REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PET. NO. 39 OF 2019

BETWEEN

PETER NZEKI & 14 OTHERS.....PETITIONERS

AND

BASE TITANIUM LIMITED & 4 OTHERS.....RESPONDENTS

JUDGMENT

PETITIONERS' CASE

1. By a petition dated 19th September, 2019 and filed on 24th September, 2019, the petitioners are seeking the following orders:

a) A conservatory order restraining the 1st respondent from engaging in any mining activities so as to halt the 1st respondent from causing further harm to and perpetuating further victimization of the petitioners until a time that a comprehensive compensation package that takes into account past harms caused by the 1st respondent to the petitioners and the quantum of the value of all the petitioners' land and assets on the land is negotiated by the two parties through a consultative and fair process.

b) Conservatory order restraining the 1st respondent from paying any form of compensation to the petitioners without involving the petitioners and their families and all the relevant stakeholders; the petitioners to be involved in developing, negotiating and agreeing on a comprehensive resettlement plan by the 1st respondent.

c) A declaration that the continued mining activities by the 1st respondent in Nguluku area of Kwale while the petitioners are still residing there and without giving the petitioners any form of compensation for the disturbance is illegal, irregular and is in contravention of Article 40 of the Constitution of Kenya as read together with Section 153 of the Mining Act.

d) A declaration that any planned eviction of the petitioners and their families before a considerable compensation that is amenable to the petitioners and their families is paid out by the 1st respondent is illegal, irregular, unprocedural and contrary to Article 28, Article 40, article 47 of the constitution of the Republic of Kenya and is therefore null and void.

e) An order for independent valuation report to be carried out by impartial agricultural, environment and land valuer to ascertain the value of the land and assets on the land belonging to the Nguluku farmers and Nora farmers before determining the value of compensation to be paid out to the petitioners and their families for the loss and inconvenience caused by the 1st respondent's mining activities.

f) A declaration that the petitioner's rights under Article 42 and Article 43 of the Constitution of Kenya have been greatly violated by the 1st respondent for all the years the 1st respondent has been prospecting and mining in Nguluku area of Kwale County.

g) A declaration that the 1st respondent must adequately compensate the petitioners and their families as stipulated under Article 153 (9) of the Mining Act to enable them move from the mining zone of Nguluku area.

h) A declaration that the petitioners herein are entitled to the full protection from discrimination and the same right has been violated through unprocedural relocation of some members of Nguluku by the 1st respondent leaving the petitioners out.

h) A declaration that as a result of the breach of rights enumerated above, the petitioners suffered damages, pain and suffering for a period of over 5 years.

j) An order for compensation as enshrined and provided under Article 23 (e) of the Constitution of Kenya made up of damages for destruction of the petitioners means of livelihood, social ties, general damages and exemplary damages pursuant to the declaration made above.

k) Costs of this petition be borne by the respondents.

l) Any other relief that this honourable court may deem fit.

2. In support of the petition, the petitioners filed a supporting affidavit sworn by Peter Nzeki on 9th September, 2019. The petitioners aver that they are residents of Nguluku area within the County of Kwale and have been affected by the mining activities of the 1st respondent which was licensed by the Government of Kenya through the 2nd respondent vide **Special Mining Lease No.23; License PL/2018/0119** area of 88KM^2. The petition is premised on Articles 20, 21, 22 and 23 of the Constitution of Kenya, 2010 and alleges violation of various rights under the Constitution under Articles 10, 27, 29, 40, 42, 43 and 47 of the Constitution and the Mining Act. It is the petitioners' case that the 1st Respondent relocated several families in Nguluku area but discriminately left out the petitioners and their families from any form of compensation.

3. Before the hearing of the petition, the 7th 11th and 13th petitioners filed an application dated 29th September, 2020 seeking to withdraw their suit against the respondents on the grounds that they were coerced into filing the suit and therefore the petition was filed without their authority. Since none of the parties were opposed to the said application, the 7th, 11th and 13th petitioner s were allowed to withdraw the case against the respondents, save for the issue of costs which is to be determined in this judgment.

4. In her submissions, Ms. Mwenja, counsel for the petitioners submitted that the petitioners who are residents of Nguluku area, have lived in thereon for several years. That the 1st respondent through the 2nd respondent acquired a mining license through a special mining lease and being enabled by the other respondents, the 1st respondent has continued to mine and prospect titanium within Nguluku area in total disregard of the petitioners rights guaranteed under the constitution and Section 153 of the Mining Act that requires the holder of a mineral right not to commence mining unless the owner or user of the land is compensated. It is the petitioners' submissions that their constitutional rights under Article 42 and 43 of the constitution have been violated as enumerated in the petition. It is their contention that as a community, they are experiencing dire socio-economic conditions in regard to access to food, shelter and water among others. The petitioners allege that they have engaged the respondents on resettlement or mitigation of the adverse effects caused by the mining activities, but the respondents have refused and/or neglected to take the necessary action. The petitioners further submitted that the respondents have discriminated them by relocating some members of the Nguluku area, leaving out the petitioners, hence a violation of the provisions of Article 27(1) of the constitution. The petitioners also cited Sections 44, 109 (1), 42 and 153 of the Mining Act, and Articles 67 and 23 of the Constitution and submitted that they are entitled to the prayers sought in the petition. The petitioners counsel relied on the case of **Judicial Service Commission –v- Mbalu Mutava & Another (2015) eKLR; Occupiers of 51 Olivia Road, Berea Township**, And **197 Main Street, Johannesburg –v- City of Johannesburg (2008) ZACCI as relied in the case of Sactrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others; and KM & 9 Others –v- AG & 7 Others (2020)eKLR**.

RESPONSE BY 1ST RESPONDENT

5. In response to the petition, the 1st respondent filed their defence to the petition dated 11th October, 2019. The 1st respondent admits that it is a holder of mining rights under the provisions of the Mining Act No.12 of 2016, which mining rights include a Special Mining Lease No.23. The 1st respondent states that it was a statutory requirement under Section 4 of the Mining Act Cap 306 Laws of Kenya (now repealed) that the Special Mining Lease could only be granted by the Government to the 1st Respondent to exercise its mining rights thereunder, upon the land vested in the Government. That in the premises, all the land within the Special Mining Lease was at all material times vested in the Government of Kenya by law by 2004. The 1st respondent contends that the petitioners have no valid legal rights over the said piece of land capable of being protected or enforced by this court against the 1st respondent as alleged or at all. The 1st respondent states that the petitioners have no valid cause of action against the 1st respondent for compensation and resettlement in relation to the land covered or incorporated in the said Special Mining Lease and that the claims made herein by the petitioners are misconceived and do not lie.

6. The 1st respondent further states that the petitioners' claim herein in so far as they relate to compensation and resettlement arising from the grant of the said special mining lease to the 1st respondent are res judicata and the court has no jurisdiction to determine the said issues of matters which were directly or substantially in issue and finally conclusively determined in the ruling and judgment in the former suit being Constitutional Petition No. 613 of 2006 **Rodgers Mwema Nzioka –v- The Attorney General & 10 Others**. The 1st respondent states that the petitioners are estopped or precluded from making compensation and resettlement claims as in terms of the said judgment, all persons affected by the acquisition of land for the Special Mining Lease and who were entitled to compensation by law were to be identified through a legal process set in motion by the Government of Kenya, and those persons included legitimate land owners and occupiers or squatters in the area, and the petitioners herein were not identified and/or did not quality as parties entitled to the said compensation. That any party who was aggrieved by that Government exercise or process had a right to petition the Government and or the court and seek necessary or appropriate reliefs in the same manner as the petitioners in Petition No.613 of 2006, and/or to be enjoined as a party in that case. The petitioners are also accused of failing to comply and exhaust the legal process established under the Mining Act for resolving claims. It is further stated that the petitioners are estopped and precluded from claiming that they own the said land as community land in the face of their own admission that Kwale International Sugar Company Limited is the proprietor, as lessee, of the said piece of land. That the petitioners have no proprietary interests or rights over the said piece of land until such time as their claim for adverse possession, if any, is lodged and adjudicated upon by the court. That in the premises, the petitioners are trespassers on the said piece of land and lack the legal capacity or legal right to institute the present claims against the 1st respondent as pleaded or at all. That in terms of the provisions of the Mining Act No. 12 of 2016, the petitioners have no legal right to stop or interfere with the 1st respondent's exercise of its mining operations while pursuing

their claims for compensation. It is further stated that the petitioners' claim for compensation on the basis of the judgment in Mombasa HCCC No. 97 of 2001 are misconceived because the said case was brought three years prior to the vesting of the land in the Government as a condition precedent before the grant of the special mining lease. That pursuant to the above condition precedent, all compensation and resettlement claims by the owners and occupants of the said parcels of land were duly processed and paid by the Government in accordance with the law before the land was vested in the Government, which vesting extinguished all the rights of the then land owners of occupiers.

7. Mr. Oyatsi, learned counsel for the 1st respondent submitted that the petition is not signed by the petitioners themselves and therefore invalid. He argued that the petitioners had not given their consent and made reference to the three petitioners who have withdrawn their case because they stated that they were not aware of it. He urged the court to dismiss the petition and order that costs be paid by the petitioners advocate in person. The 1st respondent's submission is that no constitutional rights of the petitioners have been violated by the respondents because the petitioners themselves admit that they do not have land rights on the area any they occupy, which land is owned by an entity known as Kwale Sugar International Limited which is the lease owner and which has not been enjoined to the suit, even as an interested party. It is the 1st respondent's submissions that if compensation were to be made, it ought to be made to Kwale Sugar International Limited. It is submitted that the petition does not disclose a cause of action known in law, is an abuse of the court process and ought to be dismissed with costs.

RESPONSE BY 2ND, 3RD AND 5TH RESPONDENTS

8. The 2nd, 3rd and 5th respondents responded to the petition through the replying affidavit of Raymond M. Mutiso sworn on 14th November, 2019. He has sworn that all the land owners of the initial mining lease area as defined in the Special Mining Lease area at the date of issue on 6th July, 2004 and in the subsequent area variations up to and including variation done on 5th April 2012 had all been compensated in full. That in 2018, the 1st respondent applied for an area expansion/variation of the Special Mining Lease Area to include adjacent portions of mineralized areas as well as additional areas required for mining facilities and operations. That part of the portions required for extension falls within Nguluku Village where a total of 52 households/landowners are affected and have been earmarked for compensation and/or have been compensated. That so far, no dispute on compensation has been referred to the Cabinet Secretary for arbitration as per Section 155 (e) of the Mining Act, 2016 where after any person aggrieved by any decree, order or decision made or given under the powers vested in the Cabinet Secretary may then proceed to appeal to the High Court within 30 days. Mr. Opio, learned counsel for the 2nd, 3rd and 5th respondents submitted that the compensation process has successfully been undertaken where all the petitioners herein have been compensated, save for the 1st, 3rd and 11th petitioners who have not accepted the compensation. It was therefore submitted that the 2nd and 3rd respondents have discharged their duties and as such the petitioners have no claim against them.

ANALYSIS AND DETERMINATION

9. I have considered the petition, the responses made and the rival submissions. The issues falling for determination are:

i. Whether the petition meets the threshold of constitutional petition and/or raises any constitutional issues.

ii. Whether the petitioners are entitled to the prayers sought in the petition.

iii. What orders should be made with regard to the petition?

10. First, I should begin with a potentially dispositive procedural matter raised by Mr. Oyatsi for the 1st respondent that the petition must fail because it is signed by the advocate for the petitioners and not signed by the petitioners themselves. I have perused the petition dated 19th September 2019. It is clear that the same is signed by Ms Wacu Mwenja & Co. Advocates for the petitioners. I have also perused the supporting affidavit sworn by Peter Nzeki on 9th September, 2019. In paragraph 2 of the said affidavit, Peter Nzeki has stated that he has the authority to swear the same on behalf of the petitioners and their families in the petition and has annexed a list marked "PN1". I have perused annexture "PW1" which has a list of sixteen names. It is clear that only eight of the named persons have appended their signatures. It is quite clear that the rest of the persons named in the list marked as annexture "PN1", in particular numbers 7, 8, 9, 12, 13, 14,15 and 16 did not append their signatures on the said document. It is therefore doubtful whether Peter Nzeki had the authority of the petitioners who did not append their signatures on the alleged authority as alleged in the affidavit in support of the petition. The court is in agreement with the submission by Mr. Oyatsi for 1st Respondent that that makes the petition invalid.

11. I will now turn to the other substantive issues. In order to appreciate the issues raised in the petition, one has to go through all the paragraphs in the petition. What I can deduce from the pleadings is the issue of compensation pursuant to the provisions of the Mining Act No.12 of 2016. The Act has not only defined what are minerals, but contains the entire legislation regulating the use of mineral resources in Kenya, including mineral rights, land surface rights, compensation and resolution of disputes arising thereunder. Section 153 of the Mining Act provides as follows:

153. Principles of compensation

(1) where the exercise of the rights conferred by a mineral right-

a. Disturbs or deprives the owner or any lawful occupier or user of the land or part of the land;

b. Causes loss of or damage to buildings and other immovable property;

c. Causes damage to the water table or deprives the owner of water supply;

d. In the case of land under cultivation or grazing of domesticated animals, causes any loss of earnings or sustenance suffered by the owner or lawful occupier of the land;

e. A demand or claim for compensation may be made to the holder of the mineral right to pay prompt, adequate and fair compensation to the lawful owner, occupier or user of the land in accordance with the provisions of this Act.

(2) A mineral right holder shall deposit a compensation guarantee bond with the relevant ministry.

(3) The cabinet secretary may make regulations relating to compensation guarantee bonds.

(4) A person shall not demand or claim compensation whether under this Act or otherwise-

a. In consideration for permitting entry to the land connected with the enjoyment of rights conferred under a mineral right;

b. In respect of the value of any mineral in, on or under the land that is the subject of a mineral right; or

c. For any loss or damage for which compensation cannot be assessed according to legal principles.

(5) Where a demand or claim for compensation is disputed, the parties to the dispute shall seek to resolve the disputes amicably by agreement reached through negotiations in good faith.

(6) Where a dispute cannot be resolved through negotiations within a reasonable period of time, either party to the dispute may refer the matter to the Cabinet Secretary for a determination in accordance with Section 129 of this Act.

(7) A holder of mineral right shall not commence mining of minerals unless the lawful occupier, owner or user of land is compensated.

(8) The Cabinet Secretary in consultation with the community and the National Land Commission shall in such manner as may be prescribed, ensure that the inhabitants or communities who prefer to be compensated by way of resettlement as a result of being displaced by a proposed mineral operation are settled on suitable alternate land, with due regard to their economic wellbeing, social and cultural values and the resettlement is carried out in accordance with the relevant physical planning law.

(9) The cost of resettlement under sub-subsection (8) shall be borne by the holder of the mineral right.

12. Sections 154, 155, 156 and 157 provides as follows:

154. General provisions on dispute resolution.

Any dispute arising as a result of a mineral right issued under this Act, may be determined in any of the following manners-

a. By the Cabinet Secretary in the manner prescribed in this Act;

b. Through a mediation or arbitration process as maybe agreed upon by the disputing parties or as may be stated in an agreement; or

c. Through a court of competent jurisdiction.

155. Determination of disputes by Cabinet Secretary.

Subject to the provisions of this Act, the Cabinet Secretary may inquire into and determine the following matters-

a. A dispute of the boundaries of an area held under a prospecting or mining right;

b. Any wrongful act committed or omitted in the course of prospecting and mining operations, by any persons against any other person;

c. A claim by any person to be entitled to erect, cut, construct or use any pump, line or pipes, flume, race, drain, dam or reservoir for mining purposes;

d. A claim to have any priority of water taken, diverted, used or delivered for mining purposes, as against any other person claiming the same; or

e. Assessment and payment of compensation where provided for under this Act.

156. Procedure for determination of disputes by the Cabinet Secretary.

(1) A dispute referred to in Section 155 may be referred to and determined by the Cabinet Secretary in accordance with the following procedures –

a. The party referring that dispute to the Cabinet Secretary shall lodge a memorandum with the Cabinet Secretary together with a statement of claim in the prescribed form;

b. On receipt of the memorandum, the Cabinet Secretary shall notify the party against whom the complaint has been made of the referral of the dispute and shall advise the other party of the nature of the complaint and invite that party to lodge a memorandum in response to the complaint;

c. Upon receiving the written response from the party against whom a complaint has been lodged for determination, the Cabinet Secretary shall notify the parties of the time and place at which the matter will be heard and determined;

d. The parties shall be invited to state their respective cases before the Cabinet Secretary and shall be entitled to adduce evidence on oath or affirmation in support of their cases; and

e. After hearing the statements and receiving the evidence the Cabinet Secretary shall make a written determination of the dispute.

(2) Any person who is a party to a dispute referred to the Cabinet Secretary for determination under this section may appear in person or be represented by an advocate.

(3) In making a determination of a dispute, the Cabinet Secretary shall, having regard to the subject matter of the dispute, apply relevant rules and principles concerning the matter in dispute.

(4) Subject to Section 155, the Cabinet Secretary may make such orders as he may consider necessary to give effect to a determination, including ordering the payment of compensation by one party to the dispute to the other.

(5) An order made by the Cabinet Secretary under this Section shall be enforceable by a court as if the same were an order of that court.

(6) The Cabinet Secretary shall keep a record of all matters heard and determined by him, and shall keep a written record of the evidence given before him.

(7) Any person who is interested in any dispute, decision or order shall be entitled to obtain a copy of such record and notes upon payment of prescribed fee.

(8) The Cabinet Secretary may send a copy, certified under his hand and seal, of any decree or order made by him to any civil court within the local limits of whose jurisdiction the subject-matter of the decree is situated, and such civil court shall enforce the decree of the Cabinet Secretary in the same manner in which it would enforce its own decree or order.

(9) The Cabinet Secretary shall by notice in the Gazette prescribe rules of procedure to be applied in respect to determination of disputes under this Act.

157. Appeals

Any person aggrieved by any decree, order or decision made or given under the powers vested in the Cabinet Secretary may appeal within thirty days to the High Court.

13. From the above provisions of the law, it is clear that a clear and elaborate procedure for redress of any grievance exists and outlined under the Mining Act. Under the Act, disputes are referred to the Cabinet Secretary in the first instance. It is also clear that any person who is aggrieved by any decree, order or decision made or given under the powers vested in the Cabinet Secretary may appeal to this court within thirty days. The question then becomes whether an aggrieved party can ignore the elaborate provisions in the Mining Act and resort to this court, not in an appeal as provided, but in the first instance.

14. In the case of **Mutanga Tea & Coffee Company Ltd –v- Shikara Limited & Another (2015)eKLR**, the Court of Appeal stated:

"This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER OF THE NATIONAL ASSEMBLY –V- KARUME (SUPRA) was a 5 (2) (b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the constitution. In granting the order, the court made the often quoted statements that:

Where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. (see also Kones –v- Republic & Another Ex-parte Kimani Nyoike & 4 Others (2008) 3KLR ER 296). It is ready apparent that in those cases the court was speaking to issues of the correct procedure rather that in those cases the court was speaking to issues of the correct procedure rather than

of the correct forum of the resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court…….We are therefore satisfied that the learned judge did not err by striking out the appellants suit and application which sought to invoke the original jurisdiction of the High Court in the circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanism and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159 (2) (c) and the very raison d'etre of the mechanisms provided under the two Acts."

15. In the case of **Geoffrey Muthinja & Another –v- Samuel Muguna Henry & 1756 Others (2015)eKLR**, the Court of Appeal stated:

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews…..The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of the constitution which commands courts to encourage alternative means of resolution."

16. Turning to this case, and considering the decisions cited above, I find no difficulty in concluding that the petitioners herein failed to apply or follow the procedure provided for under the Mining Act and have therefore come to this court prematurely and on that ground alone, this petition fails.

17. Even assuming that the petition is properly before this court, the issue to consider is whether the petition raises constitutional issues and whether or not they proved their case to the required standard. In the case **Kiambu County Tenants Welfare Association –v- Attorney General & Another (2017) eKLR** Mativo, J stated:

"It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. In John Harun Mwau –v- Peter Gastrol & 3 Others (2014) eKLR the court made the following observation:-

"Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it….It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all."

18. The crux of the petitioners case is that their rights under Article 40 of the Constitution have been violated in that they have not been compensated as required by Section 153 of the Mining Act. The issue in my view can be addressed under the said Act therefore is not a constitutional issue. Secondly, there is nothing to show that the petitioners have any land rights on the area they allege they occupy. The petitioners in their own pleadings admit that the land is owned by an entity known as Kwale Sugar International Limited which is the lease owner of the property. That company is not a party in this case and has not been enjoined even as an interested party. If any compensation were to be made, it ought to be made to that company and not the petitioners who are admittedly mere trespassers on the suit land.

19. Further, the petitioners state that the issue or matter of stopping the 1st respondent's mining operations on account of claims for compensation and resettlement was the subject of court adjudication and determination in High Court Petition No. 613 of 2006. If then that be the case, the claim herein by the petitioner for similar reliefs is res judicata and cannot be revived in the present petition. The petitioners' also claim for compensation on the basis of the High Court Judgment in Mombasa HCCC No. 97 of 2001. In my humble view, the said judgment does not apply to assist or advance the petitioners' case. This is because the said case was brought before the High Court in the year 2001, which is three years prior to the vesting of the land in the Government as a condition precedent before the grant of the Special Mining Lease, and all compensation and resettlement claims by the owners and occupants of the said parcels of land were duly processed and paid by the Government. Further, and in any event, the vesting of the land in the Government no doubt extinguished all the rights of the then land owners or occupies of the said parcels of land and save for the Government, no other party, including the petitioners, has any proprietary rights over the said parcel of land capable of being protected or enforced on the basis of the judgment in **Mombasa HCCC No.97 of 2001.**

20. From the facts before me, I find that this petition does not raise constitutional issues. Secondly, the alleged violations of the petitioners constitutional rights id in my view totally unfounded. I find that no contravention of constitutional rights has been proved at all. The evidence tendered on behalf of the petitioners in my view does not demonstrate the alleged violations. The petitioners have failed to discharge the burden of proof to the required standard.

21. In the final analysis, the upshot of the foregoing is that this petition lacks merit and is dismissed with costs to the respondents.

22. On costs, I have noted that there is an affidavit sworn by the 1st petitioner alleging that he had authority of the other petitioners. Already the 7th, 11th and 13th petitioners have withdrawn their suit against the respondents. In the circumstances, I order that the costs of this case to be borne by the petitioners save for the 7th, 11th and 13th petitioners.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 25th day of January, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE