



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION 298 OF 2013**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: SECTIONS 17, 27 AND 56 OF THE MINING ACT, CAP 306 LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS  
OF KENYA EX-PARTE APPLICANT/RESPONDENT**

**VS**

**THE CABINET SECRETARY,**

**MINISTRY OF MINING.....1<sup>ST</sup> RESPONDENT**

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

**AND**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**BASU MINING COMPANY LIMITED...2<sup>ND</sup> INTERESTED PARTY**

**KENYA FOREST SERVICE.....3<sup>RD</sup> INTERESTED PARTY**

**NATIONAL MUSEUMS OF KENYA.....4<sup>TH</sup> INTERESTED PARTY**

**EX-PARTE CORTEX MINING KENYA LIMITED**

**RULING**

1. By a Notice of Motion dated 16<sup>th</sup> December, 2013, the 1<sup>st</sup> interested party herein, **National Environment Management Authority** (hereinafter referred to as NEMA) seeks the following orders:
  1. **THAT this application be certified urgent and be heard at the earliest instance.**
  2. **THAT the High Court does not have the jurisdiction to hear and determine this matter.**
  3. **THAT this suit be struck off with costs.**
2. There is similarly an application dated the same day by the 2<sup>nd</sup> Respondent seeking the following orders:
  - a) **The hearing of this motion be certified urgent and in priority to all pending matters.**
  - b) **A certificate do issue to the effect that the issues pending adjudication before this Honourable Court raise substantial question of law and ought to be heard by an uneven number of judges, being not less than three, to be assigned by the Chief justice.**
  - c) **Costs be provided for.**

### Nema's Case

3. The application by NEMA is based on the following grounds:
  1. **That every person has the constitutional obligation to protect, defend and uphold the Constitution of Kenya.**
  2. **That this matter was wrongly filed and presented before the High Court which court does not have the jurisdiction to hear and determine matters of environment and land.**
  3. **That the substratum of this suit is matters environment-mining rights, which matters are squarely within the ambit of the Environment and Land Court.**
  4. **That the jurisprudence on matters environment and land would not be developed if all weighty or complex matters were field at the high court through the backdoor.**
  5. **That the Environment and Land Court does have the requisite jurisdiction to issue prerogative orders and this suit should have been filed in that court.**
  6. **That it is not too late to raise these issues of law, Jurisdiction is everything.**
  7. **That as the suit was filed in a court which has no jurisdiction, it should be struck off with costs.**
4. The said application is supported by an affidavit sworn by **Erastus K. Gitonga**, the advocate for NEMA, sworn on 16<sup>th</sup> December, 2013.
5. According to the deponent, the basis for bringing the application is that Article 3(1) of the Constitution makes it mandatory for every person to protect, uphold and defend the Constitution of Kenya. According to him, the Environment and Land Court (hereinafter referred to as the ELC) was established pursuant to Article 162(2)(b) of the Constitution and its mandate clearly spelt out therein and further at section 13 of the *Environment and Land Court Act*, Act 19 of 2011 (the ELC Act).
6. After setting out the provisions of section 13 of the ELC Act, the deponent averred that the High Court, at Article 165(5)(b) of the Constitution is specifically denied jurisdiction over matters within the jurisdiction of the ELC.
7. In his view, the substratum of this suit is mining rights of mining licensing, environmental planning and other environmental issues such as impact assessments have been raised as well and

that the prayers sought in this suit relates to mining and therefore within the ambit of the aforesaid Act.

8. The 4<sup>th</sup> interested party herein, **National Museums of Kenya** in support of this application filed the following grounds:

1. **That this ground of support is based on the 1<sup>st</sup> interested party's Notice of Motion dated 16<sup>th</sup> December 2013.**

2. **That jurisdiction is everything and should be raised in the earliest opportunity.**

3. **That this court has no jurisdiction relating to environment and land matters by virtue of article 162(2) (b) of the Constitution as read together with article 165(5) (b) of the Constitution.**

4. **That article 162(2)(b) provides that parliament shall establish courts with the status of the high court to hear and determine disputes relating to the environment and the use and occupation of... and shall determine the jurisdiction and functions of these courts.**

5. **That the jurisdiction of the said courts is found in article 13 of the Environment and Land Court Act of 2012 which provide that the court shall hear disputes relating to mining and mineral among others as well as any other dispute relating to environment and land.**

6. **That the suit filed before this court is based on disputes relating to mining and such disputes ought to be heard and determined by the Environment and Land Court.**

7. **That the jurisdiction given to the Environmental and Land Court under the said section is very wide and it cannot therefore be argued that the Environment and Land Court cannot hear and determine this suit.**

8. **That the environment and land court can also grant prerogative orders by virtue of section 13(7) of the Environment and Land Court Act.**

9. **That the Environment and Land Courts were functional as at the time this suit was being field but the ex-parte applicant chose rather to file the suit in this court which lacks jurisdiction by virtue of article 162(2) and 165(%) (b) of the Constitution of Kenya.**

10. **That this Honourable court lacks jurisdiction to hear and determine the suit and the same should be struck off with costs.**

9. The ex parte applicant herein, **Cortex Mining Kenya Limited**, in opposition to the application filed a replying affidavit sworn by **Jacob Juma**, its director on 10<sup>th</sup> January, 2014.

10. According to the deponent, the deponent of the affidavit in support of NEMA's application being an employee of NEMA is precluded by Rules 5 and 9 of the **Advocates (Practice) Rules** from drawing, filing any documents or appearing or swearing affidavits in this matter on behalf of NEMA. It was further deposed that the said deponent is precluded from swearing affidavits in a matter in which he purports to act.

11. According to the deponent, these proceedings are a challenge by way of certiorari and prohibition, to the administrative actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in revoking the Ex-Parte Applicant's Mining License without regard to the procedure set out in law hence were rightfully instituted before the Judicial Review Division of the High Court which has jurisdiction to hear and determine this matter.

12. According to him, the filing of the substantive Notice of Motion for judicial review dated 9<sup>th</sup> September, 2013 was preceded by a hotly contested inter-partes hearing of the application for leave in which the 1<sup>st</sup> interested party was heard and never raised the issue of want of jurisdiction

at the hearing of the application hence the current application is without merit and is an afterthought.

13. It was deposed that all parties to these proceedings have filed and served their respective responses and submissions to the substantive motion hence the 1<sup>st</sup> interested party should pursue its opposition to the substantive motion instead of delaying the disposal of the matter by engaging in sideshows. It was therefore his view that this application is frivolous and an abuse of the Court process.

## 2<sup>nd</sup> Respondent's Case

14. In support of the 2<sup>nd</sup> Respondent's said application, an affidavit sworn by **Waigi Kamau**, a state counsel in the office of the Attorney General on 16<sup>th</sup> December, 2013 was filed.

15. According to the deponent, the central issue in dispute in the proceedings is the revocation of a special mining licence allegedly issued to the ex parte applicant in respect of the mining of a mineral known as niobium or rare earth minerals in Kwale County. To him, the 1<sup>st</sup> Respondent has averred that the special mining licence was granted to the ex parte applicant irregularly, contrary to the express provisions of the constitution and against the public interest and in its pleadings the ex parte applicant has indicated that the minerals are extremely valuable and that their value is colossal. This position, according to the deponent, is not disputed by the 1<sup>st</sup> Respondent who is the Cabinet Secretary in charge of mining in whose view, the valuation of the minerals as declared by the ex parte applicant is roughly equivalent to 5 times the current annual national budget of the Republic of Kenya.

16. The deponent averred that he was aware that the earnings from the minerals are expected to be a major source of revenue for the country over the next decade as vision 2030 is implemented and the country makes a transition into an emerging economy. To him, these proceedings do therefore involve issues that could transform the course of this nation and which are of enormous interest to the public and as far as he is aware, no court in Kenya has ever adjudicated on a dispute of such magnitude and the proceedings do therefore involve substantial questions of fact and law.

17. He further deposed that several natural resources and other minerals such as oil, coal, titanium and iron have recently been discovered in Kenya and the principles that will emerge from the adjudication of this dispute will therefore also guide the formulation of policy and resolution of any disputes that arise in the future regarding other minerals and/or natural resources. According to him, the legacy of mismanaged natural resources in Africa, known as the resource curse are now well documented and as Principal Legal adviser to the Government pursuant to Article 156(4) (a) of the Constitution, the Attorney General is extremely keen to ensure that the principles that emerge from these proceedings conform with Articles 10 and 62 of the Constitution of Kenya for the benefit of all present and future citizens of Kenya.

18. He concluded that the issue in question involves substantial public funds and it is thus important that in this matter of great national importance, a certificate be issued pursuant to Article 165(4) of the Constitution to enable the Honourable Chief Justice constitute an uneven number of judges to hear the dispute.

## Applicant's Response to the 2<sup>nd</sup> Respondent's Application

19. The ex parte applicant herein, **Cortex Mining Kenya Limited**, in opposition to the application filed a replying affidavit sworn by **Jacob Juma**, its director on 10<sup>th</sup> January, 2014.

20. According to the deponent, these proceedings are a challenge by way of certiorari and prohibition, to the administrative actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in revoking the Ex-Parte Applicant's Mining License without regard to the procedure set out in law; that the issue as to whether the 1<sup>st</sup> Respondent complied with the law in arriving at his decision to revoke the License is a simple question of fact and law; and, that the value of the minerals, the subject matter of the revoked License is not an issue for determination in these proceedings

21. According to him, the filing of the substantive Notice of Motion for judicial review dated 9<sup>th</sup> September, 2013 was preceded by a hotly contested inter-partes hearing of the application for

leave in which the 2<sup>nd</sup> Respondent was heard and at that time, the 2<sup>nd</sup> Respondent never raised the claimed issue of complexity of this matter at the hearing of the application for leave. Further, a time frame for filing of the substantive Notice of Motion for judicial review, responses and submission on the same was fixed by the Court on 2<sup>nd</sup> September, 2013 and the substantive Notice of Motion for judicial review and the Ex-Parte Applicant's submissions were filed on 9<sup>th</sup> September, 2013 with further submission in reply being filed by the Ex-Parte Applicant on 7<sup>th</sup> November, 2013. The 2<sup>nd</sup> Respondent has, however, not filed and served any response and written submission on the substantive Notice of Motion for judicial review hence the issues now raised by the 2<sup>nd</sup> Respondent do not form part of the issues pending for determination in these proceedings.

22. It was his view that the 2<sup>nd</sup> Respondent cannot claim that this matter is complex, requiring an uneven number of Judges when it has not responded to and/or opposed the Notice of Motion for judicial review. In the circumstances, the current Notice of Motion by the 2<sup>nd</sup> Respondent is without merit and is an afterthought and is further frivolous and an abuse of the process of the Court and should be dismissed with costs.

### **Mode of Proceeding**

23. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA expressed himself as follows:

**"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

24. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

**"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

25. Therefore, I wish to deal with the application challenging the jurisdiction of this Court since the determination of the application by the 2<sup>nd</sup> Respondent may well depend on the outcome of the issue of jurisdiction in view of the matters deposed to hereinabove.

### **Nema's Submissions**

26. In the submissions filed on behalf of NEMA, it was contended that whenever the substratum of a matter is environmental and land, any dispute emanating therefrom and falls within the ambit of section 13 of the ELC Act, must be filed at the ELC where the orders sought can be issued by the ELC. According to NEMA, the prayers sought in these proceedings relate to mining rights and should be determined by the ELC and not the High Court.

27. It was therefore submitted that since section 18 of the Civil Procedure Act only relates to subordinate courts, this power is not available in the present instance since the High Court cannot transfer a case to any other superior court. It was therefore urged that the Court ought to strike out these proceedings.

### **1<sup>st</sup> Respondent's Submissions**

28. On behalf of the 1<sup>st</sup> Respondent, it was submitted that the dispute herein arises from matters touching on environment, land and mining. It was submitted that Article 165(5) of the Constitution specifically denies the High Court jurisdiction in respect of matters falling within the jurisdiction of the ELC and according to section 13(2)(a) of the Environment and Land Act, disputes relating to mining fall under the jurisdiction of the Environment and Land Court. Taking into account the fact that the ELC has jurisdiction to grant prerogative orders, it was submitted that by dint of the Constitution and the ELC Act, the High Court has no jurisdiction to hear and determine disputes relating to mining thus this suit should be struck out for lack of jurisdiction.

29. The 1<sup>st</sup> Respondent therefore urged the Court to allow the 1<sup>st</sup> interested party's Motion.

### **4<sup>th</sup> Interested Party's Submissions**

30. On behalf of the 4<sup>th</sup> interested party it was submitted that this suit is based on disputes relating to mining and revolves around environmental issues and suits of that nature ought to be heard and determined by the ELC.

31. It was submitted that the jurisdiction given to the ELC under section 13(7) of the ELC Act is very wide and it cannot therefore be argued that the ELC which were functional as at the time of the filing of this suit cannot hear and determine this suit. In support of this submission, reliance was placed on **Samuel Mutonga & 8 Others vs. Colgate Palmolive (East Africa) Ltd [2013] eKLR** and urged the Court to strike out this suit.

### **Applicant's Submissions**

32. On behalf of the applicant, it was submitted that the application seeking to strike out these proceedings is incompetent having been filed by an unqualified person.

33. It was further submitted that since the orders sought are seeking to terminate the proceedings, the application is a substantive one hence the deponent of the supporting affidavit ought not to have sworn the same.

34. It was further submitted that leave to institute these proceedings having been granted despite vehement opposition, which leave has not been set aside, the Court must have been convinced that it had jurisdiction.

35. It was submitted that the provisions relied upon do not entitle the Court to strike out these proceedings.

36. According to the applicant, the prerogative remedies that may be granted by the ELC can only be in respect of petitions contemplated under Article 23 of the Constitution. To the applicant, Parliament has no power to, and has not established any High Court known as Environment and Land Court pursuant to Article 162(2)(b) of the Constitution and therefore the ELC is a Division

of the High Court. To the applicant, only the High Court sitting in whatever Division has power to hear and determine this matter and the Division of the High Court in which prerogative remedies are sought at the moment is the Judicial Review Division hence the claim that the Division has no jurisdiction over this matter is unsustainable.

37. It was submitted that these proceedings are a challenge by way of certiorari and prohibition to the administrative actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in revoking the applicant's mining licence unprocedurally and has nothing to do with the merit. It was submitted that even if it were the case that the seven issues framed by the 1<sup>st</sup> interested party need be determined in these proceedings, that cannot divest the Judicial Review Division of the High Court of jurisdiction over this matter but would only put the matter within the concurrent jurisdiction of the Judicial Review Division of the High Court and the ELC, and cannot be a ground for striking out the Motion. In support of these submissions the applicant relied on Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited [2006] eKLR, Republic vs. Communications Commission of Kenya ex parte East African Televisions Network Ltd [2001] KLR 82, Shaban Mohamud Hassan & 703 Others vs. Attorney General [2013] eKLR, Tasmac Limited vs. Roberto Marci & 2 Others [2013] eKLR, Edward Mwaniki Gaturu & Another vs. Attorney General & 3 Others [2013] eKLR and Donald Osewe Oluoch vs. Kenya Airways Civil Appeal No. 5 of 2012.

### **Determinations**

38. I have considered the 1<sup>st</sup> interested party's application and the various positions taken by the parties herein.
39. First, I wish to deal with the issue raised by the applicant with respect to the competency of the application.
40. It must be noted that what is being raised herein is an issue of jurisdiction. In Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters Of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 the Court of Appeal expressed itself as follows:

**"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."** [Underlining mine].

41. It is therefore clear that where an issue of jurisdiction is raised before a Court, the Court must deal with the issue and reach a decision one way or the other and the mere fact that the issue is irregularly raised or that there is insufficient evidence, does not relieve the Court of the obligation to determine whether or not it has jurisdiction. This is so because the mere fact that an issue of jurisdiction is not raised does not necessarily confer jurisdiction on the Court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises.
42. Accordingly I find that even if the deponent of the supporting affidavit is incompetent to participate in these proceedings in the capacity in which he purports to do, this Court would not shut its eyes from the issue of jurisdiction and the Court must deal with the same.
43. An issue of jurisdiction may arise in one of two instances or both. The first scenario is where the Court has no jurisdiction to embark upon the investigation of the matter before it *ab initio*. The

second scenario is where though the Court was seised of jurisdiction at inception subsequent events or circumstances remove the dispute from the jurisdiction of the Court. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

**“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make.....The phrase “to make such order thereon as it deemed fit” giving powers to a statutory tribunal must be strictly construed. Powers must expressly conferred; they cannot be a matter of implication.”**

44. Similarly, in **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1 (supra)**, it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics.

45. The second scenario may occur for example in personal injury cases where as a result of deterioration in the health of the plaintiff the likely award is found to exceed the jurisdiction of the Tribunal in which it was filed. In such cases, the Courts have decided that though it is a case of lack of jurisdiction in a technical sense, such cases may be transferred to courts with jurisdiction. This was the position taken by **Koome, J** (as she then was) in **Jane Wachira Kamau vs. Musa K. Kipkios [2006] eKLR** in which the learned Judge held that where the substratum of the case changes during the pendency of the suit due to the acts of the respondent, which deprives the lower court of the jurisdiction, the Court has power to transfer the suit. In my view it does not matter whether the substratum changes due to actions of the Respondent or otherwise as long as it is not attributable to acts or omissions of the plaintiff.

46. In this case it is contended that these proceedings ought to have been instituted in the ELC. The respondents’ issue on jurisdiction as I understand it is twofold. The first ground for questioning the jurisdiction of this Court is the existence the Land and Environmental Court. Article 165(3) of the Constitution provides as follows:

***(3) Subject to clause (5), the High Court shall have—***

***(a) unlimited original jurisdiction in criminal and civil matters;***

.....

***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

47. Article 165(5)(6) and (7) thereof on the other hand provides:

***(5) The High Court shall not have jurisdiction in respect of matters—***

***(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or***

***(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).***

***(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may***

***make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

48. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article. It is common knowledge that there are several Divisions of the High Court set up by the Chief Justice in the exercise of his administrative powers. Such Divisions are not anchored in the Constitution or even in an Act of Parliament.
49. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**
50. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.
51. The applicant argues that Parliament has no power to, and has not established any High Court known as Environment and Land Court and that the said Court is a Division of the High Court. In my view the applicant's view is incorrect. The High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. Therefore it is my view that such High Court Divisions cannot be equated to the Courts established pursuant to the provisions of Article 162(2) of the Constitution. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.
52. Under Article 1 of the Constitution. The said Article provides as follows:
- (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***
- (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.***
- (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***
- (a) Parliament and the legislative assemblies in the county governments;***
- (b) the national executive and the executive structures in the county governments; and***
- (c) the Judiciary and independent tribunals.***
- (4) The sovereign power of the people is exercised at—***
- (a) the national level; and***
- (b) the county level.***
53. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “*determine the jurisdiction and functions of the courts contemplated in clause (2)*”, Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30<sup>th</sup> August 2011. These proceedings were commenced on 27<sup>th</sup> June 2013. Section 13 of the said Act provides as follows:

***(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***

***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***

***(b) relating to compulsory acquisition of land;***

***(c) relating to land administration and management;***

***(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***

***(e) any other dispute relating to environment and land.***

***(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***

***(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.***

***(5) Deleted by Act No. 12 of 2012, Sch.***

***(6) Deleted by Act No. 12 of 2012, Sch.***

***(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—***

***(a) interim or permanent preservation orders including injunctions;***

***(b) prerogative orders;***

***(c) award of damages;***

***(d) compensation;***

***(e) specific performance;***

***(g) restitution;***

***(h) declaration; or***

***(i) costs.***

54. These proceedings were commenced by the ex parte applicant seeking the following orders :

**1. An order of Certiorari be and is hereby issued to remove into this Court and quash the entire decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents made on the 5<sup>th</sup> day of August, 2013, purporting to revoke the Ex-Parte Applicant's Special (Mining) License Number 351 issued on the 7<sup>th</sup> day of March, 2013 and appointing a task force to undertake a review**

**of the Ex-Parte Applicant's License.**

**2. An Order of Prohibition be and is hereby issued against the 1<sup>st</sup> and 2<sup>nd</sup> 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 7<sup>th</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties jointly and severally.**

55. The grounds upon which the application are based are as follows:

**1. On the 5<sup>th</sup> day of August, 2013, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents made a public announcement on National Television Stations purporting to revoke the Ex-Parte Applicant's Special (Mining) License Number 351 issued on the 7<sup>th</sup> day of March, 2013 and appointing a task force to undertake a review of the Ex-Parte Applicant's license.**

**2. The 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 license and failure by the licensee 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, *ultra vires*.**

**4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions and decision contravenes the rules of natural justice as the Ex-Parte Applicant was not heard before the making of the decision.**

**5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions and decision was arbitrary as there were no reasons or grounds at all to warrant the taking of the decision.**

**6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions and decision was irrational as the purported task force 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' action and decision failed to take into account the Ex-Parte Applicant's legitimate expectation, the Ex-Parte Applicant having heavily invested in the prospecting of the mining resources in respect of which the license was issued and put in place infrastructure to commence the mining.**

**8. The 1<sup>st</sup> Respondent's actions and decision was actuated by and based upon ulterior motives.**

**9. The ends of justice demand that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents'**

**be quashed by an Order of Certiorari and any further action pursuant thereto and detrimental to the Ex-Parte Applicant's interests by the said 1<sup>st</sup> and 2<sup>nd</sup> Respondents' be prohibited by an Order of Prohibition.**

56. It is therefore clear that at the commencement of these proceedings, there was no issue with respect to the mining rights and land and environment as contemplated under section 13 of the ELC Act. These issues were introduced by the Respondents and the interested parties and based on their introduction the said parties now seek to have the applicant's cause terminated.
57. In my view, a respondent or interested party in a judicial review application ought not in his or their response to transmute the application by raising issues with a view to scuttling the applicant's cause or action and prematurely terminating the same. Where the Court is of the view that at the time the applicant set out to protect his rights, his cause of action brought it within the jurisdiction of the Court, it is my view that the Court ought to be reluctant in terminating the cause for lack of jurisdiction and instead to take steps to save the proceedings in question since it is trite that striking out of proceedings being a drastic measure ought to be taken only in situations where the proceedings are incurable by any other legally accepted alternative. It is only where the applicant invokes the jurisdiction of the Court while well aware or where he ought to have been aware that the Court had no jurisdiction that the Court will terminate the proceedings since such proceedings would amount to an abuse of the process of the Court.
58. In questioning the jurisdiction of the Court parties ought, in my view, to take the holding in the case of **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, into account. In that case it was held that **"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."**
59. Accordingly, I find that since the reliefs which were being sought by the applicant at the time these proceedings were instituted were well within the jurisdiction of this Court to grant, the application seeking to terminate these proceedings based as it is on the issues introduced by the Respondents and the interested parties is unmerited. To do so would amount to a miscarriage of justice and this Court has no jurisdiction to do an injustice.
60. The Court cannot however lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of discretion and that decision may well depend on the facts and the surrounding circumstances of the case. Taking into account the issues raised herein, it is my view that justice in this case is better served by having the same heard and determined before the Environment and Land Court. Accordingly, I direct in the exercise of the Court's inherent jurisdiction that this matter be heard and determined by the said Court. To do so is not necessarily a transfer since the said Court has the status of a High Court.
61. In the premises there will be no order as to costs.
62. Having made that determination, it is no longer necessary for me to deal with the 2<sup>nd</sup> Respondent's application. The said application is therefore kept in abeyance and the 2<sup>nd</sup> Respondent is at liberty to argue the same before the said Court.

**Dated at Nairobi this 18<sup>th</sup> day of February 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Havi for the applicant***

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

***Mr Gitonga for 1<sup>st</sup> IP***

***Mr Odipo for 2<sup>nd</sup> IP and holding brief for Mr Taib***

***Mrs Yego for 4<sup>th</sup> IP***

***Mr Simiyu for 5<sup>th</sup> IP***

***Mr. Ongoya and Mr. Maina Njanga for 6<sup>th</sup> IP***