Rockland Kenya Limited v Cabinet Secretary, Ministry of Petroleum and Mining & another (Petition 200 of 2019) [2023] KEHC 17264 (KLR) (Constitutional and Human Rights) (12 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17264 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 200 OF 2019

HI ONG'UDI, J

MAY 12, 2023

BETWEEN

ROCKLAND KENYA LIMITED ..... PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF PETROLEUM AND MINING ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

The Mining (Prescription of Royalties on Minerals) Regulations 2013 declared unconstitutional for lack of public participation.

The petitioner challenged the constitutionality of mining royalties imposed under section 183 of the Mining Act and related regulations, claiming violations of their rights to property, non-discrimination, and fair administrative action. The petitioner argued that the royalties were an unfair tax burden and lacked adequate public participation. The court upheld section 183 and the Mining (Community Development Agreement) Regulations, 2017, but found the Mining (Prescription of Royalties on Minerals) Regulations, 2013 unconstitutional due to insufficient public participation.

Reported by John Ribia

Statutes *– constitutionality of statutes – public participation – allegation that Act and regulations were passed without public participation – allegation that an Act had imposed a heavy tax burden - whether Section 183 of the Mining Act 2016, the Mining (Prescription of Royalties on Minerals) Regulations 2013 and the Mining (Community Development Agreement) Regulations 2017 were unconstitutional for lack of public participation - whether Section 183 of the Mining Act 2016, the Mining (Prescription of Royalties on Minerals) Regulations 2013 and the Mining (Community Development Agreement) Regulations 2017 were unconstitutional for imposition of heavy tax burden owing to the payment of the royalties contrary to the principles of taxation - Mining Act (Cap 306) section 183; section 225.*

Mining Law *– royalties – nature of royalties – fee vis-à-vis tax/levy -whether a royalty on mines and minerals was a fee or a levy of the nature of a tax.*

Words and Phrases *– royalty – definition - a royalty is a share of the product or profit reserved by the owner for permitting another to use the property - states that a royalty on mines and minerals cannot thus be a fee but a levy of the nature of a tax. Considering this, it was stated that royalty on minerals should be taken as an imposition of a tax - Dictionary of Mining, Mineral & Related Terms, USBM, P. 946-947; Venkataramaiya's Law Lexicon and Legal maxims (Vol. 3, P. 2128).*

Brief facts

The petitioner engaged in the mining sector, had been granted various mining licenses under the Mining Act. The Cabinet Secretary, Ministry of Petroleum and Mining (the 1st respondent), revoked the petitioner's licenses, citing non-compliance with the law. The petitioner challenged the decision, arguing that it was taken without notice, hearing, or any opportunity for defense, thereby violating their legitimate expectation, right to property, and the right to fair administrative action.

The petitioner contended that the Mining (Prescription of Royalties on Minerals) Regulations 2013 and the Mining (Community Development Agreement) Regulations 2017 (the Regulations) were unconstitutional for lack of public participation. That prior to the enactment of the impugned regulations the respondents did not comply with section 5 of the Statutory Instruments Act which required consultation with the relevant stakeholders through public participation. That argument was opposed by the respondents who averred that they had carried out the public participation exercise in compliance with the said law.

The petitioner further contended that payment of royalties was a quasi-form of taxation only in relation to mining companies. Similarly, that payment of the fees to the community placed on the petitioner a heavy burden as that was charged twice. That was under section 183 of the Mining Act and the Regulations. According to the petitioner the two aspects were contrary to the principles of taxation.

The petitioner contended that since all minerals and mineral oils form part of public land the same ought to be under the National Land Commission. The petitioner took issue with the impugned provisions describing the terms therein as discriminatory in comparison to other companies operating businesses in Kenya. On the contrary, the respondents contended that the terms in the impugned section and Regulations only applied to mining companies. As such the same could not be deemed as discrimination in that context.

Issues

i. Whether Section 183 of the Mining Act 2016, the Mining (Prescription of Royalties on Minerals) Regulations 2013 and the Mining (Community Development Agreement) Regulations 2017 were unconstitutional for lack of public participation.

ii. Whether Section 183 of the Mining Act 2016, the Mining (Prescription of Royalties on Minerals) Regulations 2013 and the Mining (Community Development Agreement) Regulations 2017 were unconstitutional for imposition of heavy tax burden owing to the payment of the royalties contrary to the principles of taxation.

iii. Whether a royalty on mines and minerals was a fee or a levy of the nature of a tax.

Held

1. Under articles 10 and 118 of the Constitution, the government must facilitate public participation in legislative processes, including statutory instruments. The respondents held 4 stakeholder meetings on specifically on payment of royalties and Community Development Agreements. The meetings involved various stakeholders such as industry stakeholders, the civil society and Government. Other than the consultative meetings, the respondents did not submit the notification notice for instance through an advertisement inviting submissions by a specified date. Despite that, the process was valid as long as a genuine consultation occurred, leading to the enactment of the Mining (Community Development Agreement) Regulations, 2017. Just because one did not participate in the exercise the same did not suffice to annul the process.

2. The respondents did not discharge their burden of proof in relation to the Mining (Prescription of Royalties on Minerals) Regulations 2013. They did not adduce the requisite evidence on whether they complied with section 5(2) and (3) of the Statutory Instruments Act. The section required a notification for the public participation of the exercise and an invite to submit comments. Failure to uphold the constitutional requirement rendered the Mining (Prescription of Royalties on Minerals) Regulations 2013 unconstitutional.
3. Ownership of minerals was stipulated under Section 6 of the Mining Act. To access the minerals section 10 of the Act stated that one could only acquire a mineral right if they were granted a permit or license in accordance with the Act. One of the obligations for a mineral right holder was payment of royalties under section 183 of the Act.
4. A royalty was a share of the product or profit reserved by the owner for permitting another to use the property. A royalty on mines and minerals could not thus be a fee but a levy of the nature of a tax.
5. Although described as a form of tax a royalty by its nature was distinct from ordinary taxes. It was a payment to the owner of the mineral resource in return for the removal of the minerals from the land. The concept of national sovereignty over natural resources, alongside a growing understanding of sustainable development in the mineral sector, was causing mineral royalties to be viewed as instruments of socio economic change. That was in harmony with the principles of equitable, efficient, productive and sustainable use of land under article 60(1) of the Constitution.
6. One of the constitutional functions of the government was its power to impose taxes and charges as envisaged under article 209 of the Constitution. While the Constitution empowered the Government to impose fees such as royalties in accordance with its principles, it did not disclose or define how high or low the same could be. The government was however given leeway to define and quantify the same in a Statute in the instant case the Mining Act, 2016. The mandate under article 209(2) of the Constitution was left to the legislature to decide based on various factors not within the knowledge and mandate of the court.
7. Allowing the petitioner's argument that payment of royalties imposed a tax burden hence unconstitutional, would be in error and untenable in light of the purposes of the Constitution. The court was mandated under article 259 of Constitution to interpret the Constitution in a manner that promoted its purposes, values and principles. The purpose of a royalty and the mandate of the Parliament in imposing such fees, was in line with the principles of the land policy under article 60 of the Constitution in relation to minerals.
8. Section 183 of the Mining Act 2016 and the Mining (Community Development Agreement) Regulations 2017 were constitutional. However, the Mining (Prescription of Royalties on Minerals) Regulations 2013 were unconstitutional as the principle of public participation was not complied with during the Regulation's enactment.
9. The basis of the alleged discrimination is the payment of royalties as stipulated under section 183 of the Mining Act by persons and corporations holding mining rights. That differentiation was grounded on the fact that only persons with mining rights pay royalties while the rest were not under that obligation. Unmistakably the two, contrary to the petitioner's allegation were in different classes and hence the differentiation could not qualify as discrimination. Discrimination occurred when differentiation in treatment occurs among persons in the same class.
10. The petitioner bore the burden of proving discrimination. The petitioner failed to demonstrate if at all, the nexus between itself as a mining company and other companies that constituted the alleged discrimination. The petitioner failed to prove that its rights under article 27(4) and 40(2)(b) of the Constitution were violated.

Petition partially allowed.

Orders

i. *Declaration issued that the Mining (Prescription of Royalties on Minerals) Regulations 2013 were unconstitutional.*

ii. *No order for costs.*

Citations

Cases

Kenya

1. *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Mentioned)
2. *Cherogony, Miriam v African Rural and Agricultural Credit Association & International Fund for Agricultural Development* Cause 1888 of 2017; [2019] KEELRC 2096 (KLR) - (Mentioned)
3. *Gichuru v Package Insurance Brokers Limited* Petition 36 of 2019; [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) - (Followed)
4. *Kenya Hotels and Allied Workers Union v Grand Regency Hotel & others* Cause 39 of 2007; [2017] KEELRC 778 (KLR) - (Mentioned)
5. *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhehia Workers) v Salaries and Renumeration Commission* Constitutional Application 294 of 2013; [2014] KEHC 8148 (KLR) - (Mentioned)
6. *Munyendo, Moses & 908 others v Attorney General & another* Petition 16 of 2013; [2013] KEHC 6033 (KLR) - (Explained)
7. *Nairobi Metropolitan Psv Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Civil Appeal 42 of 2014; [2014] KECA 95 (KLR) - (Mentioned)
8. *Nyarangi & 3 others v Attorney General* Anti-Corruption and Economic Crime Petition 298 of 2008; [2008] KEHC 3906 (KLR); [2008] KLR 688 - (Explained)
9. *Obuya , Mark & others v Commissioner of Domestic Taxes, Kenya Revenue Authority & Attorney General* Petition 383 of 2013; [2014] KEHC 4336 (KLR) - (Followed)
10. *Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission, Independent Electoral and Boundaries Commisson, and others* Civil Appeal 9 of 2013; [2016] KECA 371 (KLR) - (Mentioned)
11. *Republic v County Government of Kiambu Ex parte Robert Gakuru & Jamofastar Welfare Association* Judicial Review 434 of 2015; [2016] KEHC 7642 (KLR) - (Mentioned)
12. *Tax Justice Network- Africa v Cabinet Secretary for National Treasury, Kenya Revenue Authority & Attorney General* Petition 494 of 2014; [2019] KEHC 9486 (KLR) - (Mentioned)
13. *Wambora , Martin Nyagav Speaker County Assembly of Embu, Clerk County Assembly of Embu, County Assembly of Embu, Deputy Governor Embu County, Speaker Senate Parliament of Kenya & Attorney General* Petition 3 of 2014; [2014] KEHC 6715 (KLR) - (Mentioned)

South Africa

1. *Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [2016] ZACC 22; 2016 (5) SA 635 ; 2016 (10) BCLR 1277 - (Explained)
2. *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) - (Mentioned)

India

Hambardda Wakhana v Union of India Air [1960] AIR 554 - (Mentioned)

Texts

1. American Geological Institute (1997), *Dictionary of Mining, Mineral & Related Terms* 2nd Edn p 946- 47
2. Otto, J., *et al* (2006), *Article "Mining Royalties A Global Study of their Impact on Investors, Government, and Civil Society* World Bank Publications - Books, The World Bank Group, number 7105,
3. Venkataramaiya (1997), *Law Lexicon and Legal maxims* Law Publishers (India) Pvt Ltd 2nd Vol 3 p 2128

Statutes

Kenya

1. Constitution of Kenya articles 27(4); 40(2)(b);60(1);62(1)(f)(2)(3);66(2);69;201(b)(i);259- (Interpreted)
2. Mining (Community Development Agreement) Regulations, 2017 (cap 306 Sub Leg) regulation 12(1) - (Interpreted)
3. Mining (Prescription of Royalties on Minerals) Regulations, 2013 (cap 306 Sub Leg) - In general(Cited)
4. Mining Act (cap 306) sections 10,6,183(5)(C); 225 - (Interpreted)
5. Statutory Instruments Act (cap 2A) sections 5(1)(2)(3);11(4)- (Interpreted)

Advocates

Khaminwa and Khaminwa Advocates for the petitioner

Mr Thande Kuria Principal State Counsel for the respondent

JUDGMENT

1. The petition dated May 24, 2019 was filed for the alleged violation of the petitioner's rights under article 27(4) and 40(2)(b) of the *Constitution*.This is with reference to section 183 of the *Mining Act* 2016, the *Mining (Prescription of Royalties on Minerals) Regulations* 2013 and the *Mining (Community Development Agreement) Regulations 2017*. Accordingly, the petitioner seeks the following orders:

    i. Conservatory Orders be issued staying any further implementation of section 183 of the *Mining Act* 2016, the *Mining (Prescription of Royalties on Minerals) Regulations 2013* and the *Mining (Community Development Agreement) Regulations 2017*.

    ii. A declaration that by its administrative act with the introduction of section 183 of the *Mining Act* 2016, the *Mining (Prescription of Royalties on Minerals) Regulations 2013* and the *Mining (Community Development Agreement) Regulations 2017* the 1st respondent has caused a breach of the petitioner's right and fundamental freedom to equality and freedom of discrimination as allowed under article 27(4) of the *Constitution*.

    iii. A declaration that by its administrative act with the introduction of section 183 of the *Mining Act* 2016, the *Mining (Prescription of Royalties on Minerals) Regulations 2013* and the *Mining (Community Development Agreement) Regulations 2017* the 1st respondent has caused a breach of the petitioner's right and fundamental freedom to the right to property as allowed under article 40(2)(b) of the *Constitution*.

iv. This court do issue a declaration that section 183 of the *Mining Act* 2016, the *Mining (Prescription of Royalties on Minerals) Regulations 2013* and the *Mining (Community Development Agreement) Regulations 2017* are unconstitutional.

v. This court do issue a declaration that as a result of the acts and omissions by the 1st respondent the petitioner is deserving of damages to be ascertained by this court.

vi. Costs of this petition.

The Petitioner's case

2. At the center of this petition is the constitutionality of section 183 of the *Mining Act* 2016 as read with the *Mining (Prescription of Royalties on Minerals) Regulations 2013* and the *Mining (Community Development Agreement) Regulations* 2017. The petition is supported by the petitioner's affidavit dated May 24, 2019 and further affidavit dated February 16, 2023 both sworn by Hon. Johnstone Muthama.

3. The deponent averred that the petitioner is the holder of the Special Mining Lease No 19 dated August 15, 1991 and deals with mining business within Tsavo West National Park. He deposed that the petitioner's mining area is not Community Land as the nearest human settlement is 45 kilometers away. He deponed that the petitioner is required to make yearly rental and royalty payments to the 1st respondent as provided under section 183 of the *Mining Act* 2016.The rates of these payments are distributed as 70% to the National Government, 20% to the County Government and 10% to the Community are set in the *Mining (Prescription of Royalties on Minerals) Regulations 2013*. Further in compliance with the *Mining (Community Development Agreement) Regulations* 2017 the petitioner is required to at least pay 1% of its annual gross revenue to projects identified in the Community Development Agreement. Equally the petitioner is required to also pay statutory taxes.

4. He further deponed that on March 11, 2019, the petitioner received a letter from the Regional Mines Officer Taita Taveta Region informing it to attend a meeting the next day in the town of Kasigau which they attended. The purpose of the meeting was formation of a Community Development Agreement Committee. The petitioner, however, objected to this move vide its response to the Regional Mines Officer. Its objection was not responded to. The petitioner also wrote to the Kenya Revenue Authority indicating their grievance to the imposition of the 1% by the *Mining (Community Development Agreement) Regulations 2017*.

5. The petitioner is aggrieved that the imposition of the royalty under section 183 of the *Mining Act* and the 1% as provided in under regulation 12(1) of the *Mining (Community Development Agreement) Regulations 2017* is a quasi-form of taxation against it's revenue. He deposed that this is discriminatory because other registered companies in Kenya are not required to pay such monies. He further deposed that since the mine is in the Tsavo National Park it falls under public land. While referring to section 183 of the *Mining Act*, he averred that the *Mining (Prescription of Royalties on Minerals) Regulations 2013* had been enacted in violation of the requirement of public participation under section 5(1) of the *Statutory Instruments Act* 2013.

6. He similarly deponed that the *Mining (Community Development Agreement) Regulations 2017* are unconstitutional as they seek to impose on the petitioner a duty which ought to be borne by the Government. He averred that these regulations were enacted in contravention of section 5(1) of the

Statutory Instruments Act 2013. That the 1st respondent's actions had breached its constitutional rights under article 27(4) and 40(2)(b) of the *Constitution*.

7. In response to the respondents' affidavit, it was stressed that the respondents had not shown that actual public participation had been conducted in accordance with the law. He similarly deposed that the alleged public participation meeting as presented by the respondents was not within the petitioner's knowledge because they were never invited to the meeting or even aware of it's taking place.

The Respondents' case

8. The respondents through the 2nd respondent filed their response through the replying affidavit sworn by Raymond M Mutiso dated September 10, 2020. He averred that the *Mining Act*, 2016 was enacted to give effect to the provisions of articles 60, 62, 66(2), 69 and 72 of the *Constitution*. He noted that under article 62(1)(f) of the *Constitution* all minerals and mineral oils are classified as public land. Further that under article 62(3) all these minerals and mineral oils vest in the National Government and are held in trust for the people of Kenya.

9. He additionally, deposed that in line with article 69 of the *Constitution* the benefits of these minerals and mineral oils must accrue and equitably benefit the communities. He stressed that the obligations of the Mining License Holder are set out under section 109(i) of the *Mining Act* which requires the holder to sign a Community Development Agreement with the community where the mining operations are to be carried out. Denying the petitioner's allegations, he averred that the impugned Regulations were made in compliance with section 5(1) of the *Statutory Instruments Act*, as extensive public participation was conducted as required by law.

10. He further deposed that whereas the petitioner claimed that the impugned Regulations were discriminatory, he noted that section 183(1) of the *Mining Act* clearly provides for payment of a percentage to develop the communities. Further that the *Mining (Community Development Agreement) Regulations 2017* provide the framework that regulates the way mining companies engage with the communities that are likely to be impacted by the mining operations. That these laws were only applicable to persons conducting mining and hence companies not holding mining licenses cannot be subjected to the said provisions.

11. He deponed that the challenge to the impugned Regulations had no rational basis since royalties are paid as compensation for the right of resources owned by the State and belonging to the people of Kenya, and so no person can claim to have possession of the minerals. He pointed out that payment of royalties which is distinct from payment of taxes is the custom the world over and the applicable rates are based on the global rates.

12. He deposed that owing to section 225 of the *Mining Act*, 2016, the petitioner's business was classified as large-scale operations. The Section hence requires the petitioner to update its mine plan regarding conditions of employment, health and safety and the management of the environment and community social investments not later than eighteen months following enactment of the Act and Regulations.

13. He further deponed that waiving of the royalties as proposed by the petitioner would be unconstitutional. He further averred that grant of the sought orders would lead to stoppage of all mining activities as no transaction of minerals can take place without payment of royalties to the State by the mining companies.

The Petitioner's submissions

14. The petitioner through the firm of Khaminwa and Khaminwa Advocates filed written submissions and a list of authorities dated February 27, 2023. Counsel submitted that the petitioner took issue with section 183(2) of the Act that grants the 1st respondent the sole right to determine what the royalty is yet it is not defined in the Act. He argued that since minerals are defined as public land in article 62(f) of the *Constitution*, the same ought to be administered by the National Land Commission under section 5(1)(g) of its *Act* since a royalty is a tax. He argued that the exercise of authority by the 1st respondent in view of minerals in public land was null and void.

15. On the *Mining (Prescription of Royalties on Minerals) Regulations 2013*, counsel submitted that the Regulations came in effect vide Legal Notice No.187 of 2013 on August 16, 2013 while the *Statutory Instruments Act 2013* came into effect on the January 25, 2013. He pointed out that the information shared by the respondents was for the year 2016 adding that similarly these Regulations were not tabled before Parliament as required under section 11(4) of the *Statutory Instruments Act*. The mandatory nature of this Section he submitted was lauded by the court in the case of *Tax Justice Network – Africa v Cabinet Secretary for National Treasury & 2 others* (2019) eKLR which was cited in support. Further that despite the petitioner being one of the legally authorized miners in Kenya, it was never given an opportunity to comment on the Regulations hence lack of public participation.

16. On the *Mining (Community Development Agreement) Regulations 2017*, Counsel submitted that the Regulations were not clear on what constitutes a community but merely refers to a group of people who reside near a mining area. He noted that the petitioner operates in Tsavo National Park. He submitted that from the list issued by the respondents the nearest place to it could have been the meeting held at Voi on 16th and August 17, 2016, to which the petitioner was not invited and had no knowledge of the same.

17. He further submitted that only the miners from Eastern and the Coast attended the meeting. To him this could not be considered as public participation as it did not involve members of the local community. In support of this argument Counsel relied on the case of *Republic v County Government of Kiambu Ex parte Robert Gakuru & another* (2016) eKLR where it was stated that what matters at the end of the day is that a reasonable opportunity is offered to members of the public and all interested parties to know the issues and to have an adequate say.

18. Counsel further submitted that the requirement under section 183(5) (c) of the *Mining Act* to the effect that the local community receives 10% royalty and a further 1% under the Regulations, is an unfair tax burden contrary to article 201(b)(i) of the *Constitution*. He submitted that the petitioner's rights had been violated.

The Respondents' submissions

19. The respondents through the Principal State Counsel, Mr Thande Kuria, filed written submissions dated April 19, 2021. The issues he identified for determination are as follows:

    i. Whether the imposition of the Mining (Community Development Agreements) Regulations is discriminatory to the petitioner.

    ii. Whether there was public participation in promulgation of the Regulations in compliance with section 5(1) of the *statutory instruments Act*.

20. Counsel on the first issue opposed the petitioner's assertion of there being discrimination. To expound on this point he relied on the case of John Harun Mwau v Independent Electoral and Boundaries Commission & another[2013] eKLR where it was held that it must be clear that a person alleging a violation of article 27 of the *Constitution* must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the *Constitution*. Similar reliance was placed on the case of *Nyarangi & 3 others v Attorney General* [2008] KLR 688.

21. Counsel submitted that the impugned provision and Regulations could not be unconstitutional because mineral royalties are only payable by mineral right holders. As such companies not holding a Mining License cannot be subjected to the provisions of the *Mining Act*, 2016 and the Regulations. Reiterating the contents of the respondent's replying affidavit, Counsel argued that the petitioner had erroneously faulted the impugned Regulations since the object, purpose and effect of the said Regulations flows directly from the *Constitution* as it gives effect to the provisions of article 69 of the *Constitution*. He stressed that mineral rights are not granted for free to mineral right holders and as such royalties must accrue and equitably benefit the communities where mining activities take place.

22. On the second issue, Counsel emphasizing the importance of public participation indicated that this had been conducted. He noted that in its supporting affidavit, the petitioner had stated that it had been invited by the respondents to formulate the Community Development Agreements which meeting they attended. Further, the respondents in their replying affidavit had deposed the steps that they had taken to conduct public participation.

23. In support, he relied on the case of *Moses Munyendo & 908 others v The Attorney General and Minister for Agriculture* [2013] eKLR where it was held that the National Assembly has a broad measure of discretion on how they achieve the object of public participation and that how it is affected will vary from case to case but that it must be clear that a reasonable level of participation was afforded to the public. Additional reliance was placed on the cases of: (i) *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission*, Petition No. 294 of 2013, *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others* [2014] eKLR (ii) *Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [20016] ZAACC 22.

24. Counsel submitted that when the constitutional validity of a statute is brought under scrutiny the general principle to be applied is as was stated by the Supreme Court of India in *Hambardda Wakhana v Union of India Air* [1960] AIR 554 which stated:

> "In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assemble din a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted, Presumption is therefore in favour of the constitutionality of an enactment.

25. He therefore contended that the petitioner has not proved its case to necessitate the invalidation of the impugned action of the *Mining Act* and its Regulations.

Analysis and Determination

26. I have considered the pleadings, submissions, cited authorities by the parties herein and the law and in my view the issues that arise for determination are as follows:

    i. Whether section 183 of the *Mining Act* 2016, the *Mining (Prescription of Royalties on Minerals) Regulations 2013* and the *Mining (Community Development Agreement) Regulations 2017* are unconstitutional.

    ii. Whether the petitioner's rights under articles 27(4) and 40(2) (b) of the *Constitution* were violated by the respondents; and

    iii. Whether the petitioner is entitled to the reliefs sought.

Issue No (i). Whether Section 183 of the *Mining Act* 2016, the Mining (Prescription of Royalties on Minerals) Regulations 2013 and the Mining (Community Development Agreement) Regulations 2017 are unconstitutional.

27. The petitioner challenged the constitutionality of the impugned legislations on the following basis:

    a. Lack of public participation.

    b. Imposition of heavy tax burden owing to the payment of the royalties contrary to the principles of taxation.

        a) Whether public participation was conducted

28. The petitioner averred that prior to the enactment of the impugned Regulations the respondents did not comply with section 5 of the *Statutory Instruments Act* which requires consultation with the relevant stakeholders through public participation. This argument was opposed by the respondents who averred that they had carried out the public participation exercise in compliance with the said law.

29. Article 10 of the *Constitution* stipulates that one of the hallmarks of the Kenyan Constitution is involvement of the citizens in the Country's governance. Specifically, the Government is obligated under article 118 of the *Constitution* to facilitate public participation in the legislative process. This not only applies to Acts of Parliament as enacted by Parliament but also statutory instruments as provided under section 5(1) of the *Statutory Instruments Act*. This Section provides as follows:

    Consultation before making statutory instruments

    Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

    i. have a direct, or a substantial indirect effect on business; or

    ii. restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

30. The Court of Appeal in the case of *Martin Nyaga Wambora v County Assembly of Embu & 37 others* [2015] eKLR while speaking on public participation opined as follows:

    "(41) In particular article 196(1)(b) of the *Constitution* obligates a County Assembly to facilitate public participation and involvement in the legislative

and other business of the assembly and its committees; while section 91 of the County Government Act requires a County Government to establish particular structures for information, communication technology based platforms, town hall meetings, notice boards for announcements of matters for public interest, avenues for the participation of people's representatives and establishment of citizens fora at county and decentralized units. The respondents did not demonstrate use or availability of such structures in regard to the motion for removal of the appellant.

(42) I am in agreement with the dicta in the South African case *Doctors for Life International v Speaker of the National Assembly and others (supra)* that:

"According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process therefore means taking steps to ensure that the public participates in the legislative process."

(43) Therefore it was for the County Assembly of Embu to show the steps that it had taken to ensure the public involvement and participation..."

31. In essence in such a petition, the authority enacting the Statutory Instrument is obligated to demonstrate that the impugned Statutory Instrument was enacted in compliance with this requirement. In making such a determination therefore the Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR urged the courts to be guided by the following principles:

"(i) As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

1. Furthermore, the *Statutory Instruments Act* provides under section 5(2) and (3) that for public participation to be considered to have been done, the following prerequisites must be proved:

(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

a. drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and

b. ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—

a. involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

b. invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

33. An examination of the evidence presented before this Court reveals that the respondents held a public participation exercise with various stakeholders who were required to submit their views on the Draft

Mining Regulations on payment of royalties and the Community Development Agreements. The meetings were held on August 10, 2016, August 17, 2016, September 1, 2016 and November 3, 2016. These meetings involved various stakeholders such as industry stakeholders, the civil society and Government. The industry stakeholders meeting was held on August 16, 2016 at Voi Wildlife Lodge.

34. Other than the consultative meetings, the court notes that the respondents did not submit the notification notice for instance through an advertisement inviting submissions by a specified date. Nevertheless, owing to the guiding principles, it is clear that just because one did not participate in the exercise the same does not suffice to annul the process. This is as long as the respondents demonstrate that a real consultative process took place. In this matter, I find that public participation was conducted prior to the enactment of the Mining Regulations under consideration in the exercise, in this case, the *Mining (Community Development Agreement) Regulations, 2017*.

35. I however do not find that the respondents discharged their *onus* of proof in relation to the *Mining (Prescription of Royalties on Minerals) Regulations 2013*. This is because they did not adduce the requisite evidence on whether they complied with section 5(2) and (3) of the *Statutory Instruments Act*. This Section requires a notification for the public participation of the exercise and an invite to submit comments. As a result, failure to uphold this constitutional Requirement renders the *Mining (Prescription of Royalties on Minerals) Regulations 2013 unconstitutional*.

b) Whether payment of royalties as envisaged under Section 183 of the *Mining Act* is contrary to the principles of taxation

36. The petitioner further contended that payment of royalties was a quasi-form of taxation only in relation to mining companies. Similarly, that payment of the fees to the community placed on the petitioner a heavy burden as this was charged twice. This is under section 183 of the *Mining Act* and the Regulations. According to the petitioner these two aspects are contrary to the principles of taxation.

37. The petitioner informed that it deals in the mining business. The *Constitution* under article 62(1)(f) provides that all minerals and mineral oils form part of public land. In light of this the petitioner argued that the same ought to be under the National Land Commission. I reject this notion for two reasons. First of all only the Government is allowed to impose taxes under article 209 of the *Constitution* in a manner prescribed by an Act of Parliament. Secondly, the *Constitution* under article 67 of the *Constitution* makes known that the National Land Commission can only assess tax on land and premiums on immovable property in any area designated by law. Evidently its jurisdiction does not extend to imposition of other taxes. Moreover, the provision does not indicate that the Commission is to assess payment of royalties. The *Mining Act*, 2016 was enacted to regulate the administration of the minerals therein.

38. The *Mining Act* 2016 provides that ownership of these minerals is stipulated under section 6 of the *Mining Act*. This Section provides as follows:

> 1. Every mineral—
>
> a. in its natural state in, under or upon land in Kenya;
>
> b. in or under a lake, river, stream, or water courses in Kenya;
>
> c. in the exclusive economic zone and an area covered by the territorial sea or continental shelf, is the property of the Republic and is vested in the national government in trust for the people of Kenya.

2. Subsection (1) applies despite any right or ownership of or by any person in relation to any land in, on or under which any minerals are found.

3. The national government's control over minerals vested in it shall be exercised in accordance with the provisions of this Act.

39. To access these minerals section 10 of the Act states that one can only acquire a mineral right if they are granted a permit or license in accordance with the Act. One of the obligations for a mineral right holder is payment of royalties under section 183 of the *Act*. This Section provides as follows:

1. The holder of a mineral right shall pay royalty to the State in respect of the various mineral classes won by virtue of the mineral right.

2. The Cabinet Secretary shall prescribe the rates payable under subsection (1).

3. The Cabinet Secretary may require the holder of a mineral right to make returns relating to any royalties paid in such manner and within a period as may be prescribed.

4. Any mineral samples including core samples, removed for the purposes of testing, shall not be subject to royalty unless they exceed maximum value stipulated in regulations.

5. The royalties payable under sub-section (1) shall be distributed as follows—

   a. seventy percent to the National Government;

   b. twenty percent to the County Government; and

   c. ten percent to the community where the mining operations occur.

40. According to the *Dictionary of Mining, Mineral & Related Terms* (USBM, P 946-947) 'a royalty is a share of the product or profit reserved by the owner for permitting another to use the property'. As such, the *Venkataramaiya's Law Lexicon and Legal maxims* (Vol 3, P 2128) states that a royalty on mines and minerals cannot thus be a fee but a levy of the nature of a tax. Considering this, it was stated that royalty on minerals should be taken as an imposition of a tax.

41. Although described as a form of tax a royalty by its nature is distinct from ordinary taxes. It is a payment to the owner of the mineral resource in return for the removal of the minerals from the land. In the *Article "Mining Royalties A Global Study of their Impact on Investors, Government, and Civil Society*" by James Otto.[et al.], it was noted that the concept of national sovereignty over natural resources, alongside a growing understanding of sustainable development in the mineral sector, is causing mineral royalties to be viewed as instruments of socio economic change. I find this statement to be in harmony with the principles of land policy under article 60(1) ofthe *Constitution*. This Article provides as follows:

> "Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable."

42. Palpably, it is not in dispute that one of the constitutional functions of the Government is its power to impose taxes and charges as envisaged under article 209 of the *Constitution*. This was aptly captured in the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association*

of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others [2014] eKLR where it was held as follows:

> " 32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the *Constitution*, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional."

43. The Court further cited *Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others* Nairobi Petition No 544 of 2013 [2014] eKLR which stated:

> " (24) Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. Article 209 of the *Constitution* empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under article 209 of the *Constitution*, the legislature retains wide authority to define the scope of the tax. (See *Bidco Oil Refineries v Attorney General and others* Nairobi Petition No 177 of 2012, paras 53 – 56) "

44. While the *Constitution* empowers the Government to impose fees such as royalties in accordance with its principles, it does not disclose or define how high or low the same can be. The Government is however given leeway to define and quantify the same in a Statute in this case the *Mining Act*, 2016. It is discernable therefore that this mandate under article 209(2) is left to the legislature to decide based on various factors not within the knowledge and mandate of this court.

45. It is my humble view that allowing the petitioner's argument that payment of royalties imposes a tax burden hence unconstitutional, would be in error and untenable in light of the purposes of theb *Constitution*. This court is mandated under article 259 of Constitution to interpret the *Constitution* in a manner that promotes its purposes, values and principles. The purpose of a royalty and the mandate of the Parliament in imposing such fees, has been considered. All this is in line with the principles of the land policy under article 60 of the *Constitution* in relation to minerals.

46. In light of the above, I find that section 183 of the *Mining Act* 2016 and the *Mining (Community Development Agreement) Regulations 2017* are constitutional. On the other hand, I find that the *Mining (Prescription of Royalties on Minerals) Regulations 2013* are unconstitutional as the principle of public participation was not complied with during the Regulation's enactment.

Issue No (iii). Whether the petitioner's rights under Articles 27(4) and 40(2) (b) of the *Constitution* were violated by the respondents

47. The petitioner under the same breath took issue with the impugned provisions describing the terms therein as discriminatory in comparison to other companies operating businesses in Kenya. The respondents opposed this argument indicating that the terms in the impugned Section

and Regulations only applied to mining companies. As such the same could not be deemed as discrimination in that context.

48. Article 27(4) of the *Constitution* reads as follows:

> The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

49. Article 40(2)(b) of the *Constitution* provides that:

> (2) Parliament shall not enact a law that permits the State or any person -
>
> (b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4).

50. The Supreme Court discussing discrimination in the case of *Gichuru v Package Insurance Brokers Limited* (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) opined as follows:

> "(48) Black's Law Dictionary, 10th Edition defines discrimination as "failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." However, it must be appreciated that not all cases of distinction amount to discrimination."

51. The court went further to observe that:

> "(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification..."

52. The test for determining whether the petitioner's claim on discrimination is sustainable, constitutes demonstrating that there is a nexus between the obligation of the petitioner under the Act and obligations of other companies in Kenya. Further that the discrimination is without any objective and reasonable justification.

53. The material placed before this court makes it apparent that the basis of the alleged discrimination is the payment of royalties as stipulated under section 183 of the *Mining Act* by persons and corporations holding mining rights. This differentiation was grounded on the fact that only persons with mining rights pay royalties while the rest are not under this obligation. Unmistakably the two, contrary to the petitioner's allegation are in different classes and hence the differentiation cannot qualify as discrimination. As stated in the cited authority, discrimination occurs when differentiation in treatment occurs among persons in the same class.

54. Moreover, the petitioner who bears the onus of proving discrimination as held in the case Gichuru v Package Insurance Brokers Limited (supra) failed to demonstrate if at all, the nexus between itself as a mining company and other companies that constitute the alleged discrimination. In this regard I find that the petitioner failed to prove that its rights under article 27(4) and 40(2)(b) of the *Constitution* were violated.

55. From the foregoing analysis and the material placed before this court it is my humble conclusion that the petition dated May 24, 2019 partially succeeds, as stated above. I therefore declare that the *Mining (Prescription of Royalties on Minerals) Regulations 2013* are unconstitutional. The rest of the prayers are declined, and dismissed with no order for costs.

56 Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MAY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT