



REPUBLIC OF KENYA

High Court at Machakos

Petition 168B of 2011

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 & 20 CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 24, 25, 35, 43, 48, 50, 53, 54 & 57, 62 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA & RULE 11, (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW)

IN THE MATTER OF THE MINING ACT, CAP 306

AND

IN THE MATTER OF THE TRUST LAND (REMOVAL OF COMMON MINERALS) RULES – UNDER THE TRUST LAND ACT, CAP 288

AND

IN THE MATTER OF THE TRUST LAND ACT, CAP 288

AND

IN THE MATTER OF THE GOVERNMENT LAND ACT, CAP 280

AND

IN THE MATTER OF WILDLIFE (CONSERVATION AND MANAGEMENT) ACT, CAP 376

AND

THE PENAL CODE, CAP 63

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, NO. 8 OF 1999

IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

**IN THE MATTER OF ARTICLE 11 OF INTERNATIONAL COVENANT ON ECONOMIC,
SOCIAL & CULTURAL RIGHTS**

BETWEEN

1. SOLOMON MULWA MULYUNGA
2. ANNASTASIA NDINDA MATONYI
3. NZUU KIEMA MUSYIMI
4. DIANA MUTIE
5. STEPHEN MUSYOKI MWANGANGI
6. MULI MUTINDA
7. JAMES KISUNDU LUKO
8. KIIMA KYUTHA
9. PRISCILLA NYOKABI KANYUA
PETITIONERS

(Suing On Their Own Behalf and Behalf of Kanziko & Mathima Residents)

AND

1. ATHI RIVER MINING
2. DEVIK CEMENT AND STEEL INDUSTRY
3. EAST AFRICAN PORTLAND CEMENT CO. LTD.
4. CRISS CROSS COMPANY LTD.
5. BAMBURI CEMENT COMPANY
6. THE MINISTRY OF MINING AND NATURAL
RESOURCES
7. THE CHIEF OF MATHIMA LOCATION
8. THE COUNTY COUNCIL OF KITUI
9. THE NATIONAL ENVIORNMENTAL AND
MANAGEMENT AUTHORITY
10. THE ATTORNEY GENERAL
RESPONDENTS

R U L I N G

On the filing of a **petition** dated 19th July 2011 by 9 petitioners on behalf of the **Kanzito** and **Mathima** residents, they filed at the same time, a **Notice of Motion** dated the same date seeking conservatory and alternatively injunctive orders. The Notice of Motion was filed under **Article 19, 20, 21, 22, 23, 24** of the **Constitution** and **section 3 A** of the **Civil Procedure Act (Cap 21)** as well as **Order 51 Rule 1, 2, 4, 7, 10 (1) and (2), 11, 12, 13, 14 and 16** of the **Civil Procedure Rules**. The relevant prayers now are prayers 3 and 4, and they seek those orders pending the hearing of the petition.

The application was filed with a supporting affidavit sworn on 19th July 2011 by **Solomon Mulwa Mulyunga**, the 1st petitioner. The affidavit gives the background to the filing of the petition and the application. In brief the complaint is that the indigenous residents of **Kitui** were being coerced and misled by the local administration and the respondents to allow mining activities on their ancestral land which would have the effect of taking away their land rights, and adversely affect the environment. In addition, the residents were being coerced or misled to sign documents or papers, which were mysteriously being turned into sale agreements. That the local County Council as trustees, had failed to protect the interests of the local residents.

Nzoo Kiema Musyimi the 3rd petitioner also filed an affidavit which he swore on 19th September 2011. It was deponed *inter alia* that the respondents had started putting up some beacons on the land. The 1st petitioner **Solomon Mulwa Mulyunga** filed a further affidavit which he swore on 19th September 2011, deponing that the respondents and other unknown companies and persons had continued to make eviction threats and mining activities without the consent of local residents.

The application is opposed. The 1st respondent, **Athi River** Mining field grounds of opposition, which are that:-

- 1. There is nothing to show how many residents of Kanziko and Mathima have given authority to the petitioners to sue who are likely to suffer from any alleged violation of fundamental rights.**
- 2. The petitioners have not shown by way of a map and surveyor work the parcels of land involved and the court cannot act to undefined area.**
- 3. The provisions of the Constitution complained about came into operation on 28/08/2010 and cannot operate retrospectively and the activities complained are shown to have taken place between 2006 and 2009.**
- 4. No undertaking has been given by the petitioners to pay damages if any if the orders sought turn out not to be warranted.**
- 5. Nothing has (not) shown by the petitioners that the alleged acts complained about are not capable of being compensated by way of money.**
- 6. The petitioners have shown that they are interested in compensation and therefore orders sought shall only work injustice to the 1st respondent who has made serious investments.**
- 7. The court should not grant the conservatory orders since no basis has been made for the granting of these orders.**

The 2nd respondent **Devki Cement & Steel Industry** filed a notice of **Preliminary Objection** in the following terms:-

“-that the 2nd respondent as sued herein objects to the entire proceedings against it and will raise a Preliminary Objection at the hearing of the matter on grounds that the proceedings against it are incompetent and should be dismissed with costs.”

Replying affidavits were filed on behalf of the respondents. Responses to the said affidavits were also

filed. Written submissions were filed on behalf of the petitioners and the respondents. I have perused and considered all these.

In brief this is a Constitutional matter. It relates to land proprietary or perceived proprietary rights of inhabitants of Kitui area which is part of **Kenya**. It also relates to protection of the environment. There is no dispute that the area in question is inhabited. The applicants appear to be the inhabitants of the area. The respondents seem to rely on legal technicalities to oppose the application. They seem to rely on investments justification to oppose the application. Indeed, both are important considerations. Investments are however, done by human beings and are for the benefit of human beings. Companies are merely instruments that human being use to carry out their investment projects.

This petition was filed in 2011.

The **Constitution 2010** states under **Article 1** that the people of Kenya are sovereign. The petitioners are some of those people. The **Constitution** also has a whole **Chapter Five** on protection of land rights and the environment. The categories of ownership to land are given. Land can be community land. Whether or not that land has title is a totally different story. The interests to land are various. A member of a community can claim an interest in land either as part of a group or individually, because the rights protected in the **Constitution** are for groups and for individuals. Therefore, the argument that the petitioners have to prove how many members they represent is a non-starter.

Investments have first of all to acknowledge and accept the supremacy of the people in the local community where the investment is to take place. Their rights, including land and environment rights, in the broadest sense have to be of paramount importance in any investment venture.

The prayers in the application which are alive are prayer 3 and 4, which are in the alternative. They are merely for preserving the *status quo*, pending the determination of the petition. Under the **Constitution (2010)**, the court has wide powers to grant orders that will meet the ends of justice.

Considering the facts and arguments placed before me, I find merits in preserving the *status quo*. I allow the application and grant **prayer 3**. All parties will have a chance hereafter to ventilate their respective positions substantively. The costs of the application will be in the cause.

Dated and delivered at Machakos this **11th** day of **December** 2012.

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George Dulu

Judge

In the presence of:

Mr H. Mwendwa holding brief for Ms. Bigambo for Petitioners

Mr S.M. Makau holding brief for Mr Onyango for 3rd Respondent

Mr Kanui holding brief for Mr Makau formerly lead counsel for petitioners also holding brief for Muema Kitulu for 8th Respondent

Ms. Maina for 2nd Respondent

Mutinda – Court clerk