out in protected areas falling within the jurisdiction of the National museums of Kenya.

Mr. Ngatia further submitted that the applicant's remedy if it was aggrieved by the Minister's decision was in lodging an appeal against the decision of the Minister under section 93(2) of the Mining Act and

not by applying for judicial review which cannot lie against the decision of the Minister since there is an express provision for Appeal.

Mr. Bitta Principal state counsel highlighted the 2nd Respondent's filed submission. The 2nd Respondent submitted that he furnished the 1st Respondent with his advice vide the letter dated 5th August 2013 where he stated that the 1st Respondent was entitled to revoke a prospecting right or exclusive prospecting license where the holder fails or provides unsatisfactory response to a notice to show cause issued by the commissioner for breach of the terms and conditions governing a prospective right or exclusive prospecting licence. The 2nd Respondent further advised the 1st Respondent that he could revoke any licence where the license-

(a) Was obtained by fraud

(b) Was obtained by concealment of material facts

(c) Was obtained corruptly or through undue influence

(d) Was obtained in violation of the Constitution, the law or any regulations in force at the time,

(e) Is in breach of public policy.

The 2nd Respondent submits his advise to the 1st Respondent was sound in law and maintains the 1st Respondent was justified to revoke the Applicants license and there is no basis for issuance of any of the orders sought against the 2nd Respondent. The 2nd Respondent states that the Applicant's case is premised on alleged procedural impropriety on the part of the respondents yet the Applicant has not demonstrated by way of any evidence any such impropriety on the part of the 2nd Respondent. The 2nd Respondent further submits that there are indeed several exceptions permissible in law to procedural fairness such as in the case express statutory exclusion, or where legislation expressly requires fairness in some situations, but is silent about others, or fairness in form of disclosure would be prejudicial to public interest, or where prompt action is needed, and, or it is impractical to comply with fairness requirements.

The 2nd Respondent further submits that in instances where public interest is involved modification of the requirements of procedural fairness may be deemed as acceptable for the protection of the public good. The 2nd Respondent states that the substance of the present action is the issuance of extractive mining licences which no doubt will have attendant direct consequences on the environment and avers that having regard to the factual matters and evidence adduced by the parties the 1st Respondent's actions were permissible both under the constitution, the doctrine of public trust and precautionary principle under environmental law.

The 2nd Respondent refers the court to an article by **Prof. Kameri Mbote** titled **"The use of Public Trust Doctrine in Environmental Law".** Published in 3/2 Law, Environment and Development Journal (2007, at page 195 also available at http://www.lead-journal. org/content/07195 pdf where she states:-

> **"relates to the ownership, protection and the use of essential natural and cultural resources. It holds that certain natural resources are held by the sovereign in trust and on behalf of all the citizens because of their unique characteristics and central importance. This follows the realization that certain assets are inherently public and not subject to ownership by either the state or private actors. It relates to the ownership, protection and use of essential and natural and cultural resources, serving as a check against allocation with regard to public natural resources. <u>It has been used to guarantee access to bodies of water, protect recreational lakes and beaches, wildlife reserves and even the air. A well structured and implementation framework for the public trust doctrine ensures that governmental action can be checked to ensure it benefits the citizenry with regard to key environmental resources".</u> (emphasis mine).**

The 2nd Respondent further submits that the constitution embodies the doctrine of public trust under article 61 and 62 while under articles 42, 69 and 71 it incorporates the precautionary principle and the

principle of public participation in regard to all matters that affect the public. The Commissioner of Mines in issuing the Special Mining Licence to the applicant did not act responsibily, was ultra vires the provisions of the law and the constitution and the Minister as the custodian of the public trust was justified to intervene by revoking the said licence.

The 2nd Respondent further submitted that in the case of **Peter Waweru –vs- Republic (2006) IKLR 677** the court recognised the application of public trust doctrine in Kenya when it held that in the case of land resources, forests, waterways and wetlands the government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment.

In the instant case the 2nd Respondent points to the averments by the relevant state statutory organs with varying mandates aimed at protecting the environment, forests and national heritage and managing the property in trust and notes that they all challenge the issuance of the licence to the Applicant and submit that the 1st Respondent's actions would be justifiable under the precautionary principle. The mining activities without doubt would have direct implications to the natural environment and the local residents and these are issues of public interest which cannot be ignored.

In the case of Republic –vs- Kenya National commission on Human Rights Exparte **Uhuru Kenyatta HC Misc. App. NO. 86 of 2009** the court considered the treatment of public interest vis-avis individual interests when it held thus:-

> **"-----the court had an onerous responsibility of maintaining the delicate balance between an individual right and those of the public and that sometimes private rights have to bow to public interest. Putting all facts together, this court is of the view that in the circumstances of the case, public interest far outweighs the rights of the exparte applicant and in considering the above, balancing and putting all matters to scale this court in exercising its judicial discretion declines to give an order for certiorari and the application therefore fails".**

The case provides a rational basis while evaluating the competing interests between the public and private individuals.

The submissions by the interested parties basically reiterated the facts as set out in their respective affidavits. Except for the 4th and 8th interested parties whose submissions touch on the proprietorship and/or ownership of the land within which the licence issued to the applicant was to be operative the other interested parties submissions are pivoted on the lack of statutory approvals/ consents to the issuance of the license to the Applicant. The interested parties contend that the licence issued to the Applicant was consequently a nullity and an order of certiorari would in the circumstances not be available to the Applicant. For the court to grant an order of certiorari in favour of the Applicant would in effect be to gift an illegality and in the premises the court ought to decline to grant such an order.

The 8th interested party submits that as **Kwale County** is a devolved Unit of Government and thus under Article 6, 10, 62, 63, 69 and 71 of the Constitution the County Government ought to have been involved before the licence was granted to the Applicant as the same related to the disposal of natural resources that were within the County. There was simply no public participation of the residents of **Kwale County** and this vitiated any license issued to the Applicant. The 4th interested party, **Basu Mining Limited** claim of ownership of the land in respect of which the Applicant was issued with the licence is the subject of a separate suit and the ownership of the land and/or validity of the lease relied upon by **Basu Mining Limited** will be determined in that suit namely **HC ELC NO. 359 of 2014** and will not be subject for determination in these proceedings.

Analysis, issues and determinations

Scope of Judicial Review

The Applicant correctly submits that judicial review is concerned with the decision making process and

not the merits of the decision. The Applicant refers the court to various decisions by the courts to support this position and notably the court of Appeal decisions in the cases of the **Commissioner of Lands –vs- Kunste Hotel Ltd (1997) eKLR and Shaban Mohammed Hassan & 703 others –vs- Attorney General (2013) eKL.**

In the **Commissioner of Lands –vs- Kunste Hotel Limited** case (**supra**) the appellate Judges expressed themselves as follows in regard to the scope of Judicial review:-

> **"But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected (see Republic –vs- Secretary of State for education and science exparte Aron County Council (1991) ALLER 282 at P. 285). The point was more succinctly made in the English case of Chief Constable Evans (1982) IWLR 1155, by Lord Hailsham of St. Marylebone, thus:**
>
> **"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court".**

In the case of **Shaban Mohammed Hassan & 703 others –vs- Attorney** General (**Supra)** the court of appeal reiterated the position that the procedure of judicial review only applies to the decision making process and not the merit of the decision. The judges in the case referred to the case of **Republic –vs- Vice Chancellor, JKUAT, Exparte Cecilia Mwathi & Another (HC Misc. Application NO. 30 of 2007)** where the scope of Judicial review was considered and in which the following excert from the Supreme Court practice 1997 Vol. 53/1-14/6 was quoted:-

> **"The remedy of Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the Judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question".**

Having regard to the referred to judicial pronouncements there is no doubt as to the scope of judicial review proceedings and what they entail. The issue for determination in these proceedings is whether the 1st Respondent's decision revoking the Applicant's special mining license was in the circumstances of this case amenable to judicial review and if so whether an order of certiorari could issue.

The 1st Respondent in his submissions dated 24th September 2013 identified the issues arising out of the pleadings filed by the parties and listed the same as follows:-

(i) Whether judicial review proceedings are permissible in the circumstances of this case.

(ii) Whether Commissioner of Mines could issue a mining license before the Applicant had obtained a NEMA Licence.

(iii) Whether the Commissioner of Mines could issue a Mining License before the Applicant had obtained authorization from Kenya Forest Services and National Museums of Kenya.

(iv) Whether a Mining Licence issued before issuance of a NEMA Licence and consents and/or authorizations from Kenya Forest Services and the National Museums of Kenya is valid in law.

(v) Whether in the circumstances of this case, the 1st Respondent was entitled to revoke the Mining Licence allegedly issued to the Applicant on 7th March 2013.

The Applicant responded to the above issues and the issues arising from the other parties submissions in its supplementary submissions dated 6th November 2013 and filed in court on 7th November 2013. The issues set out above in my opinion represent broadly the issues that arise in these proceedings. I would however add the following two issues to the list:-

(a) Whether the Commissioner of Mines in issuing the special Mining Licence to the Applicant acted in breach of the Mining Act and/or the Constitution.

(b) Whether the doctrine of public trust and public interest as pleaded by the Respondents are applicable in this case.

I will now turn to consider the issues as identified.

(i) **Whether Judicial review proceedings are available to the Applicant.**

The Respondents have submitted that the Applicant has no recourse to Judicial review proceedings by virtue of section 93(2) of the Mining Act which requires any aggrieved party by any decision of the Minister to appeal to the High Court against such decision or determination. Section 93 provides a two tier system of appeal, from the Commissioners decision appeals lie to the Minister and from the Minister's decision appeals lie to the High Court.

Section 93 of the Mining Act provides as follows:-

> **93.(1) Any person aggrieved by any decision or determination of the Commissioner**
>
> **(a) refusing to grant a special licence under section 17, or as to the terms and conditions upon or subject to which the Commissioner is prepared to grant any such licence;**
>
> **(b)----------**
>
> **(c) ---------- etc, etc.**
>
> **May appeal against such decision or determination to the Minister whose decision shall be final and shall not be subject to appeal or review by any court.**
>
> **(2) any person aggrieved by any decision or determination of the Minister-**
>
> **(a) revoking a prospecting right or exclusive prospecting licence under section 27, or**
>
> **(b) declaring a lease to be forfeited under section 56, may appeal against such decision or determination to the High court.**
>
> **(3) Any person aggrieved by a decision or determination of the commissioner-**
>
> **(a) refusing to renew a lease under section 46, or**
>
> **(b) refusing to renew a special lease under section 55, may appeal against such decision or determination to the Minister, and if he is aggrieved by the decision or determination of the Minister he may appeal against the same to the High Court.**

The 1st Respondent in this matter exercised his powers under section 27 of the Mining Act to revoke the Applicant's licence and the 1st Respondent submits that the option open to the Applicant under section 93 (2) if he was aggrieved with the decision of the 1st Respondent was to appeal against the decision in the

High Court and not to bring an application by way of Judicial review. The provision is express and clear that it is an appeal that lies from the decision of the Minister under section 93(2) (a) of the Mining Act if a party is aggrieved by the Minister's decision and not a judicial review. The courts have held that judicial review is different from an appeal and that is not difficult to understand because judicial review as stated elsewhere in this judgment is always concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but ensuring that the decision making process itself was fair and lawful. To the contrary an appeal would entail an inquiry being made as to the merits of the decision to determine whether to uphold the decision or set it aside. Thus different considerations come into play in determining a judicial review application and an appeal.

The courts have therefore held that where an alternative remedy exists, the applicant seeking leave of the court to commence judicial proceedings must disclose the existence of an alternative remedy and should demonstrate the exceptional circumstances if any, under which judicial review is sought instead of the remedy provided by statute (see **Republic –vs- National Environment Management Authority Exparte Sound Equipment Ltd, Misc Civil Application NO. 7 of 2009**). The Respondents have submitted that the Applicant in its pleadings did not disclose that there is an alternative remedy provided under section 93(2) of the Act of an appeal and further did not demonstrate any exceptional circumstances to justify proceeding by way of Judicial review rather than by way of Appeal as provided under the Act.

In the case of **Republic –vs- Secretary** of **State for Home Department, Exparte Swati (1986) I ALLER 717, Sir John Donaldson MR**, held as follows:-

> **"However the matter does not stop there because it is well established that in giving or refusing leave to apply for judicial review, account must be taken of alternative remedies available to the applicant. This aspect was considered by this court very recently in Republic –vs- Chief Constable of the Merseyside police exp Calveley (1986) IALL ER 257 and it was held that jurisdiction would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition but, where parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the procedure was provided".**

In **Republic -vs- Birmingham City Council exparte Ferrero Ltd (1993) I ALL ER 530** the Court of Appeal Civil Division held as follows:-

> **"Where an alternative remedy and especially where parliament had provided a statutory appeal procedure it was only exceptionally that judicial review would be granted. It is therefore necessary where the exception is invoked to look carefully at the suitability of the statutory of appeal in the context of the particular case".**

In the case of **Republic –vs- National Environment Management Authority exparte Sound Equipment Ltd (supra**) **Lady Justice Roselyn Wendoh** while considering a judicial review application where an alternative remedy had been provided stated as follows:-

> **"The Applicant never made any effort to demonstrate that judicial review was better a mode of redress than an appeal to the Tribunal-----**
>
> **------Failure by the Applicant to disclose the existence of an alternative remedy and failure to demonstrate at permission stage, why judicial review was more convenient or effective disentitles the Applicant to the exercise of this court's discretion to grant the orders sought herein".**

Lady justice Roselyn Wendoh was upheld on appeal in **Republic -vs- National Environmental Management Authority, Civil Appeal NO.84 of 2010** where the Judges held that in determining whether an exception should be made and judicial review granted where there is an alternative remedy provided, it was necessary for the court to carefully look at the suitability of the statutory appeal

procedure in the context of the particular case and determine the issue to be determined and whether the statutory appeal procedure was suitable to determine the issue. Incase the appeal procedure would be suitable to determine the matter in contention then judicial review will not be granted.

In the case of **Republic–vs- Minister Office of President Provincial Administration & Internal Security & 2 others exparte Francis Mbuthia Kamau (2013) eKL Ngaah Jairus, J** had occasion to consider a judicial review application where there was an alternative remedy available and he dismissed the application for judicial review holding thus:-

> **"in view of the foregoing decisions and pronouncements, it can be safely concluded that where a statute restricts an Applicant, as it does in this particular case in challenging a decision it is incumbent upon the Applicant to take that stipulated course, his options are limited and in this case the only avenue open to the Applicant was lodging an appeal which to my mind is the only statutory remedy available against the second Respondent's decision".**

The Applicant in its filed supplementary submissions responded to the Respondent's submissions founded on section 93(2) of the Mining Act, and its response was that there was no compliance with section 27 of the Mining Act by the 1st Respondent and as such there was no decision made under section 27 of the Act against which an appeal would lie to the High Court. I find this submission by the Applicant rather curious when the Applicant states no decision was made under section 27 of the Act when the Applicant at the same time seeks to have the decision made by the 1st Respondent on 5th August 2013 revoking its licence quashed. The 1st Respondent has stated he was acting pursuant to powers donated to him under the provisions of section 27 in cancelling or revoking the Applicant's special licence. It is only under section 27 of the Act that the Minister has power to revoke a license in the hands of a holder. No doubt the Applicant appreciating the handicap that would confront it if it accepts the decision was made pursuant to the provisions of section 27 of the Act, takes the easier option of submitting no decision was made pursuant to section 27 of the Act and therefore no alternative remedy was available to it apart from judicial review.

If the 1st Respondent did not make a decision under section 27 of the Act as the Applicant alleges then which decision is the Applicant challenging in the present judicial review? My own view is that the Minister acted under the provisions of section 27 of the Act and in the premises the available remedy to the Applicant if it was aggrieved is as statutorily provided thereunder. The Applicant ought to have lodged an appeal against the decision of the 1st Respondent. The Applicant has contended that the 1st Respondent did not raise the issue of alternative remedy in his pleadings vide the replying affidavit but the issue being indeed one of law which goes to question the court's jurisdiction to grant orders of judicial review in these proceedings my view is the issue could be properly raised at any stage in the proceedings and that the Respondents were in order to raise it.

In the premises it is my holding and finding that the Applicant chose the wrong forum to ventilate its grievance. The orders for judicial review sought cannot therefore issue in these proceedings. Although determination of this single issue would have been sufficient to dispose of this application I will in case I am wrong in the determination of the issue deal with the other issues for completeness of my determination on all the issues.

(ii) Whether the Commissioner of Mines could issue a Mining Licence before the Applicant had obtained a NEMA Licence

The Applicant submits that obtaining of a **NEMA** Licence was not a condition precedent before it could be issued with a Mining Licence and argues that the **NEMA** Licence was one of the conditions that the Mining Licence issued to it required to be fulfilled before the Applicant could commence mining activities. The 1st interested party **NEMA**, disagrees and states that a **NEMA** licence required to be obtained before the Applicant could be issued with a mining licence. The affidavit of **Prof. Geoffrey Wahungu**, **Director General NEMA** sworn on 17th October 2013 was categorical that the special Mining License was illegally issued to the Applicant as the same was issued to the applicant before an Environmental Impact Assessment (EIA) licence was issued to the Applicant by **NEMA.**

The Environmental (Impact Assessment and Audit) Regulations 2003 are explicit in regard to the obtaining of NEMA Licences for projects that are likely to have any Environmental Impact. Regulations (3) and (4) provide thus:-

> **3. These Regulations shall apply to all policies, plans, programmes, projects and activities specified in part IV, part V and the second schedule of the Act.**
>
> **4. (1) No proponent shall implement a project-**
>
> **(a) Likely to have a negative environmental impact, or**
>
> **(b) For which an environmental impact assessment is required under the Act or these Regulations,**
>
> **Unless an environmental impact assessment has been concluded and approved in accordance with these Regulations.**
>
> **(2) No licensing authority under any law in force in Kenya shall issue a licence for any project for which an environmental impact assessment is required under the Act unless the Applicant produces to the licensing authority a licence of environmental impact assessment issued by the Authority under these Regulations.**

Under the second schedule of the Environmental Management and Co-ordination Act (EMCA) NO. 8 of 1999 item 6 '**Mining**' is one of those projects that require to undergo and EIA before implementation and by their own admission the Applicant did not submit a NEMA licence as required under the Environmental (Impact Assessment and Audit) Regulations, 2003 to the Commissioner of Mines before being issued with the special Mining Licence.

> **Section 58 of EMCA provides the procedure for applying for an Environmental Impact Assessment Licence.**
>
> **Section 58 (7) of the Act provides:-**
>
> **Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under the Act.**

The Applicant in responding to the issue respecting the **NEMA** Licence states that they had obtained a letter of approval of conditions from **NEMA** and were in the process of fulfilling the conditions in order to obtain the **NEMA** Licence. However that does not explain how the Commissioner of Mines got to issue the Mining Licence when under the **NEMA** Impact Assessment Regulations the Applicant was supposed to produce the **NEMA** Licence in support of the Application to be issued with the Mining licence.

NEMA has a mandate both under the EMCA Act and the constitution to protect and safeguard the environment for the benefit of all Kenyans. Its obligations pursuant to that mandate resonates with the provisions of articles 3, 10, 42, 69, 70 and 71 of the Constitution in so far as they touch and relate to the conservation of the environment and utilization of the natural resources. It would be abdication of duty if **NEMA** were to fail to fulfil the mandate in regard to which they were established. To the extent that the Commissioner for mines was not furnished with a **NEMA** Licence as required under the EMCA Act and the Regulations made thereunder my view is he could not issue a valid Mining Licence and the Licence he issued to the Applicant on 7th March 2013 was null and void and of no legal effect.

(iii) Whether the Commissioner of Mines could issue a Mining Licence before the Applicant had obtained authorization from Kenya Forest Services and National Museums of Kenya.

Section 5 of the Mining Act bars prospecting in closed districts and provides thus:-

5. Nothing in this Act shall be deemed to authorize any person toenter any district or area to which entrance by him may be forbidden by any written law for the time being in force.

Section 7 of the Mining Act makes provisions for Lands excluded from prospecting and mining.

7.(1) The following Classes of land are (save where otherwise in this Act provided) excluded from prospecting and Mining-

(a) Land dedicated or set apart as a place of burial or for any public purpose other than mining, except with the consent of the Minister in the case of other Land, the person or authority in whom the land is vested,

…….....

……...

i. **Trust land, except with the consent in writing of the County Council within whose area of Jurisdiction the land is situated**

…….....

…….....

(KK) Any land in or within one hundred metres of any monument or protected area declared or deemed to have been declared as such by the Minister under the National Museums and Heritage Act,

The Applicant did not obtain the consent of the Kenya Forest Services as provided under section 42 of the Forest Act, Cap 385 Laws of Kenya. The Affifavit sworn by **David K. Mbugua**, on 19th August 2013 affirms that no approval for mining was granted to the Applicant and that the letters given to the applicant were Limited to granting access to the Applicant for prospecting subject to conditions. At any rate under the EMCA Act and the Regulations there under a **NEMA** Licence would have been required in order for Kenya Forest Service Board to give consent/approval for mining within the forest Area.

The Applicant likewise would under the National Museums and Heritage Act require to obtain consent from the National Museums of Kenya to undertake any prospecting or mining activities in areas falling under them as per section 7 (1) (KK) of the Mining Act.

Section 27 of the National Museums and Heritage Act provides:-

27. unless authorised by an exploration licence issued by the Minister after consultation with the Board, no person shall by means of excavation or surface operations search for a buried monument or buried part of a monument, or for a buried antiquity, whether or not in a protected area.

Idle Omar Farah, Director General of the National Museums of Kenya through his sworn affidavit of 30th August 2013 states that they have not issued any consent to the Applicant to carry on any prospecting or mining activities in the **Mrima Hills** which is a protected area and thus any licence it may have been issued with for mining in the area would be ineffectual for want of consent on the part of the National Museums of Kenya. The Applicant has not demonstrated he obtained any suit consent and consequently the licence for mining would be invalid.

The Commissioner of Mines in my view could not properly issue a valid mining licence which would entail carrying out mining activities in areas which were otherwise protected by reason of being Gazetted Forest and/or falling under the jurisdiction of the National Museums of Kenya under the provisions of the National Museums and Heritage Act, Cap 385 Laws of Kenya when no consent was given by the

National Museums of Kenya.

(v) Whether a Mining Licence issued before the issuance of consents by Kenya Forest Service and the National Museums of Kenya would be valid.

From what I have held in regard to (ii) and (iii) above it follows that such a licence would be in valid. The holder of the licence would not have complied with the law relating to the requirement of obtaining consent or approval from the state agencies or organs mandated to give such approval for carrying out prospecting or mining activities in areas falling within their jurisdiction. The Commissioner of Mines at any rate would be acting in breach of the law that mandates him to issue such licences subject to the specific conditions being fulfilled. The requirement of a **NEMA** Environmental Impact Assessment Licence is a pre requisite to the issuance of a mining licence and in the case where the Mining is to take place within a protected area such as a Gazetted Forest or National Museum or Monument area respective consent/approvals by the authorities from those agencies have to be furnished before the licence can be issued.

(iv) Whether in the circumstances of this case the 1st Respondent was entitled to revoke the special mining licence issued to the Applicant on 7th March 2013.

The 1st Respondent under section 27 of the Mining Act is empowered to revoke a holder's licence where there is breach of the conditions of the licence. Section 27 presumes the licence in the hands of the holder would have been validly issued by the Commissioner of Mines whereupon such holder of a licence would be called upon to show cause why the licence should not to be revoked. The Minister in my view is the custodian of public trust and interest such that where the Commissioner of Mines is shown to have acted contrary to the law in the issuance of any licence the Minister would be entitled to revoke such a licence to enable an inquiry to be made respecting the circumstances under which the licence was issued. The Minister under section 27 of the Mining Act is mandated to exercise the final authority whether or not to revoke a licence issued by the Commissioner of Mines. In my view the Minister ought not to be beholden to the strictures of the process of Notice to show cause conducted by the Commissioner of Mines if it appears to the Minister that the Licence was not lawfully issued in the first place. In case the Commissioner of Mines, the issurer of the Licence had failed to act lawfully it would be fool hardy to require the same Commissioner to conduct the notice to show cause. The Minister has a duty to preserve and act in public interested and in the circumstances of this case the Minister was entitled to act in the manner that he did to revoke the Mining Licence issued to the Applicant.

The Respondent in support of his submission that he acted in public interest and that he could not be prevented and/or stopped from carrying out his duty referred the court to the case of Maritime Electric **Co. Ltd –vs- General Dairies (1937) AC** where the court stated:-

> **"The underlying principle is that the crown cannot be stopped from exercising its powers whether given in a statute or common law when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to the private individual…"**

The Applicant in challenging the 1st Respondent's decision maintains he was not given a hearing before the decision of revoking the licence was taken and in consequence that was not fair and was against the rules of natural justice. The 1st Respondent counters that, it is not in every instance that a right exists to be heard before a decision is taken. In the case of **Llyod –vs- Macmahon (1987) AC 625 at page 702H Lord Bridge** stated as follows:-

> **"My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody domestic, administrative or judicial, has to make a decision which will affect the rights of individual depends on the character of the decision making body, the kind of decision it has to make or the statutory or other framework in which it operates".**

The 1st Respondent in the present matter had before taking the decision to revoke the Applicant's mining licence considered the circumstances leading to its issue and had even taken the step to obtain appropriate advice from the Attorney General. From the information gathered the 1st Respondent was satisfied the issuance of the Mining Licence to the Applicant was not in compliance with the law and in consequence the action was not malicious, capricious and/or unreasonable. The circumstances under which the revocation of the licence took place did not in my view require the Applicant to be heard. The 1st Respondent in addition to the revocation of the Applicants licence revoked another 42 licences which were issued in similar circumstances and thus it is not like the Applicant was targeted and singled out by the 1st Respondent in the decision he took.

(vi) Whether the Commissioner of Mines in issuing the Special Mining Licence to the Applicant acted in breach of the Mining Act and/or the Constitution.

Having held and come to the conclusion that a **NEMA** Licence is a pre requisite for issuing a mining licence and equally that the consent of the Kenya Forest Service and the National Museum of Kenya were a requirement before a Mining Licence can be issued in respect of areas falling within their mandate it follows that the Commissioner of Mines in issuing the Mining licence to the Applicant acted in non compliance of the law as the Applicant at the time it was issued with the licence had not complied with any of the foregoing requirements. Having regard to section 5 of the Mining Act the Commissioner of Mines was obligated to satisfy himself the Applicant had fulfilled all the pre conditions that it was required to fulfil particularly because the mining was to take place within a protected area.

Under section 4 of the Mining Act minerals are vested in the Government and as such should be dealt with as a national resource for the benefit of all.

Section 4 of the Act provides:-

> **All unextracted minerals (other than common minerals) under or upon any land are vested in the Government, subject to any rights in respect thereof which, by or under this Act or any other written law, have been or are granted, or recognized as being vested, in any other person**.

Article 62(1) (f) of the Constitution "**all minerals and mineral oils as defined by law**" are classified as public land and by article 62(3) of the Constitution minerals are vested in and are held by the national government in trust for the people of Kenya and thus the Commissioner of Mines is placed in a position of trust to execute the functions and exercise powers as a trustee for the people of Kenya. In the present matter by failing to ensure the law was complied with he acted in abuse of his office and the 1st Respondent as his supervisor was entitled to review and audit his work and take such action as was necessary. The National values and principles of governance under article 10(1) of the Constitution apply to and bind all state organs, state officers, public officers and all persons whenever any of them-

a. **Applies or interpretes the constitution**

b. Enacts, applies or interprets any law, or

c. Makes or implements public policy decisions.

The Commissioner of Mines as such a public officer charged with making or implementing public policy decisions and in issuing the Mining Licence to the Applicant without ensuring the law was complied with he was abdicating his duty and obligations entrusted on him to carry out on behalf of the public. In my view the Commissioner of Mines acted in breach of the Mining Act and the Constitution and breach of the trust bestowed upon him.

(vii) Whether the doctrine of public trust and public interest is applicable in the instant suit.

Having regard to section 4 of the Mining Act, Article 10(1) of the Constitution that enjoins state officers and public officers to embrace National Values and principles of Governance in the execution of their duties and article 62 of the Constitution where minerals are classified as public land and therefore a national resource vested in the national government in trust for the people of Kenya my view is that the doctrine of public trust and public interest cannot be expunged from these proceedings. The Minister as earlier observed is the ultimate custodian of the public trust and interest in the various matters that fall under his docket and it matters not that there are others officers charged to do various tasks. It is him as Minister who takes responsibility and the buck rests at his desk. Under the Mining Act this hierarchy of responsibility is well recognised and articulated and that explains why under section 27 of the Mining Act the Minister has the final word on the revocation of licences. The Minister's decision once exercised under section 27 can only be challenged by way of an appeal and not by way of Judicial review. In the circumstances of this case the Minister was right and was entitled to act in the manner he did in public interest once he was satisfied the Commissioner of Mines had in issuing the licence to the Applicant acted in violation of the law.

Conclusion and decision

A party who flouts the law to gain an advantage cannot expect that the court will aid him to sustain the advantageous position that he acquired through the violation of the law. The acquisition by the Applicant of the Mining Licence was not in compliance with the law and the licence was void abinitio and liable to be revoked. The 1st Respondent had a duty and obligation in the interest of the public to have the licence revoked.

In the result it is my determination and I hold that the Applicant's Notice of Motion dated 9th September 2013 is devoid of merit and the same fails and is ordered dismissed.

Considering that it is the office of the 1st Respondent through the office of the Commissioner of Mines who neglected to perform their duties and obligations as expected of them in the processing of the application for the Mining Licence resulting in the issuance of what turned out to be an invalid licence to the Applicant, I think it would be harsh to condemn the Applicant to meet the costs of the application. I make an order for all the parties to meet their own respective costs for the application.

Judgment dated, signed and delivered this…**20th**…….day of…**March**……..2015.

J. M. MUTUNGI

JUDGE

In the presence of:

MS Ng'ania..……. For the Applicant

MR. Bitta for Ngatia..…….. For the 1st Respondent

Mr. Bitta……...For the 2nd Respondent

N/A……...for the 1st Interested Party

N/A..……..for the 2nd Interested party

N/A……..for the 3rd interested party

N/A……..for the 4th interested party

N/A……..for the 5th interested party

N/A……...for the 6th interested party

N/A……for the 7th interested party

N/A…….for the 8th interested party