REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J.)

CIVIL CASE NO. 190 OF 2010

1. LUKA KITUMBI
2. KITUMBI SIVU
3. PETER KAMOSI KITUMBI
4. JOHN NZOMO KITUMBI
5. DANIEL WAMBUA KITUMBI
…...…………. PLAINTIFFS/APPLICANTS
6. ANTONY MUTHOKA KITUMBI
7. PAUL NDAVI KITUMBI
8. ZAINA KITUMBI
9. NZEMBA LENJO

-VERSUS-

1. COMMISSIONER OF MINES & GEOLOGY
…DEFENDANTS/RESPONDENTS
2. DANIEL MUTURI KIMANI

RULING

The applicants came before the Court by Chamber Summons dated ***17th June, 2010*** and brought under Order **XXXIX**, rules 1, 2, 3, 5 and 9 of the Civil Procedure Rules and ss. 3A and 63 (e) of the Civil Procedure Act (Cap 21, Laws of Kenya).

The application carries one substantive prayer, set out as follows:

"That the Court be pleased to grant orders of injunction against the defendants by themselves, their servants, agents, officials, employees and/or otherwise against any person acting on their behalf or claiming under them from trespassing, encroaching, entering upon, interfering, alienating, erecting, excavating, disposing and/or in any other manner whatsoever dealing with the plaintiffs' fenced but unsurveyed parcel of land at Dighai Village, Mwachambo Settlement Scheme in Mwatate District pending the hearing and determination of this suit or pending further orders of the court".

The application rests on the following grounds:

(i) the plaintiffs are members of one family, 2nd plaintiff being the father, and the others siblings;

(ii) the plaintiffs are the owners of an unsurveyed parcel of land at Mwachambo Settlement Scheme, in Mwatate District;

(iii) the plaintiffs settled on the subject parcel of land in the late 1970's when the population of the area was sparse;

(iv) the Mwachambo Settlement Scheme is currently in the process of being demarcated, with the land-holders being granted legal documents;

(v) 1st defendant has unilaterally proceeded to grant to 2nd defendant a mining licence to enter and mine within the lands in the possession, use and occupation of the applicants;

(vi) such grant of mining licence to 2nd defendant was illegal;

(vii) the action taken by 1st defendant was in disregard of the rights and interests of the plaintiffs as persons occupying, possessing and residing upon the said land;

(viii) no compensation has been made to the plaintiffs for the loss, damage and disturbance suffered;

(ix) the 2nd defendant, with the support of 1st defendant, has threatened to enter and initiate mining activities on the plaintiffs' land – and this would cause to the plaintiffs loss of land, crops, trees, fruits and residences and may bring them to destitution;

(x) unless the defendants are restrained by injunction, the defendants will proceed to implement illegal acts, resulting in loss and damage which cannot be compensated in damages.

The 1st applicant swore a 47-paragraph affidavit on behalf of all the plaintiffs, deponing that all of them are residents of Daghai Village, Mwachambo Location of Mwatate District and live on a parcel of land of which 2nd applicant had come into occupation in the late 1970s; that the area in question has since been settled by many other people and has been declared a settlement scheme (Mwachambo Settlement Scheme), the settlers in which have been recognized as squatters, and the land is now being formally demarcated so they may acquire defined areas with legal title. In this regard, the deponent annexed a letter from the Ministry of Lands dated ***11th August, 2009***, by which the Project Manager of the Mwachambo Settlement Project gave general notice stating that the area in question is "a Government Land under the Settlement Fund Trustee"; and that the Ministry is "currently demarcating the land to offer the already informally settled squatters on the land"; the letter states that "the land is intended to settle the squatters as they are on the ground with minimum or no alteration at all"; and it recognizes that the deponent herein, ***Mr. Luka Kitumbi***, "is one of the squatters".

The deponent avers that 2nd plaintiff after settling within the scheme, has fenced off a portion of the land area, and distributed portions to his children, the plaintiffs herein: and this position is confirmed by ***Ronald M. Mwakio***, the Chief of Mwachambo Location, in his letter of ***8th March, 2010***.

It is deponed that Mwachambo Location has attracted a large population, attended with the growth of new institutions – such as Kamutonga Trading Centre, Kamutonga Primary School, Mwachambo Primary School, and a police post.

The deponent deposes that each of the plaintiffs, after getting an allocation of land from 2nd plaintiff, has taken possession, constructed abodes, fenced off their respective portions, and initiated agricultural activities (and 13 different photographs were exhibited to validate that averment).

The deponent deposed that the date ***14th January, 2009*** brought a new development on the suit land, which has led to the instant proceedings. On that date, 1st applicant who was performing the ordinary task of digging a pit-latrine within his homestead, struck on gemstones of different types; and upon that discovery, miners "from as far [away] as Mkuki Ranch, Wananchi Ranch and other places", flocked into 1st applicant's home, to "illegally mine the….gemstones". The deponent resorted to the local Administration officers, to keep off the intruders.

The plaintiffs as a family, in the meantime, took advice and came to agreement, that on their behalf, the deponent should formally apply for mining rights over the lands in their possession: and he then applied for prospecting rights over the entire area occupied by the plaintiffs, naming this area WIKWATYO I and II. The application was prepared, all relevant Government fees paid, and the request lodged at the relevant office at Wundanyi on ***19th January, 2009***. The Mines and Geology office at Wundanyi asked the deponent to obtain an accurate map of the area where mining rights were being sought, WIKWATYO I and II.

The deponent avers that, even as the plaintiffs moved to obtain the licence for prospecting rights, "it turned out that…..someone else……had allegedly applied for a licence over our land and as such I could not…be issued [with a] licence for [the] same area".

The deponent later received a letter dated ***4th June, 2009*** from ***B. Kimeto*** for the Commissioner of Mines and Geology, stating in part as follows:

"This is in reference to your application for registration of 'Wikwatyo I and II' location in Digai, Mwatate, Taita District received in the Department on 19th January, 2009.

"I wish to inform you that the ground verification exercise carried out between 6th and 20th March, 2009 by our officers established that the area you had applied for overlaps an area of extant title and an earlier application contrary to section 7 (1) (d) of the Mining Act, Cap. 306 of the Laws of

Kenya. Consequently, you are required to resubmit an amended sketch plan of the free area whose GPS readings are as follows……..”

The deponent avers that the particulars of the application for mining rights said to be in conflict with that of the plaintiffs, were not disclosed to him; and the plaintiffs were apprehensive that there was a lack of ***bona fides*** in the relevant Government office, since they were kept in the dark as to the visitation date when the said verification exercise took place. The deponent came to know, from the letter of ***27th May, 2009*** by ***Mr. S. K. Too*** for the Commissioner of Mines and Geology, that one of those objecting to his application was a neighbour, ***Agnes Mwakamba***; that letter says:

“I wish to inform you that the Department has received a complaint from *Mrs. Agnes Mwakamba* ***that you pegged on her piece of land without her consent. Consequently, you are advised to obtain a written consent from her in order for us to take further action on your applications”.***

The deponent took up the matter with the said neighbour, and on ***9th June, 2009*** the two came to an agreement resulting in a joint letter to the Commissioner of Mines and Geology reading, in part, as follows:

“Please refer to your letter dated *27th May, 2009*…….***concerning a complaint from*** *Mrs. Agnes Mwakamba* ***that I have pegged on her piece of land without her consent.***

“I wish to inform you that the area I have pegged Wikwatyo I and II mining location lies within my piece of land and *Mrs. Agnes Mwakamba* ***has confirmed that no pegging has been to her land”.***

The deponent avers that the Government officer still came up with the existence of another objector; ***Mr. K. B. Kimeto*** for the Commissioner of Mines and Geology thus wrote to him on ***19th June, 2009***:

“I wish to inform you that whereas you have successfully sorted out your dispute with *Mrs. Agnes Mwakamba*, ***the Department has received a fresh complaint from*** *Mr. Gibson Kirubai* ***alleging that you and others not mentioned have pegged on his shamba.***

“Please note that our instructions to you in our previous letter dated *4th June, 2009* ***still stand unless you show proof of ownership of land by furnishing us with a copy of your Title Deed of the land in question or a letter from the Lands Office.”***

The deponent suspected that 1st defendant was unwilling to issue him with a mining licence, as 1st defendant was entertaining objections to the application without openly undertaking a verification to establish the position on the ground. The deponent also apprehended lack of ***bona fides***, in the fact that so late in the day, the 1st defendant had come up with a new obstacle: he now wanted ***proof of ownership of the land the plaintiffs were occupying***; but he was not demanding such proof of ownership from those whose objections he was entertaining.

Towards the end of 2009, 1st plaintiff received reports that one ***Daniel Muturi Kimani*** (2nd defendant) had been issued with a mining licence over the suit land. The deponent came to learn that 2nd defendant, who owns no property interest in the locality, had lodged his application some three days prior to the plaintiffs’ application, and was issued with a prospecting licence “without carrying out any verification on the ground as is the requirement of the law”.

Due to the deponent’s objections, the 1st defendant summoned him to the Government office on ***11th March, 2010***: and he informed the deponent he “had the power to grant licence for mining” and there is nothing the deponent could do about it; he threatened to have the deponent arrested if he would not allow 2nd defendant to conduct mining activities on the suit land.

The plaintiffs apprehended an intent to deprive them of their property, the deponent thus averring:

“……whereas we may not force the 1st defendant to grant mining licence to us…., it is our constitutional right to own property, and in this case, our [land]……should not be forcibly taken away from us by 1st defendant [so he may] purport to give it to 2nd defendant, which act amounts to evicting our families residing therein; the land is our only source of livelihood.”

The deponent highlights the same point when he deposes:

“……our dispute with 1st defendant [concerns] our *shamba,* ***and if our*** *shamba* ***contains gemstones, then equity demands that we be given the first priority for mining licence and certainly not the 2nd defendant who is a stranger”.***

The deponent deposed that his life has been threatened by unknown persons, since his discovery of the gemstones, and in the period he has been struggling to secure prospecting rights on behalf of the plaintiffs: an attack of ***23rd April, 2009*** left his teen-age daughter dead, and his wife with grievous physical harm; suspects have been arraigned at the Voi Court.

The deponent deposes that the 2nd defendant since being given a prospecting licence, has been encroaching into the deponent's homestead, endeavouring to set up a mining camp therein; he apprehends that the setting up of such a camp would occasion the demolition of his houses.

The deponent avers that the plaintiffs' interest in this matter has not been accorded fair treatment by the responsible officers of Government: on ***8th June, 2010*** the deponent was summoned to the District Commissioner's office at Mwatate, and, in the deponent's words, told: "…..it is either I surrender to the 2nd defendant to enter and put beacons…..or I face arrest and prosecution in Court". The deponent deposes that, on ***14th June, 2010*** the 1st defendant's officers in the company of 2nd defendant and police officers from Wundanyi Police Station, entered the deponent's homestead and "purported to [conduct] verification to ascertain the extent of the land [in respect of which] 2nd defendant [had made an application]", and they concluded their mission by installing beacons from the gate running over a considerable distance on the land occupied by the plaintiffs. The plaintiffs apprehend that the action above-described will lead to an outright entry and encroachment, by 2nd defendant, upon the land occupied by the plaintiffs.

The deponent pleads that this Court should grant injunction orders against the defendants trespassing upon, or encroaching or otherwise dealing with the land occupied by the plaintiffs, at the Mwachambo Settlement Scheme.

The 2nd defendant swore a replying affidavit dated [perhaps erroneously] ***5th June, 2010*** and filed on ***6th July, 2010***. He avers that he held a prospecting right No. 6989 issued by the Mines and Geology Department, running for one year as from ***15th November, 2003;*** that he had been informed by the relevant Government office on ***4th October, 2004*** that his "Nineve" prospecting area in Mwatate Division overlapped with another existing title, and needed to be verified on the ground; that on ***13th January, 2009*** he re-pegged his "Nineve" Location using prospecting right No. 2009 issued at the Wundanyi Mines and Geology office, and running for one year as from ***18th April, 2008***; that he received from the Mines and Geology office in Nairobi, on ***21st January, 2009*** a letter informing him that the area he had applied for overlapped another existing title; that a ground verification exercise was conducted by the Department of Mines and Geology on ***6th*** and ***20th March, 2009***; that the deponent was advised on areas of overlap, and so he re-pegged his "Nineve" area and re-lodged his application on ***16th June, 2009***; that upon inquiry, the deponent was informed at the office of the Project Manager, Mwachambo Settlement Project that none of those in the squatter-settlement area had ***as yet*** been provided with a certificate of title, and that the area was still ***trust land***; that ***the deponent***, on ***16th June, 2009*** "submitted a letter to the Mines and Geology Department….informing the Commissioner that the land in question was still ***trust land*** and nobody could claim ownership"; that on ***9th December, 2009*** the deponent received a letter from the Commissioner of Mines and Geology informing him that his application had been approved by the Prospecting and Mining Licensing Committee of the Ministry on ***25th November, 2009***; that the deponent was thereafter issued with registration certificate No. 11735 for "Nineve" Location for one year with effect from ***13th January, 2009***; that the deponent renewed his registration certificate and was issued with renewal certificate No. 10493 until ***13th January, 2011***; that the deponent had written a letter of complaint to the Commissioner of Mines and Geology, on ***25th January, 2010*** regarding threats issued to him by 1st applicant herein; that the Commissioner of Mines and Geology informed the deponent "that in accordance [with] the law my application had priority….. and that he had conferred the rights to prospect….[upon] me"; that the deponent relied on security given by the OCS Wundanyi to enter the suit land and to erect his pegs there; that the deponent was subsequently served with the injunctive orders of this Court.

The deponent opposes the plaintiffs' application, and prays that he be "allowed to enter [his] registered mining location which was duly registered after following and satisfying all the requirements of the Department of Mines and Geology".

The 1st applicant swore a supplementary affidavit on ***16th July, 2010*** deponing as follows: the suit land is the ***only known home*** to the plaintiffs, who depend on it for farming and keeping animals, and they have a real interest and attachment to the same, "unlike 2nd defendant who, apart from the prospecting licence he is holding from 1st defendant, has no interest and is a stranger in the village"; the 2nd defendant's activities in the plaintiffs' farms and amidst the plaintiffs' family members, constitute nuisance and

intimidation, and 2nd defendant's excavations pose risks and dangers to the plaintiffs' families and livestock, on account of the wide and deep trenches being constructed all over the suit land; the plaintiffs, like other residents of Mwachambo Location, have legal and constitutional rights to reside on their lands and to derive a livelihood therefrom; the Government is not the owner of the lands in Mwachambo Location, neither does the Taita-Taveta County Council own the said lands, which are held ***in trust*** for residents such as the plaintiffs herein; Mwachambo Location has not been declared a mining zone, and any mining activities there will pose health risks to the lawful residents thereof; the entry of miners such as 2nd defendant upon the lands in Mwachambo Location, is an enforced activity which has not been the subject of any consultation with those in actual possession of the lands in question.

The deponent believes to be true the advice of his Advocate, that "the 1st defendant has no powers to decide matters pertaining to ***ownership of the land*** and should……[comply with] the legal procedures laid down before granting a prospecting licence"; that he also believes to be true his Advocate's advice, that "the prospecting licence to 2nd defendant…….is……..illegal and…..should be revoked"; that "since ***21st June, 2010*** 2nd defendant has trespassed into the plaintiffs' land and into their homes, in spite of the Court Order dated ***24th June, 2010***, ….with [the 2nd defendant's] men ranging between 16 to 20, [remaining] within the plaintiffs' home compound".

This Court found it fit, on ***24th June, 2010*** to grant the plaintiffs an ***interim injunction*** against the defendants, and on ***22nd July, 2010*** the 2nd defendant's ***Notice of Preliminary Objection*** (dated ***13th July, 2010***) was heard. That objection carried two elements; firstly, that, the plaintiffs' suit "is fatally defective as it offends the provisions of s.16 of chapter 40 and ss. 4, 6, 7 (1) (d) and 30 of Chapter 306 of the Laws of Kenya"; and secondly, "that the application herein is an abuse of the process of the Court". The 1st respondent was represented by learned counsel ***Ms. Kimeli***, 2nd respondent by learned counsel ***Mr. Waithera***, and the applicants by learned counsel ***Mr. Mwinzi***.

Learned counsel ***Mr. Waithera*** raised objection to both the plaintiffs' suit and application; he was placing reliance on ***s.16 of the Government proceedings Act*** (Cap. 40, Laws of Kenya) which he submitted to be the basis for the proposition that an ***order of injunction*** does not lie against the Government. Counsel invoked an extempore ruling in ***Dhanji Jadra Ranji v. Commissioner of Prisons and Attorney-General***, Nakuru HCCC No. 275 of 1998 in which the following passage appears:

"I have read Section16 of Cap.40, Laws of Kenya. I think what Section 16 says is that even where actions are brought against civil servants, whatever be the remedy sought, let it not be an injunction and, if it is asked for, especially against a Government Servant, it should not be granted against the public officer if the effect of the order would be to restrain the Government itself".

The learned Judge in that case (***Rimita, J***) believed his statement of the law to be supported by earlier decisions of the High Court: ***Nemu Investments Ltd. v. Jacob Motipei***, Nairobi (Milimani) HCCC No. 1275 of 1999; ***Rwigora Assinapol v. Commissioner of customs and Excise***, Nairobi HCCC No. 2786 of 1992. ***Rimita, J*** refused the injunctive order sought on the ground that "the order sought if granted against the Commissioner of Prisons will in effect be an order against the Government".

Mr. Waithera urged that since it was the Commissioner of Mines and Geology (1st defendant) who had issued the mining licence to 2nd defendant, the Court was powerless to make any orders regarding the mode of exercise of the ***privileges of that licence***. Indeed, learned counsel urged that the only aspect of the said licence amenable to challenge in Court was the ***manner of issuing the licence*** by 1st defendant – in which case the applicants could only proceed by way of ***judicial review***, to quash or sustain the ***procedure***.

Mr. Waithera raised a related point, which, however, was not part of the filed preliminary objection: that by ***s. 13A of the Government Proceedings Act*** (Cap. 40) the plaintiffs should have given 30 days' notice to the Attorney-General before filing suit. As ***Mr. Mwinzi*** objected to this new point, the Court made an extempore ruling, as follows:

"Learned counsel *Mr. Mwinzi* ***objects that*** *Mr. Waithera* ***in submitting on the preliminary objection, has extended his submission to something which was not in the notified terms of the objection.***

"My ruling is that a preliminary objection is an objection on a point of law. At all times the Court will take cognizance of relevant laws, and there is no requirement that all legal points in an intended preliminary objection must be announced beforehand. So long as the legal point is relevant and relates to the thrust of the objection, it may be raised without any prior ceremony".

Learned counsel urged that, by s.30 of the Government Proceedings Act, the Attorney-General is to be

made a party in any suit against a Department of Government; but in this case, the Attorney-General was not enjoined as a party. Counsel submitted that the suit was defective, incompetent, and stood to be struck out, for the procedural defects.

Counsel relied on a High Court decision (***Ang'awa, J.***), in ***David Njenga Ngugi v. The Attorney-General***, Nairobi HCCC No. 3874 of 1994, in which for the reasons given in the objection herein, a suit was struck out with an opportunity availed to the plaintiff "to begin his case afresh subject to the Limitation of Actions Act."

Mr. Waithera contended that the plaintiffs could not question the decision taken by the Commissioner of Mines and Geology (1st defendant), because by ***s. 4 of the Mining Act*** (Cap. 306, Laws of Kenya) all minerals in the country are vested in the Government, more particularly so where the mining site is ***not part of alienated land***. Counsel asked the Court to take judicial notice that the mining area in question is ***trust land***, and that the plaintiffs had no land-ownership rights.

Mr. Waithera submitted that any possible claims by the plaintiffs were limited to seeking reasonable compensation for any injury or damage such as they may incur due to the activities of the holder of mining rights, "but [they] cannot purport to prevent somebody from proceeding to mine with authority". Counsel urged, moreover, that "only a ***rightful owner*** can be compensated" – and he would not, apparently, regard the plaintiffs as "rightful owners". He relied on the Court of Appeal decision, ***Kasigau Ranching Ltd v. John Gitonga Kihara and Four Others***, Civil Application No. Nai. 105 of 1998, for the statement that, by s. 7 (1) (M) of the Mining Act "***private lands are excluded from prospecting and mining except with the consent of the owner***", but urged that the plaintiffs did not fall within the ambit of that provision.

Learned counsel submitted that s.11 of the Mining Act confers ***immunity*** upon the Commissioner of Mines and Geology, and no legal proceedings may be brought against the Commissioner exercising statutory authority in good faith.

Both counsel for the defendants submitted that the plaintiffs' suit and the application are incompetent and should be dismissed; though this was contested by learned counsel ***Mr. Mwinzi***, firstly, because only 2nd defendant had formally lodged a notice of preliminary objection.

Mr. Mwinzi urged that the suit against ***2nd defendant*** was proper in every respect: he had been sued in his ***personal capacity***; he was a trespasser; and 2nd defendant's advocate, ***Mr. Waithera***, therefore, could not purport to act for the Commissioner of Mines and Geology (1st defendant); 2nd defendant's counsel had not defended his client, but hat preferred to use his time defending the Commissioner. Counsel submitted: "What makes the suit bad as to the 1st defendant, does not apply to 2nd defendant…..The submissions made do not apply to 2nd defendant, and are not helpful to him".

On the objection based on s.16 of the Government Proceedings Act, ***Mr. Mwinzi*** submitted that the provision is only ***directory***, and so it does not stop the suit being heard on the merits. The relevant provision reads as follows:

"16. (1) In any civil proceedings by or against the Government the Court may….make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that –

(i) where in any proceedings against the government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties….."

The operative word ***may***, in the foregoing provision, counsel urged, meant that the suit was not rendered bad in law; s. 16 does not impose mandatory conditions upon the Court, and the Court may make appropriate orders for relief as merited.

Mr. Mwinzi submitted that the argument based on s.16 of the Government Proceedings Act was not proper material for a ***preliminary objection*** to proceedings before the Court: this is the position taken by the Court of Appeal in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*** [1969]EA. 696, in which the following passage (***Law***, J.A. at p.700) appears:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a plea that the parties are bound by the contract giving rise to the suit to refer the dispute to

arbitration."

Mr. Mwinzi contested the 2nd defendant's submission that the plaintiffs had not complied with the suit-notice requirement under s. 13A of the Government Proceedings Act – for the operation of the said notice requirement has an exception set out in s. 13A (3):

"The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the Court may, by virtue of proviso (i) to section 16(1), make an order declaratory of the right of the parties in lieu of an injunction."

Counsel urged that since the plaintiffs were coming to Court ***for a relief***, they fell within the exception set out in s.13A (3) of the Act: and therefore, s. 13A of the Government Proceedings Act does not limit the instant application. The overall effect, counsel submitted, was that neither s. 13A nor s.16 of the Government Proceedings Act made the plaintiffs' suit bad in law; and so the 2nd defendant's preliminary objection had not demolished the suit proceedings by raising critical points of law.

Counsel submitted that the application, in its full tenor and effect, was not about "mining operations", but about the ***rights of the plaintiffs;*** and the application has but one substantive prayer, about ***trespass***; and since the procedure of issuing a mining licence to 2nd defendant was not the object of the application, the ***judicial review*** law was inapplicable; only orders of injunction were being sought, and the matter was properly raised by Chamber Summons. Counsel distinguished the case, ***David Njenga Ngugi v. The Attorney-General***, upon which 2nd defendant had relied, urging that the notice requirement of s. 13A of the Government Proceedings Act was inapplicable in this instance.

On the competence of the Court to grant the orders sought, ***Mr. Mwinzi*** relied on this Court's decision (***Rawal, J***) in ***Royal Media v. Commissioner of Customs and Excise*** [2002] 2EA 576, in particular the holding (p.577) that:

"The Court has been given power to make any order which is appropriate under the Constitution. To uphold provisions of Acts of Parliament which bar the Court [from issuing] appropriate interlocutory orders would be an affront to the provisions of the Constitution, the rule of law, due process and powers of the Court to check and restrain abuse [of public power]."

The Court in the foregoing case, specifically in relation to s. 16 of the Government Proceedings Act, thus held (p.577):

"Section 16 of the Government Proceedings Act which is an Act of Parliament, cannot prevent a Constitutional Court from granting appropriate orders in appropriate cases."

Learned counsel made submissions on the terms of s. 12 (1) of the Government Proceedings Act, which provides:

"Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be."

He submitted that no proof had been shown that one cannot sue any Government officer if need be.

Mr. Mwinzi urged that the decision cited by ***Mr. Waithera*** for 2nd defendant, ***Kasigau Ranching Ltd v. John Gitonga Kihara and Four Others***, Civil Application No. Nai. 105 of 1998, in fact stood more in support of the applicants' case: it was there held that the defendants' prospecting licence which had expired, placed them in the position of ***trespassers***, and they must depart with their wares; and in the instant case 2nd defendant was ***trespassing*** on the plaintiffs' land – for there was ***no agreement*** to allow him to be on that land, with his equipment, wares and workers.

On this question of lack of ***agreement*** for 2nd defendant to be on the suit land, that defendant alludes to the ***nature of land-holding*** when he contends that the plaintiffs have no indicia of ownership and so, he has no duty to secure their agreement; that his only obligation is to talk to the local County Council which is the titular holder of the said land, in ***trust*** for the local inhabitants.

Mr. Mwinzi submitted that neither the Government nor the local Council was the ***owner*** of the suit land; the Council holds the land for the benefit of the people; and "the persons on the land are the beneficiaries of the land"; those ordinarily resident on the land are the "real owners"; and so, "the plaintiffs have rights and interests that cannot be wished away".

Learned counsel sought to bring such property interests within the terms of the [1969] Constitution then in force (s.75); but the same principle is found in the ***Constitution of Kenya, 2010*** which was subsequently promulgated (on ***27th August, 2010***); the relevant provisions are set out under Article 40, as follows:

"(1) Subject to Article 65 [on land-holding by citizens of foreign countries], every person has the right,

either individually or in association with others, to acquire and own property –
(a) of any description; and
(b) in any part of Kenya.
"(2) Parliament shall not enact a law that permits the state or any person –
(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4)."

For the full tenor and effect of the property-rights guarantee made in Article 40 (1) and (2), reference is to be made to the content of Article 27(4) which outlaws deprivation of property on the basis of specified discriminatory yardstics; Article 27(4) thus provides:

"The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth".

By Article 40(3) –

"The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –
……….
(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that ?
(i) requires prompt payment in full, of just compensation to the person; and
(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law."

The foregoing provisions shed new light on ***Mr. Mwinzi's*** submissions, and on the contentions of the plaintiffs regarding the "description" of the property which they claim; the "interest" in land which they claim; the "right" in land which they claim.

Learned counsel urged: "Those people [the plaintiffs] may not have title deeds; but they have rights and interests; the plaintiffs have a right over the land; they have an interest; their rights are protected; to hold otherwise would mean that the majority of the population of Kenya holding land in the rural areas are trespassers."

Counsel sought to validate his argument by citing s. 69 of the Trust Land Act (Cap. 288, Laws of Kenya), which thus provides:

"In respect of the occupation, use, control, inheritance, succession and disposal of any trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof, in so far as such rights are not repugnant to any of the provisions of this Act, or to any rules made thereunder, or to the provisions of any other law for the time being in force".

On the basis of the foregoing provisions, ***Mr. Mwinzi*** submitted that the rights of residents such as the plaintiffs herein, were recognised by the statute law and could not be denied by the defendants. By ss.7, 8, 9 and 13 of the Trust Land Act, a detailed procedure is set out to regulate those situations in which ***trust land*** in the occupation of residents is taken: ***inter alia***, the local council is to publish a Gazette notice (s. 7(1)); and compensation is to be paid to those affected (ss 7(2), (3), (4); 8). Counsel submitted that none of such procedures had been followed by the defendants herein: the plaintiffs "only found themselves being caused to move, for 2nd defendant to come and get on with the mining". Counsel relied on residence and property photographs annexed to the supporting affidavit, as showing the nature and extent of the plaintiffs' interests on the suit land; and urged that the Constitution's ***fundamental-rights guarantees*** protected the plaintiffs' rights and interests.

Counsel submitted that the Mining Act (Cap. 306, Laws of Kenya) did recognize that a suit such as the instant one may be lodged; s.67 of that Act provides:

"Nothing in this Part contained shall be deemed to prevent any person from instituting in any court of law any proceedings he may think fit to institute, as provided by law….."

Counsel submitted that 2nd defendant was wrongly using a prospecting licence to encroach, trespass upon, and injure the rights and interests of the plaintiffs; that it had not been shown that the suit was improperly before the Court; and that, consequently, the application by the plaintiffs should be heard. Counsel

submitted that the apparent object of the preliminary objection was to terminate a worthwhile suit, and the objection should be refused.
Learned counsel ***Ms. Kimeli*** returned to s.13A of the Government Proceedings Act, and urged that the suit be terminated as it did not comply with that section regarding service of notice.
Ms. Kimeli submitted that the plaintiffs, not having "***exclusive ownership***" of the suit lands, could not sue in trespass; in her submission: "The plaintiffs say the land is a settlement scheme, but they give no evidence of ownership". Counsel also maintained that an injunction could not be granted against the Government.
In this elaborate and much-contested preliminary objection, the challenge is to both the plaintiffs' Chamber Summons application of ***17th June, 2010*** and the suit by plaint bearing that same date.
The suit is against, firstly, the Commissioner of Mines and Geology; and secondly, against one ***Daniel Muturi Kimani*** who, by virtue of an authorisation given by 1st defendant, is claiming to have the right to enter lands occupied and depended upon by the plaintiffs, and to launch extensive mining operations thereon. Against 2nd defendant, there are certainly substantial claims of merit; but against 1st defendant, the questions before the Court at this stage are mainly questions of technicalities.
One of the plantiffs' prayers in the main suit, seeks injunctive relief to protect their property rights in the form of their properly-secured and effectively-occupied ***family homes***. In the run-up to the determination of that question after the full hearing, the plaintiffs seek interim protection for their homesteads, as set up on the suit lands.
Is it the case that the plaintiffs lack ***locus standi*** to come before the Court, making such prayers?
The preliminary objections raised herein must be resolved not in the traditional mode, of assessing the compliance of a suit with standing statutory technicalities, such as those set out in ss. 13A and 16 of the Government Proceedings Act. The judicial task has since the ***22nd*** and ***23rd July, 2010*** when the matter was heard, come to a compelling turning point, with the promulgation of the ***Constitution of Kenya, 2010*** on ***27th August, 2010***, which dictates [Sixth Schedule, clause 7(1)] that –
"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".
So, a new obligation is placed upon the Judge who, though beginning from the established judicial practice and the known principles of interpretation, must assess any cause coming up before him or her in relation to the imperative terms of the new Constitution.
For the foregoing reason, the Court must rethink ***the relationship between the old statute law and the requirements of the new Constitution***; the Court must reconsider some of the authorities cited by the parties: as for example, the High Court's decision in ***Dhanji Jadra Ranji v. Commissioner of Prisons and Attorney-General***, Nakuru HCCC No. 275 of 1998. There will, therefore, be no pre-ordained path that must lead to the termination of the suit and the application now before the Court, just on the strength of the technical objections being raised for the defendants.
I take judicial notice that the ***Constitution of Kenya, 2010*** is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially ***programme documents*** for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the ***adjudication of disputes by the Judiciary***. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the ***Constitution of Kenya, 2010***.
Article 159(2) of the new Constitution thus provides:
"***In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***
(a) justice shall be done to all, irrespective of status;
…………………………
(d) justice shall be administered without undue regard to procedural technicalities;
………………………
(e) the purpose and principles of this Constitution shall be protected and promoted."
What are those "***purposes and principles***"? They are set out in ***Article 10***, under the heading "National Values and Principles of Governance", which "bind all state organs, State officers, public officers and all persons whenever any of them….(a) applies or interprets this Constitution; (b) enacts, applies or

interprets any law; or (c) makes or implements public policy decisions". It is declared that (Art. 10(2)):
"The national values and principles of governance include –
(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
(c) good governance, integrity, transparency and accountability…."
It is against this background of overriding law, that the justiciability of the plaintiffs' case is to be assessed at this threshold stage. Is it true, as both defendants urge, that the suit and the application have no legal basis, or are untenable and must be dismissed ***in limine***? Although such a fate was urged to be inevitable by both learned counsel ***Mr. Waithera*** and ***Ms. Kimeli***, their case was founded exclusively on the technicalities of the ***old law***: of ss. 4, 7 and 11 of the Mining Act (Cap. 306, Laws of Kenya); these provisions, in declaratory fashion, confer powers on those in Government office to claim ownership of all minerals, and to dispense at their discretion, all the mining rights. It is not, however, apparent today, that such provisions can be said to be an exception to the principles of ***good governance*** ordained by the new Constitution – even though they be endorsed by case law of the past (for instance, ***Kasigau Ranching Ltd. v. John Gitonga Kihara and Four Others***, Civil Application No. Nai. 105 of 1998).
The fact of there being existing authority endorsing the "pre-Constitution" apprehension of the law, will dictate that a dependable professional establishment should begin to collate all ***decisions of the superior courts***, particularly those of the Court of Appeal, for the purpose of reconsideration and new directions, in view of the functioning of the law relating to precedent.
On the basis of the affidavit evidence, ***Mr. Mwinzi*** urged that the plaintiffs, even though they were not bearing formal documents of title, had the ***most practical indicia of ownership***, in the sense of living their lives, for many years, in homesteads constructed and fenced on the suit land, earning their entire livelihood therefrom. Counsel was, in my opinion, able to demonstrate cogently that, by the terms of the ***Trust Land Act*** (Cap. 288, Laws of Kenya), the plaintiffs must be regarded as the ***de facto*** owners of the suit land; it appears to me, from the evidence, that the availing of documents of title to the plaintiffs for the lands they occupy, is but a ***formality*** – for in substance, they are the owners. Can such lands be arbitrarily claimed by the Commissioner of Mines and Geology, and thereafter disposed of just as he chooses, introducing to these lands miners of his choice, and these miners then enter the land, disrupt the social lives of the resident families, and dig up the ground prospecting for minerals, in the process actually taking over those lands without the consent of the lawful occupants?
As a matter of law, learned counsel, ***Mr. Mwinzi*** raised a weighty point, justifying the plaintiffs' action, which neither counsel for the defendants effectively met: the ***de facto*** owners of the suit land were the plaintiffs; ***nobody had a better title than they have***.
Since, formally, the land in question was ***trust land*** at the material time, it was still protected under the Constitution of Kenya, 2010, as ***community land***; such land, by Article 63(1) of the Constitution,
"shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest".
Land in such a category, by Article 63(3) of the Constitution –
"shall be held in trust by county governments on behalf of the communities for which it is held".
The position of the defendants on the question of entitlement to the suit land, by the plaintiffs, cannot be upheld for another reason: ***possession***. In the learned work of Professor ***Kevin Gray*** and ***Susan F. Gray***, ***Elements of Land Law***, 5th ed.(OUP) the special character of ***possessory interests***, which entitles such interests to the law's direct protection, is clearly stated (at p. 152):
"The protection accorded raw possession expresses a strong sense of respect for what one finds on the ground. The large social interest in preserving the peace and good order of the status quo comprises a subliminal theme which extends throughout the entire range of property law. On this pragmatic view the avoidance of socially harmful disruption has been deemed to justify the compromise between fact and entitlement which was implicit in the historic law of adverse possession. Sustained possession has long served as the strongest evidence of ownership of an estate in land."
Against this background, I hold that the entitlement to the suit land attaches to ***the plaintiffs***; and I must then come to the conclusion that the first defendant had no right, in law and on constitutional principle, to assume disposal powers over the suit land, and to assign the same for any purpose whatsoever, to 2nd defendant.
I hold, besides, that the statute law upon which 1st defendant purported to rely, gave him no authority to

exercise an ***exproprietory power*** over the plaintiffs' lands. It follows that 2nd defendant who poses as the beneficiary of such unconstitutional confiscation, is devoid of any title whatsoever and is, in fact, a trespasser. The 2nd defendant's continued trespass is a violation of the plaintiffs' constitutional rights, and a cause of grievance in respect of which both the suit and the application of ***17th June, 2010*** have been validly brought.
I dismiss the 2nd respondent's preliminary objection with costs to the plaintiffs.

DATED and **DELIVERED** at **MOMBASA** this ***26th*** day of ***November, 2010***.

J. B. OJWANG
JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Plaintiffs/Applicants: ***Mr. Mwinzi***
For the 1st Defendant/Respondent: ***Ms. Kimeli***
For the 2nd Defendant/Respondent: ***Mr. Waithera***