



Kasigau Ranching (DA) Company Limited v Cabinet Secretary, Ministry of Petroleum & Mining & 3 others; Ngilorit (Interested Party) (Environment & Land Case 159 of 2019) [2024] KEELC 6336 (KLR) (2 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 159 OF 2019
SM KIBUNJA, J
OCTOBER 2, 2024**

BETWEEN

KASIGAU RANCHING (DA) COMPANY LIMITED PLAINTIFF

AND

THE CABINET SECRETARY, MINISTRY OF PETROLEUM & MINING 1ST DEFENDANT

THE COMMISSIONER OF MINES AND GEOLOGY 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

LILIAN MERCY MUTUA T/A LILIAN M. GEMS 4TH DEFENDANT

AND

ELIZABETH WANGECHI NGILORIT INTERESTED PARTY

(Vide Ruling of 17TH June 2020 in ELC Misc. Appl. No. 4 of 2020, as restated in the ruling herein of 13th January 2022)

JUDGMENT

1. The suit herein was instituted vide a plaint dated 29th August 2019 and filed on 4th September 2019 where the plaintiff averred that they are the registered owners of Land Parcel LR 12180 measuring 21,186Ha located in Kasigau Area within Taita Taveta County. That the 4th defendant has been carrying out illegal mining activities on its land with the assistance of the 1st and 2nd defendants. The plaintiff claimed to have issued the 2nd defendant with an objection letter on 7th January 2015 against the issuance of a mining permit to the 4th defendant since they had not consented to mining activities on the suit property. It was further averred that despite the objection, the 1st and 2nd defendants issued



the 4th defendant with a mining permit registration number MP/2018/0113 dated 7th November 2018 that enabled her to mine on Mining Location Reference No. 149/1-10 on the suit property. It is the plaintiff's case that the 4th defendant is using the mining permit to claim ownership on the portion of the suit property where she is mining. The plaintiff prayed for judgement against the defendants jointly and severally for: -

- a. "An order of cancellation of mining permit registration number MP/2018/0113 dated 7th November 2018.
 - b. A declaration that the mining permit registration number MP/2018/0113 was illegally issued to the 4th defendant.
 - c. A declaration that the 4th defendant is a trespasser on Land Parcel LR No. 12180 and Mining Location Reference No. 149/1-10 Machungwa "A" Kasigau Ranch.
 - d. Damages.
 - e. Any other or further relief this honourable court may deem fit and proper to grant."
2. The firm of Mulwa Isika & Mutia Advocates entered appearance on behalf of the 4th defendant by filing a Memorandum of Appearance dated 25th September 2019. In her defence, the 4th defendant stated that her mining permit No. MP/2018/0113 for Mining Location Reference No. 1459/1-10 Machungwa "A" within the Kasigau Ranch was issued to her in compliance with the legal requirements set out under the Mining Act No. 12 of 2016. She prayed for the plaintiff's suit to be dismissed with costs.
3. The 1st, 2nd and 3rd defendants filed their defence on 12th May 2021, averring that the Mining Location Reference No. 1459/1-10 comprised of 10 claims that were first registered under Pentagon Geo-exploration Company on 10th August 1989, who had consent from Kasigau Ranch (D.A) Company Limited pursuant to an agreement dated 7th May 1982. The Mining location No. 1459/1-10 was then transferred to Naishorua Mining Company Limited on 14th September 1992 pursuant to a lease agreement with Kasigau Ranch dated 15th December 1989. The defendants further averred that Naishorua Mining Company Limited was equally owned by Mr. Olongida Ngilorit Medukenya and Mr. David Muthui Kariuki. After the demise of Mr. Olongida and the distribution of his shares to his heirs, on 11th October 2011, Mr. David Muthui forwarded to the Commissioner of Mines and Geology signed transfer forms for the Mining Location 1459/1-10 to Ms. Lilian Mercy Mutua, the 4th defendant. The said transfer was approved by the Commissioner of Mines and Geology on 14th October 2011, following the presentation of consent to prospect and mine in Kasigau ranch dated 17th September 2011. The said consent signed by the chairman of the ranch indicated that the ranch had consented to the transfer of the Mining Location 1459/1-10 to herself from Laikipia Mining Company (David Muthui). Further to that on 31st December 2017, the 4th defendant applied through the mining cadaster for a mining permit over the area formerly held under Mining Location 1459/1-10 in compliance with Section 225 (6) of the Mining Act 2016. The 4th defendant submitted a mining permit, a consent for mineral prospecting and mining in Kasigau Ranch issued on 17th September 2011, mining entrance fees, community development and consent fees dated 3rd November 2011, 6th October 2015 and 23rd May 2017 respectively. On 23rd August 2018, the Mining Rights Board reviewed and recommended the granting of the mining permit to the Lilian M Gems. The approval was signed by the Chairman of the board on 11th October 2018 and approved by the Cabinet Secretary on 29th October 2018. Vide a letter dated 30th October 2018 the 4th defendant accepted the offer and paid the first-year annual rent of Kshs 10,000/= . The 4th defendant was hence granted a Mining permit registration number MP/2018/0113 for a period of 5 years over the area formerly covered by the Mining Location



- No. 1459/1-10 in Kasigau Ranch. The defendants prayed for the plaintiff's suit to be dismissed with costs and insisted that the said permit was issued procedurally and lawfully.
4. During the hearing, the plaintiff called Harie Ndungu, a geologist, and Jonathan Mwangeje Mshiri, chairman, who testified as PW1 and PW2 respectively. The 1st to 3rd defendants called Raymond Mutiso, a civil servant, who testified as DW1, while the 4th defendant and interested party testified as DW2 and DW3 respectively.
 5. PW1 told the court that he visited mining locations Nos. 1458 and 1459, located inside the ranch, and prepared the Geological Assessment Report for the Machungwa B mining location dated 13th November 2019, that he produced as exhibit. It was his evidence that on location No. 1458, he found yellow and black tourmaline, and pegmatite rock which is evidence of gemstone rock. He confirmed that mining was being conducted on location No. 1458, instead of No. 1459 which had been allocated to Lilian M. Gems. He assessed the rock was about 40% of the tourmaline, which amounted to about 237 tons, and with a kilogram going for Kshs 5,000/=, its total value was Kshs 1,185,000,000/=. That on location No. 1459, there were signs of prospecting, but did not bother with it. On cross-examination, PW1 could not confirm how many mines were on location No. 1458, but added that there was no active mining taking place on the said location. He also admitted that he did not produce copies of the mining rights on locations No. 1458 and 1549. He further stated he relied on one Daniel, the ranch manager and the GPS, to locate the mining locations. That at the sites, he did not see anybody mining but there were some disused houses, scrap metals, and large mining villages where illegal mining operated from.
 6. PW2 testified he was the plaintiff's chairman from 2014. He informed the court that the plaintiff was not involved when the Commissioner of Mines issued the mining license to the 4th defendant to mine within the ranch. He contended that the plaintiff never gave the 4th defendant any mining rights in the ranch, and that she had never applied for the same. That the rights they had issued to Naishura were extinguished in 1994, but it continued until they sold the interest in 2011. He confirmed that the 4th defendant was mining out of 1458, which was derived from 1459 (1-10). He stated that the 4th defendant should have been mining on 1459B, but that she was instead mining on 1458B. He claimed that the mining rights were issued to the 4th defendant on 7th November 2018, when this suit was in court. On cross-examination, PW2 stated that a member of the ranch who wishes to mine must satisfy certain conditions, which are set out in their by-laws, which include the issuance of dividends to the ranch, and grazing rights to the members of the ranch. He said that Oluganda had been given a license to mine on location 1458 (1-10), while location 1459 (1-10) belongs to David Muthui and Oluganda under Naishura, who had bought the interest from Pentagon Limited. He reiterated that Lilian M. Gems, had neither applied for consent to mine on the Plaintiff's ranch nor bought any rights from Naishura.
 7. DW1 Raymond Mutiso testified that the 4th defendant was mining on the ranch with the plaintiff's consent, on the basis of the mining license over 1459 (1-10) that was first issued to Pentagon, who later transferred their rights to Naishura, who in turn sold it to the 4th defendant, on 14th October 2011. He also confirmed that Machungwa 1458 (1-10) was Machungwa A, while Machungwa 1459 (1-10) was Machungwa B, which were transferred to Olongida and Naishurua respectively. He contended that the plaintiff had consented to the 4th defendant mining on the ranch as seen from the letter dated 29th September 2011, and that the 4th defendant had paid entrance fees to the plaintiff. He confirmed that the 4th defendant was issued with mining license permit MP/2018/0113 over 1459 (1-10) on 7th November 2018, which lapsed on 6th November 2023, but claimed that the license is still valid. He confirmed that the office did not request for a new consent for the renewal of the permit and



- maintained that though he did not see an agreement between the plaintiff and 4th defendant, the license was issued on the strength of the consent issued in 2011. Further to that, he maintained that the plaintiff never forwarded to the Ministry any resolution terminating the consent given to the 4th defendant.
8. DW2 testified that she had been mining on the ranch since 2011. She told the court her advocate had failed to come to court or send a representative on the hearing date, even though she had given her part of the money she wanted, and had promised to give her the balance later. That upon her advocate failing to come to court on the hearing date, she instructed Mr Ngonze advocate in the evening to represent her, and gave him the documents she had. She asked that she be given more time to get her documents from her former advocate so as to proceed with her case.
 9. DW3, the interested party, testified that her late husband had mines at the plaintiff's ranch. She contended that location 1459 (Machungwa B) belonged to her husband and David Muthui, the directors of Naishurua, while location 1458 (Machungwa A) belonged to her husband alone. She maintained that she was not involved in selling of location 1459 to the 4th defendant, and that the documents that purported to sell it to the 4th defendant did not bear her signature. She admitted that she did not have any mining license in her name, but that together with her sons, they were mining under her late husband's license.
 10. The court gave directions on filing and exchanging submissions on the 18th October 2023. The learned counsel for the plaintiff and interested party filed theirs dated the 6th November 2023 and 17th November 2023, respectively, which the court has considered. The matter took long before a date for judgement could be fixed because the court had to deal with applications filed by the 4th defendant first. Then on the 23rd May 2024, the court fixed the suit for judgement today.
 11. The issues for the determination by the court are as follows:
 - a. Whether the plaintiff had given consent to the 4th defendant for prospecting and mining on land parcel 12180 or mining locations 1459/1-10.
 - b. Whether issuance of mining permit No. MP/2018/0113 to 4th defendant by the 1st and 2nd defendants was lawfully and procedurally done.
 - c. Whether the plaintiff has sustained damages, and if so, who should compensate it.
 - d. Who pays the costs?
 12. The court has considered the parties' pleadings, oral and documentary evidence presented, submissions by the two learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. The evidence adduced herein confirms that on 7th May 1982, Kasigau Ranching Company Limited, the plaintiff, entered into an agreement with Pentagon Geo-exploration, whose directors were Ologinda Ngiloriti and Michael Macharia, to prospect for minerals within Kasigau Ranch. The agreement was valid for 2 years, and Pentagon Geo-exploration agreed to pay Kshs 5,000/= as an entrance fee to the ranch, and a refundable deposit of Kshs 6,000/= . That through a lease agreement dated 15th December 1989, Kasigau Ranching Co. Ltd leased parts of their land to Naishorua Mining Co. Ltd to mine and prospect. Pentagon Geo-exploration then transferred their mining rights on Location No. 1459 (1-10) to Naishorua Mining Co. Ltd on 14th September 1992 for a consideration of Kshs 40,000/=. The transfer



was approved on 16th October 1992 by the Commissioner of Mines and Geology, who wrote to Naishorua Mining Co. Ltd on 13th November 1992 informing them of the same.

- b. Naishorua Mining Co. Ltd was incorporated on 23rd October 1989 with two directors, David Muthui Kariuki and Olonginda Ngilorit. On 20th June 2010, David Muthui Kariuki wrote to the Olonginda Family, informing them that as a director of Naishorua Mining Co. Ltd, he had decided to divide the Naishorua mining locations into two, that is, No. 1356/1-2, 135/1-6, 1447/1-5, 1445/1-10 for Elizabeth Wangeci, (widow to Olonginda Ngilorit), and locations 1355/1-10, 1459/1-10, 1526/1-10, 1527/1-4 for himself. On 1st August 2011, David Muthui Kariuki wrote to the Commissioner of Mines and Geology Department seeking renewal of mining locations held by Naishorua as per the sharing arrangements between himself and Elizabeth Wangeci.
- c. On 17th September 2011, Aphonc Mwaïdoma, then chairman of the board of directors, Kasigau Ranch, wrote to the Ministry of Environment, Natural Resources, Mines and Geology department confirming that Lilian Mercy Mutua of Lilian M. Gems has been accepted to prospect and mine within Kasigau Ranch. He wrote another letter, dated 29th September 2011 to the Ministry of Environment, Natural Resources, Mines and Geology department confirming that the management of Kasigau Ranch had consented to the transfer of location No. 1943/1-0 and location 1459/1-10 to Lilian Mercy Mutua of Lilian M. Gems. On 3rd October 2011, David Muthui Kariuki transferred his mining rights on Location No. 1459 (1-10) to Lilian Mercy Mutua of Lilian M. Gems for a consideration of Kshs 200,000/= . Lilian Mercy Mutua who had been mining in the said location 1459/1-10, applied for renewal of the mining permit on 31st December 2017. The same was approved on 29th October 2018 by the Cabinet Secretary, Ministry of Petroleum and Mining. The 4th defendant was then issued the mining permit registration No. MP/2018/0113 on 7th November 2018 for five years from 7th November 2018 to 6th November 2023.
- d. It is the plaintiff's case that Lilian M. Gems, 4th Defendant, has been carrying out illegal mining activities on the ranch, which activities, the plaintiff had reported to the Cabinet Secretary, Ministry of Petroleum and Mining, vide a letter received on 4th December 2018. Through the said letter, the plaintiff demanded the revocation and cancellation of the mining license number MP/2018/0113, issued to Lilian M. Gems. In his testimony, PW2 restated the position that the plaintiff had not given its consent. Further, and in support of the plaintiff's claim, Elizabeth Wangeci Olonginda, the widow of Olonginda Ngilorit, testified as DW3 [interested party], and claimed that mining location 1459 (Machungwa B) belonged to her husband and David Muthui, the directors of Naishurua, while location 1458 (Machungwa A) belonged to her husband alone. She confirmed that she never sold the mining location 1459 to the 4th defendant, and that the documents that purported to sell it to the 4th defendant did not bear her signature. It is the testimony of PW2, that the plaintiff was not involved when the Commissioner of Mines issued a mining license to the 4th defendant.
- e. A mining permit is a mining right within the meaning of Section 4 of the *Mining Act* that authorizes the holder to carry out small-scale mining operations (reference is made to Section 32(3)(b)(ii) of the *Mining Act*). The 4th defendant was granted a mining permit registration no. MP/2018/0113 on 7th November 2018 by the then Cabinet Secretary, John Munyes, Ministry of Petroleum and Mining, to mine non-precious minerals on mining location 1459/1-10, located within Kasigau Ranching (D.A) Co. Ltd, for five years. Kasigau Ranching (D.A)



Co. Ltd is the registered lessee of LR No. 12180 measuring 21,186ha from the County Government of Taita Taveta.

- f. Section 136 of the *Mining Act*, requires a person to apply for a mining permit to the Cabinet Secretary responsible for mining, while Section 141 of the *Mining Act* provides for the holder of a mining permit to apply for the renewal of the permit to the Cabinet Secretary responsible for mining in the prescribed form, and upon payment of the prescribed fee. Regulation 69 of the MINING (LICENCE AND PERMIT) REGULATIONS [Legal Notice 87 of 2017] stipulates that the applicant use Form MP3 to make the renewal application. The court has perused the 4th defendant's re-grant application and I do note that the same though made on 31st December 2017, does not follow the laid down procedure for a renewal of a mining license as stipulated in the Mining (Licence and Permit) Regulations 2017. The mandatory attachments stated in Form MP3 that is proof of payment of the application fee; a report summarizing mining operations undertaken since the permit was granted; revised mining programme; a report describing environmental remediation actions taken during the term of the permit; and an updated environmental audit report were not attached to the said renewal application.
- g. Further to that, in the application dated 31st December 2017, it has been indicated that the permit was issued on 8th September 1988 and expired on 27th May 2015. In the Mining Register produced by Raymond Mutiso, DW1, for the 1st, 2nd and 3rd defendants, it is shown that Pentagon Geo-exploration was first issued with Prospecting Rights Number 3154 on 4th August 1988, and started pegging on 8th September 1988. In mining, pegging is described as physically marking the area set out for mining claims, in such a conspicuous manner, as to alert other prospectors who may be in the area. Therefore, the date indicated on the 4th defendant's renewal application dated 31st December 2017, is not the date that the mining permit was first issued to Pentagon Geo-exploration, but rather the date of pegging.
- h. The mining register also shows that Pentagon Geo-exploration transferred their mining rights on location No. 1459/1-10 to Naishorua Mining Co. Ltd on 14th September 1992, for a consideration of Kshs 40,000/=. The transfer was approved on 16th October 1992 by the Commissioner of Mines and Geology, and Naishorua Mining Co. Ltd notified on 13th November 1992 of the approval. It is further shown in the mining register that Naishorua Mining Co. Limited transferred their mining rights to the 4th defendant with effect from 14th October 2011. This was shortly after David Muthui Kariuki executed a transfer of claim or location No. 1459/1-10 to the 4th defendant on 3rd October 2011, for a consideration of 200,000/=. The transfer of claims or location was signed and stamped by the Commissioner of Mines and Geology on 14th October 2011. Nevertheless, it is the interested party's case that David Muthui Kariuki had no interest in location 1459/1-10, that he could transfer to the 4th defendant, as that location, 1459/1-10, belonged to her late husband Olonginda Ngilorit.
- i. The court finds that David Muthui Kariuki and Olongida Ngilorit incorporated Naishorua Mining Co. Ltd on 23rd October 1989. Naishorua Mining Co. Ltd held mining rights in the ranch pursuant to a lease agreement with the plaintiff dated 15th December 1989. David Muthui Kariuki wrote to the widow of his deceased co-director, Elizabeth Wangeci, who testified as DW3, on 20th June 2010, that he had divided the company's mining locations due to financial constraints. In the said letter, he stated that he had allocated mining locations No. 1356/1-2, 135/1-6, 1447/1-5, 1445/1-10 to DW2, as the widow to Olonginda Ngilorit, and that he had allocated 1355/1-10, 1459/1-10, 1526/1-10, 1527/1-4 to himself. Following this,



David Muthui Kariuki wrote to the Commissioner of Mines and Geology Department on 1st August 2011, seeking renewal of mining locations held by Naishorua as per the sharing arrangements between himself and Elizabeth Wangeci. In the said letter, he referred to minutes of a meeting alleged to have been held between himself and Elizabeth Wangeci.

- j. I have perused the said minutes dated 1st August 2010, which inter alia resolved to dissolve the partnership between Olongida Ngilorit and David Muthui Kariuki; that the company name Naishorua, to remain with David Kariuki; that the mining locations No. 1356/1-2, 135/1-6, 1447/1-5, 1445/1-10 be held by Elizabeth Wangeci, and Mining locations 1355/1-10, 1459/1-10, 1526/1-10, 1527/1-4 be held by David Muthui Kariuki. However, the said minutes were not been signed by Elizabeth Wangeci. This was also noted by the Department of Mines and Geology, and a directive was on 31st August 2011 issued that a brief on the status of the locations should be prepared. There is no evidence before the court that the 2nd defendant ever looked into the status of these mining locations. There is also no evidence that the 2nd defendant gave written approval to David Kariuki to transfer Mining locations 1355/1-10, 1459/1-10, 1526/1-10, 1527/1-4 from Naishorua to himself. Therefore, the transfer of claims or location dated 3rd October 2011, purporting to transfer mining locations No. 1459/1-10 from David Muthui Kariuki to the 4th defendant, was invalid, for the reason that David Muthui Kariuki had not legally and effectively transferred the mining locations to himself from Naishorua.
- k. In her renewal application dated 31st December 2017, the 4th defendant alleged she had consent from the land owner of her mining site. She referred to a letter dated 17th September 2017, and stated that the plaintiff had granted Lilian Mercy Mutua consent to prospect and mine in Kasigau ranch. The granting of mining rights, such as a mining permit held by the 4th defendant on privately owned land, as the plaintiff's suit property, is governed by Section 37 (1) of the [Mining Act](#), which provides that:

- “(1) A prospecting and mining rights shall not be granted under this Act with respect to private land without the express consent of the registered owner, and such consent shall not be unreasonably withheld.
- (2) For the purpose of subsection (1), consent shall be deemed to be given for the purposes of this Act where the owner of private land has entered into –
- a. a legally binding arrangement with the applicant for the prospecting and mining rights or with the Government, which allows for the conduct of prospecting or mining operations; or
 - b. an agreement with the applicant for the prospecting and mining rights concerning the payment of adequate compensation.
- (3) Where consent is granted prior to any change in land ownership, such consent shall continue to be valid for as long as the prospecting and mining rights subsists.

I have perused the said letter, that was alleged to have been written by Alphonse Mwaidoma, the then Chairman, Kasigau Ranch, on 17th September 2011, to the Ministry of Environment,



Natural Resources in the Mines & Geology department. The letter stated that the 4th defendant had been allowed to prospect and mine in Kasigau Ranch. The plaintiff, has through the testimony of PW2, Jonathan Mwangeje Mshiri, disowned the letter, and stated that it did not refer to the specific acreage, area and duration of consent. He maintained that the letter did not give the 4th defendant consent to mine on the suit property. He insisted that the 4th defendant had never applied to the plaintiff for consent to mine on the suit property.

- i. Further to the protection guaranteed to a private owner of the land, Section 34 of the [Mining Act](#) obligates the Cabinet Secretary to notify the land owner of a pending application for a mining permit. It states that:

“The Cabinet Secretary shall, on receipt of the application, give notice in writing of the pending applications application for the grant of a mineral right:

- a. to the land owner or lawful occupier of the land where the mineral is located;
- b. the community; and
- c. the relevant county Government.”

Section 34(1) of the [Mining Act](#), states in mandatory terms that an applicant for mining rights, such as the mining permit held by the 4th defendant, shall obtain express consent of the registered owner of the land upon which the mining permit shall be applied on. The 4th defendant failed to adduce evidence demonstrating that the plaintiff was notified of renewal application as the land owner.

- m. Upon perusal of the Mining Permit No. MP/2018/0113, the court has noted that Condition 6 gives effect to Section 44 of the [Mining Act](#) which states that, the holder of a mineral right shall exercise the rights conferred under the mineral right reasonably, responsibly and in a manner that does not adversely affect the interests of any other holder of a mineral right, or the owner or occupier of the land over which the mineral right extends. Condition 25 gives effect to Section 153 (1)(a) of the [Mining Act](#) to the effect that if mining operations disturb or deprive the owner or any lawful occupier or user of the land or part of the land from utilizing the land, a demand or claim for compensation is made a prompt, adequate and fair compensation shall be considered in accordance with the provisions of the Act. PW2 testified that the 4th defendant never applied for consent to mine within the ranch. He stated that an application for consent to mine is made to the directors of the ranch, and forwarded to the shareholders of the ranch for approval. After approval, the consent is reduced to a written letter to the applicant for payment of the entrance fee. On cross-examination, PW2 stated that a member of the ranch who wishes to mine on the suit property must satisfy certain conditions. These conditions are stipulated in the plaintiff's by-laws which stipulate the procedure to be followed to be allowed to mine on the ranch. I have perused the court file and I have come across a letter dated 4th October 2013, from Isika & Associates to the court's Deputy Registrar seeking the issuance of a summon to one Alphonse Mwaidoma to give evidence on behalf of the 4th defendant. The 4th defendant did not pursue the summons and the said Alphonse Mwaidoma was not availed as a witness to speak on the said letter. The court has noted that the 4th defendant filed a defence on 24th October 2019 primarily claiming that her mining permit was legal. She however did not file any further documents or statements in compliance with Order 11 of the Civil Procedure Rules. In my view, the 4th defendant has failed to establish the veracity of the letter dated 17th September 2011, signed by Alphonse Mwaidoma



- n. It is clear to the court that no consent, within the meaning of Section 37 (1) of the *Mining Act* was ever obtained by the 4th defendant from the plaintiff to mine on mining locations 1459/1-10. The court in the case of Titus Musau Ndome v Cabinet Secretary, Ministry of Mining & 2 others [2017] eKLR held that;

“It is clear that no consent has been obtained to date even after several reminders to the Applicant. While the Applicant awaited a decision on whether or not his application for renewal of mineral right would be granted, a new regime governing the Mining Sector came into force; The *Mining Act*, 2016. Section 37 and 38 of the *Mining Act*, 2016 requires persons applying for a prospecting and/or Mining right to obtain consent of the land owner in the case of private land and/or the county government in the case of trust land before they can be issued with a prospecting and/or Mining License.”

The court has perused the plaintiff’s letter to the 1st defendant seeking the revocation of the mining permit issued to the 4th defendant for lack of consent from the land owner as stipulated in the *Mining Act*. The 1st defendant received that letter on 4th December 2018, which was a month after issuing the mining permit to the 4th defendant on 7th November 2018. Once the 1st defendant became aware of the plaintiff’s rejection of the mining activities of the 4th defendant on their land, there ought to have been a suspension of the permit as stated in Condition 22 of the mining permit for failing to meet the obligation of consent from land owner. The 1st defendant ought to have called all parties concerned and resolved the dispute as stated in Condition 26 of the said permit. The 1st defendant neither revoked nor suspended or cancelled the mining permit issued to the 4th defendant despite the glaring protests from the plaintiff.

- o. It is clear to the court that the plaintiff is the registered proprietor of the land known as LR No. 12180, measuring 21,186ha as seen from the Certificate of Lease dated 11th May 2018. The plaintiff’s title to the suit property has not been challenged in any way by the defendants on any of the grounds set out in Section 26 (1) of the *Land Registration Act*, which provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The certificate of lease over the suit property, produced by the plaintiff, is indefeasible evidence of the plaintiff’s ownership of land. The court is therefore satisfied that the suit property belongs to the plaintiff since their registration and proprietorship has not been disputed. As the absolute and indefeasible owner of the property, the plaintiff is conferred with all the rights and privileges accruing to her as provided in Sections 24 and 25 of the *Land Registration Act*, including the right to possession, to a quiet and peaceful occupation and right to use of their property.



- p. The actions of the 4th defendants of mining on the ranch without the consent of the plaintiff amounts to trespass as defined in Section 3 (1) of the Trespass Act, Chapter 294 of Laws of Kenya, which provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Having found the 4th defendant is guilty of trespassing onto the plaintiff’s land, it is no brainer that they denied the plaintiff from using, occupying, possessing and enjoying it. It is trite law that trespass to land is actionable per se. The plaintiff need not prove that it suffered any specific loss or damage. The court will however assess the damages to award depending on the facts and circumstances of each case. In the case of Duncan Nderitu Ndegwa versus Kenya Pipeline Company Limited & another [2013] eKLR, it was held that:-

“ On the issue and quantum of general damages, once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary to for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant’s trespass.”

- q. The plaintiff, through PW1 presented a Geological Assessment Report prepared by Kinross Haire Consultancy Company on 13th November 2019. The report investigated and assessed the environmental damages, production and value of gemstones mined by the 4th defendant at the disputed Machungwa B. The report covered the years May 2011 and July 2017 when the 4th defendant was mining in the ranch. It was reported that the estimated yellow tourmaline mined for the seven years was about 237,000 kilograms, with a local market value of Kshs 5,000 per kilogram, making the estimated value Kshs 1,185,000,000/=. The estimated green tourmaline mined by the 4th defendant was about 442 kilograms, with a local market value of Kshs 10,000 per kilogram, making the estimated value Kshs 4,420,000/=. The report also recommended for the systematic rehabilitation and restoration of the mined land back to its original state, through back filling and landscaping of the already exhausted mines works. The estimated costs of rehabilitation and decommissioning of the mines is estimated at Kshs. 13,000,000/=.
- r. Through the geological assessment report, the plaintiff has painted a picture to the court of the extent of the yellow and green tourmaline gemstone mining activities, and its value, as well as the mine work operations carried out by the 4th defendant. The report also recommended for the rehabilitation of the exhausted mines, and this will guide the court in settling on a certain amount of monetary values of damages and restoration costs of the mines to its former value.
- s. Besides general damages for trespass, the court is of the view that the plaintiff ought to be awarded exemplary damages. The court in the case of Qaydee (Quarry) Limited versus Maraga (Appeal 37 of 2020) [2022] KEELC 3173 (KLR) (8 June 2022) (Judgment) held that;

“ Turning now to exemplary damages, was there any basis for the award of the same? I am not persuaded that there was any. Exemplary damages are punitive in nature and as put forth by Devlin LJ in the case of Rookes vs Banard (1964) AC 1129, they are awarded in three categories of cases. In the said case, Devlin LJ, elaborated as follows :-



The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category,—I say this with particular reference to the facts of this case,—to oppressive action by private corporations or individuals... Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff... This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object,— perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.

It will be noted from the above that the three categories where exemplary damages may be awarded are:-

- i. Oppressive, arbitrary or unconstitutional action by the servants of the Government;
 - ii. Where the defendant's conduct is calculated so that he can make profit for himself which may well exceed the compensation due to the plaintiff; and
 - iii. Where the same is expressly authorised by statute.”
- t. Further, the court is of the view that the plaintiff is entitled to restoration and conservatory orders against the 4th defendant for the rehabilitation and decommissioning of the mines. Section 15 (a)(v) of the ELC Act provides for the ‘polluter pay principle’ as one of the guiding principles of the court; which states that the costs of pollution should be borne by the person responsible for the same. The 4th defendant should bear the costs of rehabilitating, reclaiming and decommissioning the mining locations. The polluter pays principle is one of the principles that guide the court in enforcing the constitutional right to right to a clean and healthy environment as provided in Article 42 of *the Constitution* of Kenya. The principle will ensure that the 4th defendant will pay the cost of environmental restoration of the mining locations that she has degraded over the years without the plaintiff's consent. The plaintiff has qualified the mining rehabilitation and decommissioning to Kshs 13,000,000/= a figure that has not been disputed by any of the defendants. It is the view of the court that though the National Environment and Management Authority is not a party in this proceeding, it should supervise the restoration, rehabilitation and decommissioning of the mines herein.
- U. The actions of the 4th defendant of trespassing on the suit property ought to be permanently restrained. The plaintiff is therefore entitled to an order of eviction, as well as a permanent injunction restraining the 4th defendant from remaining on the suit property.
- V. Costs under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, follow the event unless otherwise directed on reasonable grounds. In this suit, I find no reason to depart from that position, and the plaintiff is awarded the costs of the suit.



13. The upshot of the foregoing determinations is that, the Plaintiff has proved her case against the Defendants on a balance of probabilities. Therefore, I enter judgment in her favour against the Defendants and issue the following orders:
- a. A declaration is hereby issued that the mining permit registration number MP/2018/0113 was illegally issued to the 4th defendant.
 - b. An order of cancellation of mining permit registration number MP/2018/0113 dated 7th November 2018 is hereby issued.
 - c. A declaration is hereby issued that the 4th defendant is a trespasser on Land Parcel LR No. 12180, and Mining Location Reference No. 149/1-10 Machungwa "A" Kasigau Ranch. The 4th Defendant should vacate and give vacant possession to the plaintiff within ninety [90] days and in default eviction orders to issue.
 - d. The Plaintiff is awarded general damages in the sum of Kshs. 5,000,000/= to be paid by the Defendants jointly and or severally.
 - e. The Plaintiff is also awarded exemplary damages in the sum of Kshs 10,000,000/= to be paid by the Defendants jointly and or severally.
 - f. The Plaintiff is awarded restoration and conservation damages of Kshs 13,000,000/= against the 4th defendant to be used in the rehabilitation, restoration and decommissioning of the mining location No. 149/1-10 Machungwa "A" Kasigau Ranch, under the supervision of National Environment and Management Authority.
 - g. The costs of the suit awarded to the plaintiff as against the defendants, jointly or severally.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON 2ND THIS DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff: Mr Getunge

Defendants : Mr Makuto for 1st to 3rd Defendants.

Mr Ngonze for 4th Defendant

Interested Party: No Appearance

Leakey– Court Assistant.

