Washumbu (Directed Agricultural) Company Limited v Mbiriri & 4 others (Petition E005 of 2023) [2023] KEELC 19179 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19179 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION E005 OF 2023

LL NAIKUNI, J

JULY 5, 2023

BETWEEN

THE WASHUMBU (DIRECTED AGRICULTURAL) COMPANY LIMITED ..... PETITIONER

AND

JOSEPH KAMAU MBIRIRI ..... 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF PETROLEUM & MINING ..... 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

NATIONAL ENVIRONMENT AUTHORITY ..... 4TH RESPONDENT

COUNTY GOVERNMENT OF TAITA TAVETA ..... 5TH RESPONDENT

RULING

I. Introduction.

1. The Petitioner, the Washumbu (directed Agricultural) Company limited moved this Honorable Court through filing of a Main Petition and Notices of Motion applications dated 21st February, 2023 against the 1st, 2nd, 3rd & 4th Respondents herein. The application was brought under the provisions of Articles 2 (2) and 23 of *the Constitution* of Kenya 2010, Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

2. Later on upon being served, the 1st Respondent also filed a Notice of Motion application dated 10th March, 2023. Both of them were brought under a Certificate of urgency and sought the Court's determination. Its instructive to note that each of the parties filed their replies to the application accordingly. The Honorable Court will proceed to handle these applications though simultaneously but separately for ease of reference and flow.

II. The Notice of Motion Application dated 21st February, 2023 by the Petitioner

3. The Notice of Motion application by the Petitioner sought for the following orders: -

    a. Spent;

    b. Spent;

    c. This Honourable Court be pleased to issue a Conservatory Order restraining the 1st Respondents whether acting directly or through third parties, agents and/or parties, agents and/or proxies, from conducting unregulated mining activities on LR. Number 14206 – Taita pending the hearing and determination of this Petition.

    d. Such other, further, incidental or alternative reliefs as the Honourable Court may deem just and expedient.

    e. The Costs of and incidental to this Application shall abide in the outcome of the Petition herein.

4. The Application is premised on the grounds, testimonial fact and the averments made out under the 15th Paragraphed Supporting Affidavit of JAMES MWANG'OMBE KINUSA sworn on 21st February, 2023 together with five (5) annextures marked as "JMK – 1 to 5" annexed hereto. He averred as follows:-

    a. He was the Director and Secretary General of the Petitioner herein duly authorized and having the full knowledge and information concerning this matter and therefore competent to swear this Affidavit.

    b. The Petitioner was a Limited liability with its head company offices in Taita Taveta within the Republic of Kenya. It was established as a Corporate entity to hold land in Trust of the Washumbu Community and was involved in the matters of public interest., Wildlife Conservancy and legal empowerment of the Washumbu community. It brought this Petition for purposes of the enforcement of *the Constitution* of the Kenya, 2010 pursuant to the provision of Article 258 (1).

    c. A Community land could not be encroached by private developer without following due process. Also, it was irrational for a private individual to conduct unregulated mining activities leading to environmental degradation.

    d. The provision of Articles 42 and 69 of *the Constitution* enjoined the 2nd – 5th Respondents to adopt a proactive approach in the nature of the precautionary principle in environmental governance and management. The precautionary principle required that where there were serious or irreversible threats of damage to the environment, immediate, urgent and effective measures must be taken to prevent environmental degradation even in the absence of full scientific certainty on the threat.

    e. On 15th February, 2023, the 1st Respondent with armed security personnel entered into the suit land being Land Reference Number 14206 – Taita with intentions to displace the local inhabitants without any public involvement and/or following due process for purposes of conducing private mining exploration.

    f. Despite there being no community consent, the Respondent intends to forcefully undertook private activities on the suit land and locking out the members of the community.

g. In its mining expedition on the suit land, the 1st Respondent was using explosives and dangerous chemical compounds that were contaminating water sources and causing mental strain to the young and elderly citizens.

h. Article 70 of *the Constitution* stipulates that where a person alleges that their right to a clean and healthy environment protected under Article 42 has been, was being or was likely to be denied, violated, infringed or threatened, the person may apply to the court for redress in addition to any other legal remedies that were available in respect to the same matter. On such an application the court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment.

i. That has demonstrated a clear and unrefuted manifestation of serious and irreversible threats and continuing damage to the environment which called for immediate, urgent and effective measures to be taken to prevent environmental degradation.

j. There were widespread cases of strange diseases of a respiratory and carcinogenic nature as a result of the Respondents' poor management of the environment.

k. The suit land has Gemstones and mineral deposits and Petitioner's fear was that unless he was restrained, the 1st Respondent would conduct a Mining exploration whose aim was to deplete the limited resources rendering the application nugatory.

l. The action by the 1st Respondent of clearing bushes and scooping earth materials being unregulated, meant that there was a likelihood of massive degradation of the environment including environmental pollution.

m. It is in the interest of justice that this Application be certified as urgent and the conservatory orders sought issued to prevent the illegal mining activities in the Petitioner's land whose effect to occasioning environmental pollution.

III. The Replying Affidavit by the 1st Respondent's to Petitioner's application dated 21st February, 2023

5. The Application was opposed through a 14th Paragraphed Replying affidavit sworn on 10th March, 2023 by Joseph Kamau Mbiriri. He averred that:-

a. The Petitioner also alleged to be part of the community living near the mining area and part of the community that was affected by the mining activities which was not true as the there was no habitation within a twenty (20) kilometres range from the mining site nor was the Petitioner within that community.

b. Vide the Affidavit of James Mwangambe Kinusa that I am carrying out unregulated mining activities, by using explosives and dangerous chemical compounds which had caused mental strain to the young and elderly and also strange diseases and had produced exhibit marked as "JMK – 5" as evidence.

c. The annexeture marked as "JMK – 5" never qualified as a report worth reliance by the Honorable Court to issue the adverse orders being sought taking that:

i. The report never disclosed its source of data.

ii. The report never disclosed the cause of the alleged death and/or disabilities.

iii. The report never indicated that the information contained therein was related to the activities being carried out by the 1st Respondent.

iv. The report gave information for period running from the year 2009 to 2019 but failed to disclose the areas covered in the research (if at all).

d. The Petitioner's actions herein were mischievous and full of malice as the issues being presented to the court herein were not new to the parties and had been subject to:

i. The Civil Case – "Mombasa ELC No. 423 of 2017 Joseph Kamau Mbiriri – Versus - Robert Kiwuwa Kigo & others wherein the Petitioners herein were the Defendants and the Court therein vide Ruling and orders dated 9th February 2022 extended the injunctive orders issued on the 17th November 2020 in favor of the Plaintiff – the 1st Respondent herein. Attached herein and marked as "JKM - 4a and 4b" were a copy of the Ruling and the Court Order; see specifically under Paragraph 11a of the Ruling). This matter had been heard and was pending delivery of the Judgment on notice before Justice L.L Naikuni.

ii. The Environment Tribunal Appeal No.015 of 2022 wherein the Petitioners herein were the Claimants and the same orders in the Application herein were sought and the matter as at 20th February 2023, was pending ruling before the Tribunal. The Petitioner herein had conveniently filed a Notice of Withdraw dated 20th February 2023 (date before filing the application and Petition herein) having failed to obtain the orders at first instance. Attached herein and marked as "JKM - 5a and 5b" were a copy of the Application filed before the tribunal and the Notice of Withdraw respectively.

e. The Petitioner concealed from this Honorable Court the existence of the Environment Tribunal Appeal No. 015 of 2022 and the Civil Case - Mombasa ELC No.423 of 2017 Joseph Kamau Mbiriri – Versus - Robert Kiwuwa Kigo & others pending for Judgment before the High Court while seeking the orders herein, which amounted to material non-disclosure.

f. Noting that the orders issued by Hon. Justice L.L Naikuni on the 9th February 2022 extending injunctive orders issued on the 17th November 2020 were still in place and any other orders sought or issued would be in conflict with the Court orders.

g. The Petitioner's herein were well aware of these facts, then their actions could only be interpreted as forum shopping in an attempt to frustrate or circumvent orders issued by the Honorable Court which was a blatant abuse of the court.

h. He was operating unregulated mining activities which allegation could not be further from the truth and he wished to table:

i. He was a holder of eight (8) location under mining permits Nos 1970 - 1977/1-10 at Bungule Area, Kasigau Division, Voi Sub County, within the County of Taita Taveta which had been running since the year 1987. Attached herein and marked as "JKM – 6" was a copy of the permits and "JKM – 7" was a current receipt for payment of permit for the period years 2022 - 2023.

ii. He also had the Environmental Impact Assessment License-Registration No. 0068654 issued on the 1st November 2021. Attached herein and marked "JKM – 8" was a copy of the License.

iii. Vide the Inspection report by the 4th Respondent dated 25th February 2022, the Environmental Impact Assessment License-Registration No.0068654 was held to be valid. Attached herein and marked as "JKM – 9" was a copy of the report.

iv. It should be noted that these reports come after (or are more current that) the alleged Petitioner's report (Petitioner's "JMK -5") and should be given more probative value noting that they are reports from the 4th Respondent herein.

v. He also had all the necessary and current legal permits that were necessary and allowed him to carry out the mining activities.

i. He was not the only miner operating in the suit premises as deponed by the Petitioner.

Therefore, the Application and Petition herein were incompetent and also fell short on the doctrine of "Res – Sub Judice" under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 as there was a suit on the same subject matter pending determination under "Mombasa ELC No.423 of 2017 Joseph Kamau Mbiriri – Versus - Robert Kiwuwa Kigo & others and should be dismissed with costs to the 1st Respondent.

IV. The Notice of Motion application dated 10th March, 2023 by the 1st Respondent

6. The Notice of Application sought the following orders:

a. Spent;

b. This Honorable Court be pleased to review, set aside and/or vary the Conservatory Orders issued on 2nd March, 2023 restraining the 1st Respondent from conducting mining activities at Location 1970 – 1977/1 – 10 at Bungule Area, Kasigau Division, Voi Sub County, Taita Taveta County.

c. The 1st Respondent be at liberty to apply for further orders of directions as this Honourable Court may deem fit to grant.

d. The costs of this application be provided for.

7. The Application is based on grounds on the face of it, the testimonial facts and the averments made out under the 23rd Paragraphed Supporting Affidavit sworn by JOSEPH KAMAU MBIRIRI, dated 10th March, 2023 together with twelve (12) annexures marked as "JKM – 1 to 12" annexed hereto. He averred that:-

a. He was a male adult of sound mind and understanding. He carried out the business of mining industry. He held a Mining License and had been mining within the location known as 1970 – 1977/1 – 10 at Bungule area, Kasigau Division, Voi Sub – County, the County of Taita Taveta since 1987 and the 1st Respondent herein.

b. The Petitioner alleged to be part of the community living near the mining area and part of the community that was affected by the mining activities which was not true as the there was no habitation within a twenty (20) kilometres range from the mining site nor was the Petitioner within that community.

c. A party seeking ex - parte orders was under obligation to disclose to the Court all relevant material facts in its application; without choosing what to disclose or not to disclose. There was no room or option for silence or taking advantage of the other party who had no opportunity at

such stage to reply. A party who chooses to deliberately mislead the Court or failed to disclose material facts while seeking an ex - parte order was always at a risk of having the ex parte orders set aside or vacated or discharged once it was discovered the orders were obtained through deliberate misrepresentation of facts or non - disclosure of material facts.

d. The Petitioner/Applicant obtained conservatory orders by misrepresenting facts before the Court in alleging that the 1st Respondent had just recently began carrying out unregulated mining which was a blatant lie noting that the 1st Respondent had been engaged in lawful mining activities since the year 1987.

e. The Petitioner failed to disclose to the Honorable Court that the issues in dispute in the Petition and Application before the Court were also subject to Mombasa ELC No. 423 of 2017 Joseph Kamau Mbiriri – Versus - Robert Kiwuwa Kigo & others wherein the Petitioners herein were Defendants therein and was pending Judgment before Justice L.L Naikuni.

f. The Petitioners failed to disclose that they sought and obtained orders which orders contradict the orders issued in Mombasa ELC No. 423 of 2017 Joseph Kamau Mbiriri – Versus - Robert Kiwuwa Kigo & others vide Ruling and orders dated 9th February 2022 extended the injunctive orders issued on the 17th November 2020 in favor of the 1st Respondent herein.

g. The 1st Respondent had been carrying on mining activities since the year 1987 and had heavily invested in the mine venture and had many employees who had been deprived of a lively hood because of the orders issued herein.

h. Unless this matter was heard as a matter of urgency by this Honorable court and the Orders sought issued, the 1st Respondents mining activities would be paralyzed and his assets would be in great danger, thus suffering irreparable damage and loss.

V. Analysis and Determination

8. I have keenly considered all the pleadings, the well - articulated submissions by the Advocates for the Petitioner/Applicant herein and the Respondents, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

9. From the perusal of the documents filed on record by the respective parties, the Honorable Court has crystallized the subject matter into the following three (3) issues for Court's determination as follows: -

a. Whether the Notice of Motion application dated 21st February, 2023 by the Petitioner and the one dated 10th March, 2023 by the 1st Respondent are merited and meet the threshold of being granted Conservatory orders on the one hand and review on the other hand.

b. Whether the parties herein are entitled to the reliefs sought by the parties herein.

c. Who should bear the Costs of the applications dated 21st February, 2023 and 10th March, 2023

Issue No. a). Whether the Notice of Motion application dated 21st February, 2023 by the Petitioner and the one dated 10th March, 2023 by the 1st Respondent are merited and meet the threshold of being granted Conservatory orders on the one hand and review on the other hand.

10. Under this sub – heading, the main substratum of the two pronged applications are granting of the Conservatory orders as urged by the Petitioners herein and causing review or setting aside an order already issued by this honorable Court as moved by the 1st Respondent herein in the course of the proceedings hereof. Pursuant to that, the Honorable Court will endeavor to deal with each of these issues accordingly. Firstly, on the concept of granting Conservatory orders. There has been myriad of decisions now generated by various courts over the said issue. There will be no need to re – invent the wheel whatsoever. In the Petition Numbers E408 of 2020 - Okiya Omtatah Okoiti – Versus - Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties) [2021] eKLR, this Court made a detailed summary of the nature of conservatory orders in reference to various decisions of the superior Courts. This Court stated as follows: -

> 16. In the Civil Application No. 5 of 2014 "Gatirau Peter Munya -Versus - Dickson Mwenda Kithinji & 2 Others (2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders 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 Applicant's case for orders of stay.
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> 17. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd – Versus - MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -
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> > 5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.
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> 18. In Judicial Service Commission – Versus - Speaker of the National Assembly & Another [2013] eKLR the Court had the following to say about the nature of conservatory orders:
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> > Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.
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> 19. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

20. The foregoing was fittingly captured by Ibrahim, J (as he then was) in Muslim for Human Rights (Milimani) & 2 Others – Versus - Attorney General & 2 Others (2011) eKLR. The Learned Judge, correctly so, stated as follows: -

> The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

21. The decisions in Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR, Platinum Distillers Limited – Versus - Kenya Revenue Authority (2019) eKLR and Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR also variously vouch the cautionary approach.

22. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

11. I refer to the case of Board of Management of Uhuru Secondary School – Versus - City County Director of Education & 2 Others [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

> (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
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> (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
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> (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
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> (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

12. In the case of "Wilson Kaberia Nkunja – Versus - The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR the Court summarized three main principles for consideration on whether to grant conservatory orders as follows: -

> (a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

13. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

14. On prima facie case, the same was defined in Mrao – Versus - First American Bank of Kenya Limited & 2 Others (2003) KLR 125 to mean: -

> ...In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

15. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua – Versus - Patrick Thuita Gachure & Another (2015) eKLR while dealing with what a prima facie case is, made reference to Lord Diplock in the case of: American Cyanamid – Versus - Ethicon Limited (1975) AC 396, when the Judge stated thus: -

> If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

16. Further on what constitutes 'a prima-facie" case was further dealt with by the Court of Appeal in "Mirugi Kariuki -Versus - Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> " It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under Section 11 (1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought."

17. I further refer to the case of "Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

18. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by provision Articles 22 (1) and 258 (1) of *the Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when *the Constitution* has been contravened, or is threatened with contravention.

ISSUE No. b). Whether the parties herein are entitled to the reliefs sought by the parties herein.

19. Under this Sub – heading, the Court will critically assess whether the parties are entitled to the reliefs sought from the filed pleadings. In the instant case the Petitioner contended that they have demonstrated a clear and unrefuted manifestation of serious and irreversible threats and continuing damage to the environment which called for immediate, urgent and effective measures to be taken to prevent environmental degradation. There is widespread cases of strange diseases of a respiratory and carcinogenic nature as a result of the Respondents' poor management of the environment. In its mining expedition the in the suit area the 1st Respondent is using explosives and dangerous chemical compounds that is contaminating water sources and causing mental strain the young and elderly citizens.

20. The Petitioner contended that the provisions of Article 70 of *the Constitution* stipulates that where a person alleges that their right to a clean and healthy environment protected under the provision of Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to the court for redress in addition to any other legal remedies that are available in respect to the same matter. On such an application the court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment.

21. The provision of Articles 42 and 69 of *the Constitution* of Kenya, 2010 enjoined the 2nd - 5th Respondents to adopt a proactive approach in the nature of the precautionary principle in environmental governance and management. The precautionary principle required that where there are serious or irreversible threats of damage to the environment, immediate, urgent and effective measures must be taken. to prevent environmental degradation even in the absence of full scientific certainty on the threat.

22. The Respondents' common position is that the Petitioners failed to establish a prima-facie case. As captured above, the Respondents gave several reasons as to why there was no breach of *the Constitution* and the law.

23. The issues raised in the Petition cannot, therefore, be wished away. They are serious constitutional issues worth consideration. It is on that background that this Court finds that the Petition raises a prima-facie case in the circumstances of this case.

24. This second requirement for the granting of conservatory orders dictates that an Applicant must demonstrate that if the application is not allowed, the substratum of the Petition will be lost and as such the main claim will be rendered nugatory. In other words, the Applicant will suffer prejudice.

25. Put differently, an Applicant must show, albeit on the face of it, that if not granted conservatory orders, the objective of the Petition to forestall the continued or threatened violation of the rights and fundamental freedoms or *the Constitution* will irredeemably be lost and there would be no need to further pursue to main Petition.

26. The Petitioner/ Applicant has since argued that conservatory orders are meant to preserve the status quo, it was necessary to allow the application. It was contended that if no orders are granted, then the ordinary citizens will be unable to be compensated in the event the Petition is successful. The Court observes that the Petitioner's claims are that there has been a widespread of diseases (strange diseases) of a respiratory and carcinogenic nature as a result of the Respondents' poor management of the environment.

27. The 1st Respondent on the other hand argued that there is no habitation within a 20kms range from the mining site nor is the Petitioner within that community. I have carefully considered this aspect of the dispute. One of the parties, concededly, stand to suffer prejudice either way this Court decides on this issue.

28. Given the impact of mining and the effects of a person's health and life, there is every justification for an expeditious determination of this matter.

29. As the Petitioner has established a prima facie case, it will be unfair to allow the 1st Respondent to continue mining during the subsistence of this Petition. Conversely, in the event the Petition is unsuccessful, the 1st Respondent will still have the right to continue with their business.

30. By putting the consideration on a weighing scale, this Court finds that, in the unique circumstances of this case, there will be greater prejudice putting members of the Public through living in agony with the emissions from the 1st Respondent's organization before the Petition is heard and determined.

31. The foregoing finding is buttressed by the reasoning of the Court of Appeal in "Alfred N. Mutua – Versus - Ethics & Anti-Corruption Commission (EACC) & 4 others [2016] eKLR where even after dismissing an application for conservatory orders, the Court went ahead to assert the constitutional rights of the Applicant and the need for the Court to protect those rights. The Court eventually granted orders which maintained the status quo. The Court expressed itself as follows: -

> 59. As indicated above, it has come to the attention of the Court that notwithstanding the pendency of the applicant's petition alleging abuse of legal process by the 1st and 2nd respondents, the 1st and 2nd Respondents have preferred charges against the applicant and bonded him to appear before the Magistrate Court to answer the charges which are the subject matter of the petition.
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> 60. If that is allowed to happen, the constitutional right of the applicant to the protection of the law and his right to institute legal proceedings to enforce his rights will be breached and the Court will have failed to protect and promote the purpose and principles of *the Constitution* including the rule of law. Moreover, the prosecution will undermine the authority of the High Court to administer justice in an orderly and effective manner, bring the administration of justice into disrepute and render the petition futile. The courts should not be seen to be impotent.
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> 61. We would for those reasons invoke the constitutional principles and the inherent jurisdiction of the Court and in spite of the dismissal of the application, grant a conservatory order suspending the charges and the arraignment of the applicant until 27th May, 2016 when Petition No. 310 of 2014 is scheduled to be heard. Thereafter, the applicant is at liberty to move to the High Court and the High Court has liberty to make any further orders.

32. Likewise, in this case, there is the need to maintain the status quo as the Court determines whether *the Constitution* and the law were infringed as alleged. The Court, therefore, returns the verdict that the Petitioner stand to suffer irreparable loss if no interim relief is granted.

33. The issue of 'Public interest' is defined by the Black's Law Dictionary 10th Edition at page 1425 as: -

> " The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

34. Generally speaking, Constitutions and laws are passed for the orderly governance of the people. As such, the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore, where *the Constitution* is alleged to be violated or is threatened with violation, the Court must thread carefully since the allegation is yet to be subjected to legal scrutiny. Further, where the constitutionality of a statute is impugned, Courts must weigh, with care, the alleged breaches against the doctrine of presumption of constitutionality of statutes. It is the case that unless proved otherwise, statutes are deemed constitutional and may only be suspended in the clearest of cases and where the statute is a threat to life and limb.

35. The applicability of the doctrine of constitutionality of a statute was further dealt with by the Court of Appeal alongside the aspect of public interest. That was in case of: "Attorney General & another – Versus - Coalition for Reform and Democracy & 7 others [2015] eKLR.

36. In this case, it is in public interest that *the Constitution* and the law are respected and followed. Therefore, an allegation that *the Constitution* is violated or is threatened with violation ought not to be lightly taken. However, Courts must always exercise restraint so as not to deal with the main issues at interlocutory stages.

37. On the issue of public interest; public interest lies in favour of preserving and protecting values and interest. I find this is a suitable suit in which, court ought to intervene by exercising its checks and balances against, the excesses of the Executive, which it has purported to use administrative process to extend its powers. I find that public interest would thus be greatly jeopardized and compromised should the court decline to grant the interim orders preserving the substratum of the suit herein.

38. Secondly, on whether the Notice of Motion application dated 10th March, 2023 by the 1st Respondent has merit of having the orders made on 2nd March, 2023 be reviewed. This Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying court orders. These are found mainly under the provisions of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 (1) & (2) of the Civil Procedure Rules, 2010. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

Section 80 provides:- any person who considers himself aggrieved:-

a) By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.

Order 45 (1). States as follows:- Any person considering himself aggrieved:-

a) By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is allowed by this Act, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of Judgement to the Court which passed the decree or made the order without unreasonable delay".

39. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

a. There should be a person who considers himself aggrieved by a Decree or order;

b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;

c. A decree or order from which no appeal is allowed by this Act;

d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or

e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.

f. The review is by the Court which passed the decree or made the order without unreasonable delay.

40. The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible.

41. Discussing the scope of the review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa, 9 Supreme Court Cases 596 at Page 608. had this to say:-

> "The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason".....means a reason sufficiently analogous to those specified in the rule..."

42. It is instructive to note that the decision on whether or not to grant conservatory orders rests entirely within the discretion of the court handling such an application and considering the circumstances of the instant case, this court is reluctant to interfere with the discretion of the learned Judge as to do so will be tantamount to sitting on an appeal from the decision of a court with equal jurisdiction and thus interfering with the said court's discretionary powers. In my humble view, the most appropriate action would have been for the applicant to seek a review before the same judge who made the impugned orders or file an appeal before the Court of Appeal as this court does not wish to come across as trespassing into the domain of another judge fulfilling his constitutional mandate.

43. Whereas it is not disputed that a right to a fair hearing and due process of the law is enshrined in our Constitution under Article 50, it is not lost to this court that there are exceptions to the general rule that a party should not be condemned unheard. I am guided by the decision in the case of "Thomas Edison Ltd. – Versus - Bathok 1912 15 C.L.R. 679 wherein it was held thus:-

> "There is a primary precept governing administration of justice that no man is to be condemned unheard and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence, but instances occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or if irremediable by one party, interim orders may issue to give room to the court to determine the dispute on the merits."

44. A perusal of the orders issued by this Court on 2nd March, 2023 shows that this Court was satisfied hat there was a prima facie case warranting the specific orders that he issued. I reiterate that it would, in the circumstances of this case, be improper for this court to purport to overturn the said orders. In any event, it is trite law that before granting orders to set aside or disturb conservatory orders, the court must be satisfied that the applicant will be irreparably injured if the orders are not set aside. In this case the injury complained of is the applicant will be unable to charge suspects with certain offences created by the new Act or fulfill certain international obligations. I find that the injury complained of has to be balanced with the legal requirement that all laws pass the constitutional validity test. In addition to the above consideration, the court is also bound to consider where the public interest lies and in this case, I find that nothing can be of greater public interest than the court playing its constitutional mandate of ensuring that the individual rights and freedoms under *the Constitution* are protected and that all laws especially those creating offences conform to *the Constitution*.

45. Given the circumstances of this case, I am not satisfied that 1st Respondent has demonstrated that the orders setting aside the conservatory orders are merited. This court observes that in filing the instant application instead of pursuing the main petition whose hearing had already been fast tracked, the 1st Respondent has contributed to an unnecessary delay in the finalization of the main petition that would have settled the ultimate question on whether or not the impugned sections of the Act are unconstitutional.

ISSUE No. Who will bear the costs of the applications dated 21st February, 2023 and 10th March, 2023?

46. It is now well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost. Costs is the award that a party is granted at the conclusion of any legal action or proceedings in any litigation.

47. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms. The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus- Ihururu Dairy Co - operative Societies eKLR (2014).

48. In the instant proceeding, although the Petitioner has fully succeeded in prosecuting his application and the one by the 1st Respondent has not been successful, but taking that the Petition is still on Course, it is just, fair, reasonable and equitable that the Costs for the applications to be in the cause.

VI. Conclusion and Disposition

49. In the long run, having caused such an elaborate analysis to the framed issues herein, the Honorable Court now proceeds to make the following orders: -

    a. That the Notice of Motion application dated 21st February, 2023 is found to have merit and hence be and is hereby allowed in its entirety.

    b. That this Honourable Court do hereby issue a conservatory order restraining the 1st Respondents whether acting directly or through third parties, agents and/or parties, agents and/or proxies, from conducting unregulated mining activities on LR. Number 14206 – Taita pending the hearing and determination of this Petition.

    c. That the Notice of Motion application dated 10th March, 2023 is hereby found to lack merit and hence it is hereby dismissed in its entirety.

    d. That for expeditious sake, I direct as follows:-

        i. The Main petition herein should be heard and determined within the next One Hundred and Eighty (180) days being on 24th January, 2024.

        ii. All Respondents granted 14 days leave to file and serve their Responses.

        iii. The Petitioner granted 7 days leave to file serve further Affidavit from any new issues raised from the replies, if necessary

        iv. There should be a mention on 3rd October, 2013 for purposes of taking directions on how to dispose the said Petition accordingly.

    e. That the costs of the two applications to be in the Cause.

It is so ordered accordingly.

RULING IS DELIVERED THROUGH A MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DELIVERED AT MOMBASA THIS 5THDAY OF JULY 2023.

.....

HON. JUSTICE L.L NAIKUNI (JUDGE)