



Peter v Cabinet Secretary, Ministry of Petroleum and Mining & 7 others (Environment & Land Petition 24 of 2021) [2022] KEELC 14957 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14957 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 24 OF 2021
NA MATHEKA, J
NOVEMBER 22, 2022

BETWEEN

JAMES KYALO PETER PETITIONER

AND

CABINET SECRETARY, MINISTRY OF PETROLEUM AND MINING 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT 2ND RESPONDENT

DAVID I MUREBU, REGIONAL MINES OFFICER, TAITATAVETA 3RD RESPONDENT

DAMARIS KIMONDO, DEPUTY COUNTY COMMISSIONER, MWATATE SUB-COUNTY 4TH RESPONDENT

GLADWELL WANGUI KINYANJUI 5TH RESPONDENT

MOSES KINYANJUI WANJIRU 6TH RESPONDENT

ELIZABETH WANJIRU KINNJUI 7TH RESPONDENT

BARAKA MINING AND MINERALS LTD 8TH RESPONDENT

RULING

1. The application is dated April 29, 2021 and is brought under rules 4, 13 and 23 of the [*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure rules*](#) seeking the following orders;

1. That this honourable court be pleased to certify the application herein as urgent and service be dispensed with in the first instant.



2. That this honourable court be pleased to issue a conservatory order staying the enforcement of the 1st to 4th respondents impugned decisions as contained in the letters dated December 10, 2020 and February 8, 2021 and restraining the 5th to 8th respondents either by themselves, their agents, servants or employees, in any way from trespassing/entering into, mining, allocating to third parties or interfering in any manner with the petitioner's exclusive mining area known as location No MP/ 2018/0241 within Mwatate Sub-County as contained in the agreement entered on October 27, 2020, between the petitioner and the 5th to 8th respondents until determination of this application.
 3. That this honourable court be pleased to issue a conservatory order staying the enforcement of the 1st to 4th respondents impugned decisions as contained in the letters dated December 10, 2020 and February 8, 2021 and restraining the 5th to 8th respondents either by themselves, their agents, servants or employees, in any way from trespassing/entering into, mining, allocating to third parties or interfering in any manner with the petitioner's exclusive mining area known as location No MP/ 2018/0241 within Mwatate Sub-County as contained in the agreement entered on October 27, 2020 between the Petitioner and the 5th to 8th respondents until determination of the petition filed herewith.
 4. That this honourable court be pleased to grant any other or further orders as it may deem fit to further the ends of justice.
 5. That the costs of this application be borne by the Respondents jointly and severally.
2. It is based on the grounds that the petitioner is a member of Mwatate Small Scale Miners Self Help Group, and he is engage in mining at a delineated area known as No MP/ 2018/0241, Mwatate in Taita Taveta County. The petitioner is affected by the actions of the respondents and in particular the impugned decisions made by the 3rd and 4th respondents in respect to the mining area known as No MP/ 2018/0244, which decision have been made to extent to the petitioner's mining area, which are to different locations as such the said actions by the respondents are not only unlawful, but also *ultra vires*, unreasonable and unwarranted and indeed interfere with the freedom of contract espoused under the law, hence meddling into private citizenry matters. The petitioner herein is a prospective miner in mining of gemstone except diamond within delineated area known as No MP/ 2018/2041 measuring 0.5043Km² and more in particular as stated in the agreement entered between the petitioner and the 5th to 8th respondents who are the owner of the mining location No MP/ 2018/0241, Mwatate Sub-County in Taita Taveta County and the aforesaid Self- Help Group holds the mining licenses and permits over the aforesaid mining area No MP/ 2018/0241 amongst others. The decision by the respondents to order for the forcible eviction is not only illegal but also mala fides as it is aimed at using the uncouth method to drive the petitioner out of his business after many years of toiling in the said mines and on discovery of Tsavorite in his mining. On December 21, 2021 the petitioner wrote to the 1st respondent complaining of the harassment meted on him by the 3rd respondent and the eminent danger of eviction, which letter was not responded to.
4. On January 18, 2021 the 5th respondent through the 8th respondent wrote a letter to him entitled to vacate and cease illegal mining in location No MP/ 2018/0244 and further gave me 14 days to vacate the mining area, however no relationship whatsoever related to the cited location hence the intention is to illegally force him out of his mining area being No MP2018/0241. On February 2, 2021 he received a letter from the 6th respondent which letter was in response to the 5th respondent's one date January 18, 2021 and whose effect was that it was legally on his mining site and the same showed the choreographed infighting in the running and management of the 8th respondent's affairs, which he is not part of. The



1st to 4th respondents are being used by the 5th to 8th respondents to threaten to evict the petitioner from leased mining area known as No MP/2018/0241 using illegal processes.

5. The petitioner herein reported the eviction threats to Mwatate Police Station and to the 2nd respondent but to date the petitioners has not received any assistance and or feedback on the investigations of the same. Despite the petitioner having made numerous appeals to the 2nd respondent to stop the eviction, the 2nd respondent vide the Regional Mines Officer issued the petitioner with a notice to vacate mining location Number MP/2018/0244, which mining location if different from that of the petitioner. The 2nd respondent vide the 4th respondent invited the petitioner amongst other miners and landlords for a consultative meeting on February 22, 2021 for purposes of resolving the existing dispute having suspended all mining activities on suit location. However, no consensus was reached by the petitioner and the 1st respondent. The and 4th respondents suspension of mining activities within the entire locality has disrupted the mining activities of the petitioner and hence his livelihood and to those who depend on his employment.
6. The 5th - 8th respondents here in have threatened to and further trespassed upon the petitioner's area of mining thus disrupting the mining activities therefrom which trespass has caused the mining activities of the petitioner to be suspended thus occasion suffering and loss upon the petitioners. The petitioner rights are being infringed upon and if this honorable court does not intervene the respondents are willing and determined to continue violating the rights of the petitioner.

1st to 4th respondents stated that Baraka Mining and Minerals Limited (the 8th respondent) is the owner of mining permits number MP/2018/0241 and MP/2018/0244. Copies of the mining permits are annexed herewith and marked DIM 1 (a) and (b). That the mining permits confer upon the 8th respondent exclusive rights to carry out mining operations in the area specified in the permits No 30 MP/2018/0241 and MP/2018/0244. That vide a letter dated 9th Dec 2020 the they received a complaint that trespassers had encroached on the 8th respondent's mining location and were carrying out mining activities without consent from the 8th respondent. A copy of the letter dated December 9, 2020 is annexed herewith and marked as DIM 2. That they replied to 8th respondent's letter dated December 9, 2021 vide a letter dated December 10, 2020. A copy of the letter dated December 10, 2020 is annexed herewith and marked as DIM 3. That vide the letter dated December 10, 2020 they informed the 8th respondent that he will visit the said mining area, ascertain the illegalities complained about and take the necessary actions to remedy the situation. That they directed all mining activities on MP/2018/0244 to be stopped pending the settlement of the complaint. That they are aware that the 8th respondent issued notice to vacate and cease illegal mining activities in location No MP/2018/0244 vide letters dated 18th { January 10, 2021. Letters dated January 18, 2021 are marked as a bundle DIM 4. That I visited the mining location, the subject of this proceeding, and established that it fell within the are covered by mining permit No MP/2018/0244. That the petitioner's mining activities are situated in an area covered by mining permit number MP/2018/0244 and not MP/2018/0241 as stated in the agreement dated October 27, 2020. That they explained to the illegal miners on site that they were mining contrary to 20 the provisions of the *Mining Act* and requested them to vacate the mines. That the illegal miners vacated the mine peacefully but went back to the mine before settlement of the complaint. That they wrote a letter dated February 3, 2021 directing all the illegal miners to cease mining activities and vacate the subject land or face forceful eviction. A copy of the letter dated February 3, 2021 is annexed herewith and marked DIM.

7. That on March 19, 2021 Baraka Mining Company Limited held a meeting with the illegal miners (local investors) and entered into an agreement with them. The agreement, duration was 3 years with effect from March 19, 2021 to March 19, 2024. A copy of the minutes of the meeting held on March 19, 2021 is annexed and marked DIM 6.



That the petitioner herein did not enter into an agreement with the 8th respondent covering the mining operations, the subject matter of this suit, within the mining location covered by mining permit No MP/2018/0244. That grant of the orders sought will violate the 8th respondent's exclusive rights to carry out mining operations in the area specified in the mining permit No MP/2018/0244 and allow the petitioner to continue illegal mining activities contrary to section 201 of the Mining Act No 12 of 2016. That the Petitioner failed to discharge the burden of proof, set out in section 214 of the Mining Act No 12 of 2016, he has failed to prove that he is the holder of a mineral right, or the holder of a licence or permit granted under the Mining Act No 12 of 2016, or is otherwise authorized to engage in mineral dealings, to warrant grant of the orders sought. That the application and petition dated April 29, 2021 ought to be dismissed with costs.

8. This court has considered the application and submissions therein. In respect of the instant application, I find that the sole issue for my determination is whether the applicant has met the threshold for grant of conservatory orders. This threshold was established by the Supreme Court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* (2014) eKLR as follows:

(86) “Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”.

9. The starting point is to determine whether the applicant has established a *prima facie* case with a likelihood of success. In the case of *Centre for Rights Education and Awareness (Creaw) & 7 Others vs Attorney General* (2011) eKLR it was held that:

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

10. When a court is called upon to determine whether a *prima facie* case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the applicant has put forward a case that is arguable and not frivolous. The petitioner stated that he is a member of Mwatate Small Scale Miners Self Help Group, and he is engage in mining at a delineated area known as No MP/ 2018/0241, Mwatate in Taita Taveta County. The petitioner is affected by the actions of the respondents and in particular the impugned decisions made by the 3rd and 4th respondents in respect to the mining area known as No MP/ 2018/0244, which decision have been made to extent to the Petitioner’s mining area, which are to different locations. The plaintiff has not produced any mining licence in court. What he has is a lease agreement permitting him to mine at a location known as No MP/ 2018/0241. He has not adduced any document allowing him to be mining on No MP/



2018/0244. For these reasons I find that the applicant has not established a *prima facie* case to warrant the interim orders sought. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22TH DAY OF NOVEMBER 2022.

N.A. MATHEKA

JUDGE

