



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LANDS DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 359 OF 2014 (FORMERLY MICS. CIVIL APPLICATION NO. 331 OF 2013 J/R)**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF: AN APPLICATION BY BASU MINING LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE ILLEGAL & UNLAWFUL AND MALICIOUS ISSUANCE OF A SPECIAL MINING LICENCE BY THE COMMISSIONER OF LANDS**

**AND**

**IN THE MATTER OF: THE MINING ACT, CAP 360 LAWS OF KENYA, THE TRUST LAND ACT, CAP 288 LAWS OF KENYA & ARTICLES 19, 20, 21, 22, 23, 40, 47, 60 62, 64, 71, 227, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**THE REPUBLIC .....APPLICANT**

**VERSUS**

**THE COMMISSIONER OF MINES .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**BASU MINING LIMITED.....EX-PARTE APPLICANTS**

**AND**

<b>CORTEC MINING KENYA LIMITED.....</b>	<b>1<sup>ST</sup> INTERESTED PARTY</b>
<b>THE CABINET SECRETARY.....</b>	<b>2<sup>ND</sup> INTERESTED PARTY</b>
<b>MINISTRY OF MINING.....</b>	<b>3<sup>RD</sup> INTERESTED PARTY</b>
<b>NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....</b>	<b>4<sup>TH</sup> INTERESTED PARTY</b>
<b>KENYA FOREST SERVICE NATIONAL MUSEUMS OF KENYA.....</b>	<b>5<sup>TH</sup> INTERESTED PARTY</b>
<b>COUNTY GOVERNMENT OF KWALE.....</b>	<b>6<sup>TH</sup> INTERESTED PARTY</b>

### **JUDGMENT**

The Exparte Applicant **Basu Mining Limited** pursuant to leave granted on 19<sup>th</sup> September 2013 filed the substantive Judicial review application by way of Notice of Motion under the provisions of Section 8 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 Rule 3 of the Civil Procedure Rules. By the application the Exparte Applicant sought the following orders:-

- a. An order of certiorari to issue to remove and to bring before this Honorable court for purposes of quashing any proceedings, authority, decision and or order of the 1<sup>st</sup> Respondent and or their officers, servants, agents, subordinates and or employees granting and or issuing the Special Mining Licence NO. 351 issued to **CORTEC MINING KENYA LIMITED**.
- b. An Order of Certiorari to issue to remove and to bring before this Honorable Court for purposes of quashing any proceedings, authority, decision and or order of the 1<sup>st</sup> Respondent and or their officers, servants, agents, subordinates and or employees directing and requiring the issuance and or publication of any notice NO. 3899 published in the special issue of the Kenya Gazette Vol. CXV-NO. 52 dated 22<sup>nd</sup> March 2013.
- c. An Order of Prohibition do issue prohibiting the 1<sup>st</sup> Respondent and or their officers, servants, agents subordinates and or employees from taking any further steps or action in furtherance of the purported grant of a special Mining Licence to **COTEK MINING KENYA LIMITED**.
- d. An Order of Mandamus do issue directing the 1<sup>st</sup> Respondent and or their officers, servants, agents, subordinates and or employees to cancel, delete and or remove any and all entries that may have been entered in their records which in any way adversely affects or prejudices the rights and interests of the Applicant and especially their rights on or over the parcels of land more particularly described in and subject to the Lease Agreement dated 28<sup>th</sup> September 2008.
- e. A declaration that the 1<sup>st</sup> Respondent's actions in issuing the special (Mining) Licence to the 1<sup>st</sup> Interested party and any alleged powers to this end that he purports to exercise under the Mining Act, Cap. 306 of the Laws of Kenya, which have resulted in or may result in the Ex-parte Applicant's interests and rights in relation to the land the subject matter of such actions are in contravention of the Applicant's guaranteed rights under Article 40 as read with Articles 258, 259 and 260 of the Constitution.
- f. A declaration that the 1<sup>st</sup> Respondent's actions in issuing the special (Mining) Licence to the 1<sup>st</sup> Interested Party and any alleged powers to this end that he purports to exercise under the Mining Act, Cap. 306 of the Laws of Kenya, which have resulted in or may result in the Ex-parte

Applicant's interests and rights in relation to the land the subject matter of such actions are in contravention of the Applicant's guaranteed rights under ARTICLES 19, 20, 21, 22, 23, 40, 47, 60, 62, 64, 71, 227, 258, 259 and 260 of the Constitution.

- g. A declaration that the provisions of the Mining Act, Cap. 306 in as far as they tend to or derogate in any manner whatsoever from the full rights of the Ex-parte Applicant over their land, and Section 4 thereof in particular are inconsistent with and are as such in contravention of the Constitution and are therefore null and void to the extent of such inconsistency.
- h. The costs of this Application be provided for.

The Judicial review application is based on the statutory declaration dated 14<sup>th</sup> September 2013 and the verifying affidavit sworn by **IQbal Bayusuf** on 17<sup>th</sup> September 2013.

The Exparte Applicant herein was enjoined as the 2<sup>nd</sup> Interested party in **ELC NO. 195 of 2014** (formerly Misc. Application NO. 298 of 2013(JR) where the 1<sup>st</sup> named interested party herein **M/S Cortec Mining Kenya Limited** is the Applicant. In both suits the principal issue concerns the special (Mining) Licence issued to **Cortec Mining Kenya Ltd**. In the latter suit **M/S Cortec Mining Kenya Limited** seeks the quashing of the Cabinet Minister's decision to revoke its special (Mining) Licence issued on 7<sup>th</sup> March 2013 while in the instant suit **Basu Mining Limited** seeks an order to quash the decision pursuant to which the Special (Mining) Licence NO. 351 was issued to Cortec Mining Kenya Limited on the basis that **Basu Mining Limited** is the holder of a lease over the subject land over which **Cortec Mining Kenya Limited** was issued with the Licence and on further grounds that the Special (Mining) Licence to **Cortec** was not legally and lawfully issued.

Owing to the two matters having more or less similar issues and facts the parties on 27<sup>th</sup> May 2004 though not agreeing to have the two matters formally consolidated, agreed to have the two matters heard at the same time owing to the similarity of the issues under contention. The court issued directions in that regard and directed the filing of submissions.

When this matter came up for highlighting of the submissions by the parties on 2<sup>nd</sup> December 2014 **Mr. Taib Advocate** who was appearing for the Exparte Applicant **Basu Mining Limited** with **Mr. Ochieng Advocate** informed the court that the Exparte Applicant had reached a consent with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> interested party for the grant of prayers (a) (b)(c) and (d) of the Judicial review application. It was not apparent what prompted this eventuality but it is imaginable that it is because all the parties had exhaustively canvassed the judicial review aspects of the matter during the hearing of the application by **Cortec Mining Kenya Ltd** in **ELC 195 of 2014** which was heard first and at any rate the court was going to make a determination of those issues in the judgment in that suit. **Mr. Havi Advocate** for the 1<sup>st</sup> interested party objected to the consent in the manner proposed by the consenting parties but the point is that the Exparte - Applicant and the other consenting parties did not address the court on the judicial review issues. The court in the premises treats the prayers sought in the Notice of Motion under prayers (a) (b) (c) and (d) as having been abandoned by the applicant and will make no determinations in regard to those particular issues and prayers.

Hence in this application what remains to be considered and determined is whether there was any breach and/or violation of any constitutional rights and whether any declarations sought by the Exparte Applicant can be granted.

The Exparte Applicant's case is that it holds a lease in regard to the area the Commissioner of Mines purported to grant a Mining Licence to Cortec Mining Kenya Limited, the 1<sup>st</sup> interested party herein. A copy of Lease Agreement is annexed to the verifying affidavit of **IQbal Bayusuf** and marked "**BML 1**". The lease is stated to be for a term of 33 years presumably from the date of the lease 29<sup>th</sup> September 2008. Clause 7 of the lease provided:-

**“The sublessee shall have full and exclusive rights of occupation to the said premises and liberty and permission to prospect and explore in or in the area now precious minerals and presently defined in the Act in such area of the trust land as defined otherwise known as Dzombo area”.**

The Exparte Applicant states the County Council of Kwale granted it consent to prospect for minerals within the leased premises being **Kiruku, Ndzombo, Nguluku and Mrima Hill** and for that reason avers that the 1<sup>st</sup> interested party could not have been properly issued a mining Licence over an area in respect of which the Exparte Applicant held a leasehold interest without the consent of the Exparte Applicant and the County Council of Kwale. The Exparte Applicant avers that following the promulgation of the Kenya Constitution 2010 power and authority was devolved to the County Governments such that in the case of applying for prospecting rights and/or mining licences the County Government of the area where the prospecting or mining is to take place must be involved and has to give its consent/approval.

The Exparte Applicant contends it is the holder of a lease and that its property rights are protected under article 40 of the Constitution from arbitrary deprivation unless full and prompt compensation is made to it. The Applicant having chosen to abandon the prayers relating to the grant of Judicial review orders (a) to (d) seeks declaratory orders under prayers (e) to (g) which are to the effect that his rights and interest over the land the subject matter in relation to the Mining Licence issued to **Cortec Mining (k) Ltd** have been violated or stand to be violated in case the Mining Licence is not revoked and/or cancelled and/or the 1<sup>st</sup> Respondent Continues to purport to exercise his powers under the Mining Act to deal with the lands the subject matter of the impugned Mining Licence. The Applicant avers that the 1<sup>st</sup> Respondents actions would be a violation of the Applicant’s rights guaranteed under articles 19, 20, 21, 22, 23, 40, 47, 60, 62, 64, 71, 227, 258, 259 and 260 of the Constitution. By this application the exparte applicant is seeking a determination of rights over the land it claims to have a lease over.

The lease instrument on which the Applicant places reliance as bestowing rights of ownership to it is challenged and denied by the 6<sup>th</sup> interested party, the County Government of Kwale who are supposed to have granted the lease to the Applicant. In the submissions before the court **Mr. Maina Njenga Advocate** for County Government of Kwale relied on the replying affidavit sworn by **MM Mwavo**, the County Secretary, Kwale County Government and filed in court on 14<sup>th</sup> April 2014 in **ELC 195 of 2014 (Cortec Mining (K) Ltd –vs- Cabinet Secretary Ministry of Mining & others)** where the Kwale County Government was enjoined as the 8<sup>th</sup> Interested Party and was heard in the application. The Exparte Applicant herein had also been enjoined as the 2<sup>nd</sup> interested party in the case by Cortec Mining (K) Limited. The 6<sup>th</sup> interested party challenged the authenticity of the lease in favour of the Applicant stating that the same had not been executed by the Council and termed the lease as irregular, unlawful and a forgery.

The 6<sup>th</sup> Interested Party submitted that the Applicant’s intention is to validate the lease through these proceedings without a proper inquiry and interrogation of would be witnesses being under taken. The 6<sup>th</sup> interested party contended that tangible evidence was necessary in order to determine the authenticity of the lease and that cannot be done in these proceedings as witnesses need to be presented to give viva voce evidence and to be cross-examined. The 6<sup>th</sup> Interested party states it is the trustee for the Residents of Kwale County and it had a duty and obligation to safe guard the interests of its residents. The subject land is trust land and vests in the County Government to manage on behalf of the Residents.

**Mr. Bitta Advocate** for the Respondents submitted that the pleadings by the Applicant were by way of judicial review and it was his submission on behalf of the Respondents that the declaratory orders sought by the Applicant cannot be granted in the instant judicial review application. The Respondents state that under articles 60,61,62 and 260 of the constitution the National Government is the custodian of all public land which is managed/administered on its behalf by the National Land Commission. Under section 7 of the Mining Act and article 62 of the constitution all unextracted minerals constitute public land in respect of which the National Government is entrusted with the duty and obligation to exploit for the benefit of the people of Kenya.

**Mr. Havi Advocate** for the 1<sup>st</sup> interested party relied on the sworn by Jacob Juma on 13<sup>th</sup> January 2014 and submissions dated 23<sup>rd</sup> May 2014 which made generous references to the submissions made in **HC ELC NO. 195 of 2014** where Cortec Mining (K) Ltd was the Applicant while the Applicant herein was the 2<sup>nd</sup> Interested Party. In regard to the present application by the Applicant herein he submitted that:-

- i. The applicant lacked a locus standi to institute these proceedings as the lease relied upon was non-existent. The lease was not approved by the Kwale County Council and its authenticity and validity is contested.
- (ii) The applicant's prayer's founded on Judicial review are time barred by reason of not having been brought within the limitation period of 6 months from the date of the decision sought to be quashed.
- (iii) That the Applicant's application is incompetent as the orders sought by way of judicial review relating to declarations cannot be granted. Enforcement of breach of rights should be by way petition.

The 2<sup>nd</sup> interested party in his submissions relied on the affidavit sworn in **ELC NO. 195 of 2014** and submits that declaratory orders cannot issue in a Judicial review application and states that the application having been made under the Law Reform Act Section 8 declaratory orders cannot be issued and avers that declaratory orders will only be issued in Civil Proceedings. The 2<sup>nd</sup> interested party further stated that judicial review is only concerned with the propriety and/or fairness of the decision making process and does not delve into the merits and/or demerits of the decision which would be necessary were the court to make declaratory orders. Thus in the 2<sup>nd</sup> interested party's view the court lacks the jurisdiction to make the declaratory orders sought by the Applicant.

The Exparte Applicant in responding to the submissions made by the Respondents and the interested parties in regard to whether or not the court can issue declaratory orders in a judicial review application maintained that this court has the jurisdiction to give declaratory orders and cited articles 22 and 23 of the constitution which provide for access to court by any person to seek enforcement of their fundamental rights under the bill of rights. The Applicant argues that under article 23 of the constitution the court has power to grant declaratory orders and further that under article 22 (3) (b) the formalities relating to proceedings for enforcement of bill of rights need not be technical and the court may entertain proceedings on the basis of informal documentation. Further the Applicant argues that the matter was referred from the Judicial Review Division to the Environment and Land Court since it is the one that has jurisdiction to deal with matters relating to land. The Applicant urged the court to deal with the matter without placing undue regard to procedural technicalities and invited the court to be guided by article 159(2) (d) of the constitution which enjoins the court to administer justice without undue regard to procedural technicalities.

### **Determination of issues**

The Applicant, as indicated earlier in this judgment, at the hearing of this application stated it had entered a consent with the Respondents and the 2<sup>nd</sup> interested party to have orders related to judicial review being prayers (a) (b) (c) and (d) granted as prayed. As the issues relating to judicial review were canvassed in the **Cortec Mining Case (ELC NO.195 of 2014)** where all the parties participated and a determination on the issues is to be made in that case the court rather than record a consent granting the orders of judicial review in this matter will treat the prayers relating to judicial review in this suit as having been abandoned by the applicant with the consent of the Respondents and the 2<sup>nd</sup> interested party. The court takes that position because the judicial review application orders are targeted at quashing decision that granted the Special Mining Licence NO. 351 to **Cortec Mining Kenya Limited** who is opposed to the consent being granted in the terms proposed by the Applicant as it would be prejudicial to its interest. The court therefore makes no determination on the merits and/or demerits of the prayers of judicial review (a)(b) (c) and (d).

### **Whether declarations are available in these proceedings**

The Respondents and the interested parties have submitted that declarations cannot issue in Judicial review matters. Section 8 of the Law Reform Act does specifically set out the orders that the High Court can grant in Judicial review proceedings. Section 8 Law Reform Act, Cap 26 Laws of Kenya provides under subsection 1 and 2 as follows:-

**8.(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of Mandamus, prohibition or certiorari.**

**(2) in any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, (1 and 2, Geo 6, C. 63) of the United Kingdom empowered to make an order of mandamous, prohibition or certiorari, the High Court shall have power to make a like order.**

Under the foregoing provision of the law it is clear that the High Court in determining an application for judicial review has jurisdiction to only grant the orders specified in section 8 of the Law Reform Act. In the case of **Khobesh Agencies Limited & 32 others –vs- Minister of Foreign Affairs and International Relations & 4 others (2013) eKLR** the court had occasion to consider the scope of the court’s jurisdiction in a judicial review application and was emphatic that judicial review is a special jurisdiction given to the court under the provisions of section 8 and 9 of the Law Reform Act and it does not extend to other Civil and Criminal matters. **Odunga, J** in the case stated thus:-

**“31. However, whereas, the court is bound in determining an application for judicial review to ensure that the Constitutional provision are adhered to, this does not entitle the court to change, the nature of the judicial review application into a constitutional petition. To do that would defeat the express provisions of section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya. It must always be remembered that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It is governed by section 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. Any other remedy such as declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before making such a declaration. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Accordingly, it would be improper to turn judicial review proceedings into Civil Proceedings or even a constitutional petition where by virtue of Article 23(3) of the Constitution, the court has jurisdiction to award interalia a declaration of rights, on a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights under Article 24, an order for compensation and an order of judicial review. Under the said Article the operative phrase is “a court may grant appropriate relief, including “ as opposed to section 8 of the law Reform Act which employs the phrase. “The High Court shall not”. I therefore find that it was incorrect for the applicants to equate the court’s judicial review jurisdiction with the court’s jurisdiction under article 23(3) of the Constitution. See Commissioner of Lands –vs- Hotel Kunste Ltd Civil Appeal NO. 234 of 1995 and Sanghani Investment Ltd –vs- Officer in Charge Nairobi Remand and Allocation Prison (2007) IEA 354”.**

I fully agree with **Hon. Justice Odunga’s** exposition of the law on the scope of Judicial review as set out in the above passage in his said judgment. In the case of **Sanghani Investment Ltd-vs- Officers in charge Nairobi Remand and Allocation Prison (2007) IEA 354** referred to by **Odunga J**, the court observed thus:-

**“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination**

**of the case on merits-----“.**

The Exparte Applicant in the present application seeks declaration orders in regard to rights over land in a judicial review application and further seeks a declaration that section 4 of the Mining Act Cap 306 Laws of Kenya is inconsistent with and in contravention of the Constitution and to that extent is null and void. The Applicant would need to present and adduce evidence by way of viva voce evidence to establish his claim over the land that it states it holds a lease over. The lease is contested and disputed by the 6<sup>th</sup> interested party, Kwale County Government which makes it even more critical for viva voce evidence to be adduced to establish the validity or otherwise of the lease. That cannot be done in these judicial review proceedings. Likewise the quest to have section 4 of the Mining Act declared unconstitutional would require to be considered in a petition which permits the court to grant and issue declaratory judgments and/or pronouncements. Under judicial review the court’s jurisdiction is restricted to issue orders of Mandamus, certiorari and prohibition which of necessity are confined to review of decisions whose propriety is in question. As earlier stated judicial review is about reviewing the process through which the decision was made to determine whether the process was indeed fair and not about the merit or the demerits of the decision. Accordingly it is my holding and finding that the applicant’s application for declaratory orders within the present judicial review proceedings is misconceived and incompetent and cannot be granted. I dismiss the Applicant’s prayers for declaratory orders with costs to the Respondents, the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> interested parties.

Orders accordingly.

Judgment dated, signed and delivered this...**20<sup>th</sup>**.....day of...**March**.....2015.

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A ..... for the Applicant

Mr. Bitta..... For the 1<sup>st</sup> Respondent

Mr. Bitta..... for the 2<sup>nd</sup> Respondent

MS. Ngania.....For the 1<sup>st</sup> Interested Party

Mr. Bitta for Ngatia..... For the 2<sup>nd</sup> Interested Party

N/A.....for the 3<sup>rd</sup> Interested Party

N/A.....for the 4<sup>th</sup> Interested Party

N/A.....for the 5<sup>th</sup> Interested Party

N/A.....for the 6<sup>th</sup> Interested Party