



REPUBLIC OF KENYA



KENYA LAW
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Hillo Artisernary Miners Cooperative Society Limited (Suing through their Registered Officials (Abdi Katelo Godana, Kotola Qalicha & Shoba Roba Mudho) v Cabinet Secretary for Interior and National Administration & 2 others (Constitutional Petition E004 of 2024) [2025] KEHC 13050 (KLR) (23 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CONSTITUTIONAL PETITION E004 OF 2024**

FR OLEL, J

SEPTEMBER 23, 2025

N THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS SECURED AND GURANTEED UNDER ARTICLES

**22,23,27,28,40, 43,47, 238(1),(3), 244(C)& (D) , 245(4), 258(1)
AND 259 OF THE CONSTITUTION OF KENYA,2020**

AND

IN THE MATTER OF GAZETTE NOTICE NO 3032 DECALRING PARTS OF MARSABIT AS DISTURBED AND DANGEROUS

AND

IN THE MATTER OF VIOLATIONS TO SECTIONS 8(1),(A) OF THE PUBLIC ORDER ACT, CAP 56

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, NO 11A OF 2011

AND

IN THE MATTER OF FAIR ADMISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF PUBLIC ORDER ACT, CAP 56

BETWEEN

**HILLO ARTISERNARY MINERS COOPERATIVE SOCIETY LIMITED PETITIONER
SUING THROUGH THEIR REGISTERED OFFICIALS (ABDI KATELO GODANA, KOTOLA QALICHA & SHOBA ROBA MUDHO**



AND

CABINET SECRETARY FOR INTERIOR AND NATIONAL
ADMINISTRATION 1ST RESPONDENT
COUNTY COMMANDER, MARSABIT COUNTY 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

A. Background of the Petition

1. The Petitioner before the court for determination is the one dated 28.07. 2024, where the petitioners seek for the following orders;
 - a. A declaration order holding that the decision of the 1st respondent issuing the impugned Kenya Gazette Notice No. 3032 dated 14th March 2024 of shutting down the petitioners' members' mining business/activities is unconstitutional, null and void ab initio,
 - b. Conservatory orders be issued quashing the implementation and enforcement of the said decision by the 2nd respondent, barring the petitioner members from accessing their mining sites situated within the areas in the impugned Kenya Gazette Notice No.3032 dated 14th March 2024.
 - c. Conservatory orders be issued quashing the closure notice issued on the 14th March 2024 by the 2nd respondent, shutting down the petitioners' members' mining activities.
 - d. A declaration that the rights of the petitioner under Articles 40 and 47 of *the Constitution* of Kenya 2010 were violated by the respondents
 - e. In the alternative, an order of mandamus do issue compelling the 1st and 2nd respondents and their agents to allow the petitioner members to carry out their mining business/activities within the general Hillo Area in Dabel location of Golbo Division.
 - f. The Costs of the Petition be borne by the Respondents.
 - g. Any other order that this Honourable court shall deem fit to grant.
2. The said petition is supported by the grounds stated on the face of the petition and the supporting Affidavit of Abdi Katelo Godana dated 28th June 2028. He depones that on 14th March 2024, the 1st respondent, through the Kenya Gazette Notice No. 3032, declared parts of Marsabit County as a disturbed and dangerous area. The said areas were mainly mining sites within the general Hillo Area in Dabel location, Golbo division, of Marsabit county.
3. The said gazette notice further ordered that pursuant to Section 8(1) of the *Public Order Act*, no person was allowed to access the affected area without the written authority of the County Police commander, and the restriction was to last for a period of 30 days and could be extended, varied, or continued as the 1st respondent would direct. Pursuant thereto, the 2nd respondent stationed police officers within the mining areas to enforce the said government directive.
4. The Gazette notice No 3032 lapsed after 30 days, and the directives issued thereunder were never extended, but to date, the 1st and 2nd respondent agents had barred the petitioners' members from



accessing the mining sites and exposed them to loss of their properties and assets, which acts were unlawful, considering that they had peacefully run their mining operation within the said sites for the last 30 years uninterrupted and invested heavy machinery, which was wasting away due to enforcement of the impugned gazette notice.

5. They contended that as a result, they had suffered immeasurable financial loss and had also been discriminated against since other third parties were being allowed access to the mines, yet they too had a legitimate interest to protect. The respondents' actions were therefore illegal, unreasonable, arbitrary, oppressive, and procedurally unfair as the said gazette notice violated provisions of Articles 27, 28, 40, and 43 of *the Constitution* of Kenya 2010. Since the 1st respondent had acted in excess of his jurisdiction and in bad faith, they urged this court to find merit in their application and be pleased to allow the same.

(ii) The Response

6. The respondent filed an affidavit sworn by County police commander, Mr Leonard Kimayo, who deponed that the impugned gazette notice No. 3032 was issued by the 1st respondent based on recommendation made by the National Security Council following multiple incidents of insecurity within the mining areas, due to the proliferation of illicit arms trafficking, especially from Somalia through Wajir County.
7. As a result multiple fatalities amongst illegal miners (over 10 deaths) had been recorded within Hillo gold mines between March, 2024 to July, 2024 and to make matters worse, on 19th July, 2024 over 3000 people armed with assorted crude weapons and guns forcefully entered one of the mining sites within Hillo gold mines and shot dead two people include a police officer and injured several others. During the said attack, two (2) G3 rifles belonging to the police also got lost.
8. The respondents further did contend that the applicants were mining without being licensed by the relevant government authorities, yet they were extensively using mercury to process gold without wearing personal protective clothing, which, in turn, was detrimental to the environment and personal health of all those who resided within the said area, as the said mercury contaminated both water and land resources. Finally, over the years, the miners had also abandoned several open mining pits, which posed a danger to animals and residents.
9. The gazette notice issued and its enforcement was therefore lawful, and urged the court to find that the petition filed lacked merit and be pleased to dismiss the same.

(iii) The Response by Interested Party

10. The interested party filed their replying affidavit dated 07.03.2025, sworn by Adan Mamo Elema. He averred that they represent the interests of the indigenous and local community residing within the Hillo area in Dabel location of Golba division, and that as a community, they had been significantly affected by the petitioners' illegal mining activities, which had resulted in serious security incidents, environmental degradation, and social instability within the said area.
11. The gazette notice No 3032 was issued after consultation by various government security agencies to address prevailing security challenges directly linked to the illegal mining operations undertaken by the Applicant members. It had been issued in good faith to protect public order, which outweighed the petitioners' private interest. Further, they urged this court to note that previously, they had instituted NAIROBI ELC LJR CASE NO E007 OF 2023, challenging the petitioners' operations, and the said court had affirmed that no mining activities could take place until the local community was consulted.



12. He further averred that it would be a travesty of justice to allow the applicants to continue with their illegal mining activities, yet without doubt, they were degrading the environment and endangering the security of the entire region, and reiterated that public interest to protect the community from harm outweighed the petitioners' individual rights. They thus prayed for this court to dismiss the petition with costs.

B. Analysis & Determination

13. This court has considered the Petition, the affidavits filed in support and in opposition of the said petition, and given due consideration to the submissions filed by the parties' respective Counsel
14. The issues which arise for determination are;
- a. Whether the threshold for a constitutional petition has been met.
 - b. Whether the impugned Kenya Gazette Notice dated 14th March, 2024, is unconstitutional, null and void ab initio.
 - c. whether conservatory/mandatory orders should be issued as prayed for in the petition.
 - d. Whether the Petitioner's rights have been violated.
 - e. Who should bear the costs of this suit?

i. Whether the threshold for a constitutional petition has been met

15. On this issue, this court is guided by the finding in the case of *Anarita Karimi Njeru v Republic* 1979 eKLR, where the court held that-

“We would however, again stress that if a person in seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

16. The principle was re-stated in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013]eKLR, where the court stated;

“The principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle...”

17. In addition, Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the “Mutunga Rules”) provides that:

Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed, or threatened, a person so affected or likely to be affected may make an application to the High Court in accordance with these rules.”



18. Rule 10 of the “Mutunga Rules” governs the form that a constitution should take. Rule 10(2) of the said Rules specifically provides as follows:

- “(2) The petition shall disclose the following—
- a. The petitioner’s name and address;
 - b. The facts relied upon;
 - c. The constitutional provision violated;
 - d. The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - e. Details regarding any civil or criminal case involving the petitioner or any of the petitioners which is related to the matters in issue in the petition;
 - f. The petition shall be signed by the petitioner or the advocate of the petitioner; and
 - g. The relief sought by the petitioner.”

19. Though the respondents allege that the petition neither provides particulars of the alleged complaint nor the manner of alleged infringements, a perusal of the pleadings filed does not support their contention. I find that the Petition as presented complies with the provisions of Rule 10(2) of the Mutunga Rules, as the facts and cause of action are concisely pleaded (stating the cause of action, rights violated, and declarations sought). The threshold of a constitutional petition has therefore been met.

ii. Whether the impugned Kenya Gazette Notice dated 14th March, 2024, is unconstitutional, null and void ab initio.,

20. Section 106 of the *National police service act* provides that;

- (1) The Cabinet Secretary may, after consultation with the National Security Council, by notice in the Gazette, and in such other manner as he may direct, declare that an area of Kenya is in a disturbed or dangerous state, or that, by reason of the conduct of the inhabitants of such area or any class or section of such inhabitants, it is expedient to increase the number of police officers stationed in such area.
- (2) Upon publication of a notice under subsection
 - (1) the Inspector-General may—
 - (a) by order published in the Gazette and in other such manner as the Inspector-General may consider appropriate to bring it to the notice of the persons affected thereby, prohibit the possession of arms in the area, and order the surrender of all such arms, by all or such of the inhabitants of the area, as may be specified; and
 - (b) Station an additional number of officers in the area.



21. The above referred to provision of law expressly allows the Cabinet Secretary for Interior and National Administration, in consultation with the National Security Council, to declare a particular area a disturbed area, and evidently, by issuing the Gazette Notice dated 14th March 2024, he did not overstep his boundary nor did he act in an ultra vires manner considering the insecurity incidences that consistently occurred within the prohibited area.
22. The petitioner's prayer that the said impugned Gazette notice be declared unconstitutional does not hold, as the cabinet secretary, decision/proclamation was anchored in law.

iii. Whether the court should issue conservatory/mandatory orders prayed for.

23. The petitioner sought for conservatory orders to quash the implementation and enforcement of the 2nd respondent's decision to bar the petitioner members from accessing their mining sites within the areas mentioned in the impugned Kenya Gazette Notice No 3032, dated 14th March, 2024.
24. The conservatory order sought at this stage is misconceived as it 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 and cannot be sought as a final order. See Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR & Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) Eklr.
25. Regarding the prayer for mandamus, the requirements for an order of mandamus to issue were explained by Mativo J. in Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General), and was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration). The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
 - iii. An express refusal, or an implied refusal through unreasonable delay;
 - iv. No other adequate remedy is available to the Applicants;



- v. The Order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought;
 - vii. On a balance of convenience, mandamus should lie
26. The respondents have clearly demonstrated that the illegal mining activities are being carried out within the gazetted areas without NEMA and other statutory approvals, and this has led to;
- a. Illegal proliferation of arms trafficked from Somalia through Wajir county, causing a surge of insecurity within the mining areas
 - b. Several deaths, including that of a police officer, and loss of two (2) G3 rifles belonging to the police.
 - c. Infiltration of illegal immigrants from Ethiopia
 - d. Environmental degradation and social instability.
- (which particulars are elaborated in the responses filed)
27. Mandamus orders cannot be issued to uphold an illegality (illegal mining). The respondent's action to prioritize public interest and safety far outweighs the applicant's interest within the said gold mining areas as specified by the Gazette notice No 3032 of 14th March, 2024. For clarity, all miners within the said area, whether they are the petitioner's members, or community members of the interested parties, must fully comply with NEMA environmental regulations, the provisions of the Mining Act, 2016, and the regulations developed thereunder before they can be allowed to engage in mining activities.

C. Disposition

28. The upshot is that the petitioners have not proved that the Respondents have violated any of their rights.
29. Thus the petition dated 28th June, 2024, lacks merit and the same is dismissed with no orders as to costs.
30. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 23RD DAY OF SEPTEMBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 23rd day of SEPTEMBER ,2025

In the presence of: -

Ms OdoyoPetitioner

Ms Nyendo..... Respondent

Mr. Jarso..... Court Assistant

