



**Rockland Limited v Cabinet Secretary, Ministry of Petroleum & Mining &
another (Constitutional Petition E008 of 2021) [2023] KEHC 22403 (KLR)
(Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E008 OF 2021**

AC MRIMA, J

SEPTEMBER 21, 2023

BETWEEN

ROCKLAND LIMITED PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF PETROLEUM &
MINING 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Background:

1. Rockland Kenya Limited, the Petitioner herein, is a limited liability company in the business of mining.
2. Through a Special Mining Lease No. 19 issued on 15th August, 1991 under the provisions of the then *Mining Act* (Repealed) and renewed on 24th August 2012 for a further period of 21 years by Commissioner of Mines and Geology, under Section 55 of the repealed *Mining Act*, the Petitioner operates several mines within Tsavo West National Park in Kenya.
3. It is its case that, being the holder of the Special Mining Lease, by virtue of Regulation 19(a) of the Mining (Dealing in Minerals) Regulations, it is eligible to apply for an Export Permit that allows it to export minerals for sale to other parties outside the Republic.
4. On 7th September 2017, The Cabinet Secretary Ministry of Mining, the 1st Respondent herein, made a directive (hereinafter referred to as ‘the impugned directive’) that required export permits to be submitted to its office ‘for consideration of granting’ and also introduced other requirements to accompany the application.



5. The further requirements included; the requirement that every application for export permit must be accompanied by an inspection report from Mineral Audit and a geologist from the Department of Geological Survey; that no application would be considered without an inspection report; that the weight and market value arrived at in the expert opinion of the inspections; and that there be photographic evidence of minerals being exported and computation of royalty payable.
6. On 17th November 2020, the Petitioner, in line with Section 171 of the *Mining Act* and Regulation 20 of the Mining (Dealing in Mineral) Regulations 2017, made an application to the Director of Mines for an Export Permit.
7. It is the Petitioner's case that to date, its application has not been approved and is running losses and unable to run its business as a result of its inability to sell minerals.
8. It is its case that the conditions laid out by the 1st Respondent are oppressive, unreasonable and contrary to Section 171 of the *Mining Act* and Regulation 20 of the Mining (Dealing in Minerals) Regulations 2017.
9. It asserted that despite being one the largest mining companies in the Republic, it has never had any consultation with the 1st Respondent over the directive issued on 7th September, 2017.

The Petition:

10. Through the Petition dated 30th September 2020, supported by the Affidavit of Wilson Gumbi and further affidavit deposed to on 30th September 2020 and 24th February 2022 respectively, the Petitioner's General Manager, the Petitioner sought this Court's intervention in respect of the 1st Respondent's impugned directive.
11. It pleaded that the impugned directive granted the 1st Respondent self-imposed discretionary power in respect to the approval and granting of Export Permits, a power not granted to it under Section 171 of the *Mining Act* and Regulations 20 of the Mining (Dealing in Minerals) Regulations 2017.
12. It averred that according to the forgoing section, the 1st Respondent should not consider or approve the applications but merely grant Export Permit.
13. It was its case that the impugned directive usurped the conditions with regard to what is required when applying for an Export Permit by imposing extra conditions not provided for in Regulation 20(3) of the Mining (Dealing in Minerals Regulations 2017), a regulation which has neither been repealed nor amended.
14. On the foregoing, the Petitioner pleaded that the impugned directive could neither be said to have repealed nor amended Regulation 20(3) of the Mining (Dealing in Minerals) Regulations 2017, nor was it a Statutory Instrument since it was introduced in breach of Section 5 of the *Statutory Instruments Act* that requires public consultations.
15. The Petitioner posited that the impugned directive offended the use of public land as provided for under Article 62(1)(f) and (4) of *the Constitution* since it neither was not an Act of Parliament nor was it introduced under any Act of Parliament.
16. It was its case that the impugned directive had impeded its right to pursue economic, social and cultural development as allowed under Article 1(1) & (2) of the International Covenant on Economic, Social and Cultural Rights 1966.
17. It asserted that the impugned directive was being used to curtail its business.



18. The Petitioner pleaded that, properly understood, the 1st Respondent's power under Section 171(1) of the *Mining Act* and Regulation 20(4) of Mining (Dealing in Minerals) Regulations 2017 are merely procedural and is only meant to sign as opposed to consider applications for Export Permits.
19. As regards the delay occasioned to it, it pleaded that its rights to expeditions administrative action was violated contrary to Article 47(1) of *the Constitution* and Sections 2, 3 and 4 of the Fair Administrative Actions Act.
20. It posited that it had not received any written explanation from the 1st Respondent on the delay in breach of its rights under Article 47(2) of *the Constitution* as read with Section 4(2) & (3) of Fair Administrative Actions Act.
21. The Petitioner further claimed violation of its right to non-discrimination as guaranteed under Article 27 of *the Constitution* since the impugned directive was imposed only on companies that were holders of mining licences but not to any other company.
22. On the foregoing factual and legal basis, the Petitioner prayed for the following reliefs: -
 - a. That conservatory Order be issued staying any further implementation of the 1st Respondent Directive of 7th September 2017.
 - b. A declaration that by its administrative act of issuing the Directive on 7th September 2017 by the 1st Respondent, 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*, a breach of the Petitioner's rights and Fundamental Freedom to the right to Property as allowed under Article 40(2)(b) of *the Constitution*.
 - c. That this Court do issue a Declaration that the 1st Respondent's Directive of 7th September 2017 is unconstitutional.
 - d. That 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, and
 - e. That the Petitioner is deserving of costs

The Submissions:

23. The Petitioner filed a pair of written submissions dated 12th July 2021 and 25th February 2022.
24. It was its case that the Respondent had not placed anything on record that factually contradicted its evidence.
25. It was submitted that this Court ought to grant the prayers sought for under Rule 16 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 for lack of their response.
26. Substantively, the Petitioner submitted that under Regulation 20 of the Mining (Dealing in Minerals) Regulations 2017 as read with Section 171 of the *Mining Act*, application for Export Permits is made to the Director of Mines.
27. From the foregoing, it was its case that it is the duty of the Director of Mines to receive applications, verify, approve and forward them to the 1st Respondent for issuance of the permit.
28. It was its submission that the impugned directive was illegal and had the effect of usurping powers that Legislature had granted to the Director of Mines.



29. The Court of Appeal decision in Republic -vs- Chairman Amagoro Land Disputes Tribunal & Another ex-parte Paul Mafwabi (2014) eKLR was referred to where it was observed: -

.... By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it...

30. As regards failure of the directive to abide by the provisions of Part II and IV of the *Statutory Instruments Act*, it was submitted that it sought to obtain powers that had already been granted the Director of Mines contrary to Section 70 of the *Interpretation and General Provisions Act* which requires any power to give licence, permit or authorization to be consistent with the law.

31. In finding support in Commissioner of Domestic Taxes -vs- W.E.C Lines (K) Limited (2022) KEHC 57, the Petitioner submitted that the impugned directive ought to have been subjected to Parliament. In the case it was observed: -

... Even if the VAT Regulations, 2017 had not been declared invalid, it is the affirmative duty of this Court to give effect not only to *the Constitution* but clear provisions of statute. I therefore hold that the VAT Regulations 2017 ceased to have any effect immediately on the 8th day after the said Regulations were not tabled before the National Assembly. The Commissioner could not apply them to the Respondent's case as they were at the time null and void.

32. It was urged that the Petition be allowed as prayed.

The 1st and 2nd Respondents' case:

33. The Cabinet Secretary Petroleum and Mining and the Attorney General opposed the Petition through Grounds of Opposition dated 8th March 2022.

34. It was their case that Petition is not meritorious since the Petitioner is a mineral permit holder under the Act to whom a mineral right is granted but not a mineral dealer to whom a licence has been issued to deal or export minerals.

35. It was stated that the issuance of a mineral dealer's licence is not automatic on issuance of a mineral rights permit.

36. On the foregoing, it was their case that the Petition is premised on the assumption that the impugned directive issued by the Cabinet Secretary in charge of mining is erroneous for usurping the powers of the Director of Mines yet he is the one in charge of Mining, the Administrator of the Act and has the responsibility of ensuring that the sector is governed by the provisions of the Act.

37. It was their case that under Article 201(c) and (d) the Cabinet Secretary has the obligation to respect and uphold the national principles and values and prescribe Regulations to facilitate effective implementation of the Act.

38. Based on the foregoing, it was submitted that the directive issued by the Cabinet Secretary is legal, regular and meets the constitutional muster contrary to the Petitioner's erroneous assertion.

39. It claimed that the impugned directive was issued under the statutory powers of the Cabinet Secretary under Section 158(1) of the Act that provides that a person shall not dispose of minerals, whether for sampling, assay, analysis or otherwise except with the written consent of the Cabinet Secretary.



40. The Respondents denied that the impugned directive was a statutory instrument since it merely was an internal administrative directive issued under the Mining (Dealing with Minerals) Regulations setting general conditions in furtherance of the provisions of the Act and the Mineral Dealers' Regulations.
41. It was their case that the Petitioners had not demonstrated how it conflicts with Section 70 of the Interpretations and General Provisions Act.
42. They maintained that the impugned directive was regular and legal. They prayed that the Petition be dismissed with costs.

The Submissions:

43. The Attorney General filed written submissions dated 8th March 2022.
44. From the outset, the 2nd Respondent expressed reservations on the conduct of the Petitioner stating that despite being a holder of a mineral right under the Mining (Prescription of Mineral Royalties) Regulations issued vide Legal Notice Number 187 of 2016, it was not paying royalties under the said regulations since a conservatory order in its favour has been in force from 2019.
45. It was its case that as such, the Petitioner has not moved the Court to conclude the matter despite the Respondents complying with filing of responses and submissions.
46. On the substance of the Petition, it was reiterated that the Petition is without merit since the Petitioner is a mineral right/ license or permit holder to whom a mineral right is granted but not a mineral dealer to whom a licence has not been issued to deal with or export minerals.
47. It was the 2nd Respondent's case that the issuance of a mineral dealer's licence is not automatic on issuance of a mineral rights permit since the latter is subject to other stringent measures more so when it comes to the issuance of a mineral export licence.
48. On the foregoing, it was its case that the directive issued by the 1st Respondent was legal, regular and met the constitutional muster.
49. It submitted that contrary to the Petitioner's erroneous assertions, the memo containing the directive was expressly issued under the statutory powers of the Cabinet Secretary under Section 158(1) of the Act that provides that a person shall not dispose of minerals, whether for sampling, assay, analysis or otherwise except with the written consent of the Cabinet Secretary.
50. The 2nd Respondent faulted the Petitioner's heavy reliance on Regulation 20(1) Mining (Dealing in Minerals) Regulations 2017, submitting that it placed a premium on subsidiary legislation as opposed to the substantive provisions of mining statute to support his claim, a position that is contrary to Section 31(b) of the *Interpretation and General Provisions Act*.
51. The 2nd Respondent found support of the foregoing argument in the Court of Appeal decision in David Wakairu Murathe vs. Samuel Kamau Macharia Civil Appeal No. 171 of 1998 [2008] 2 KLR (EP) 244 where it was observed: -

First, election petitions are governed by a special and self-contained regime and Civil Procedure Rules are inapplicable except where expressly stated. Secondly, Order 49 rule 3A is a piece of subsidiary legislation promulgated by the Rules Committee for the purposes of the *Civil Procedure Act*, and under the ordinary canons of statutory interpretation they cannot override express provisions of an Act of Parliament.



52. The 2nd Respondent further disputed the argument that the 1st Respondent was usurping the powers of the Director of Mines by submitting that Cabinet Secretary in charge of Mining is the Administrator of the [Mining Act](#) and has the responsibility of ensuring that the sector is governed by the provisions of the Act.
53. It was its case that the impugned directive was not a Statutory Instrument but merely an internal administrative directive issued under the Mining (Dealing with Minerals) Regulations.
54. It asserted the claim that the impugned directive was in conformity with the provisions of Section 192(2) of the [Mining Act](#) which expressly provides for the Cabinet Secretary in charge of mining to prescribe such other records and instruments that shall be entered in the register of mineral rights.
55. In the end, it was urged that the Petition be dismissed with costs.

Analysis:

56. There are two main issues for determination in this Petition. They are as follows: -
 - a. Whether the 1st Respondent, the Cabinet Secretary, Ministry of Mining, has the power to grant export permits.
 - b. If the answer to (a) above is in the affirmative, whether the impugned directive contravene Article 47 of [the Constitution](#) for want of conformity with lawfulness, reasonableness and procedural fairness.
57. The issues shall be dealt with in seriatim.

a. Whether the 1st Respondent, the Cabinet Secretary Ministry of Mining, has the power to grant export permits:

58. The Petitioner answers the above issue in the negative. To it, the power is bestowed upon the Director of Mines whereas the Cabinet Secretary reserves the administrative duty to only sign the export licences once granted by the Director of Mines.
59. The Respondents hold the converse position.
60. It is the position that the dispute is hinged on the provisions of Section 171 of the [Mining Act](#) and Regulation 20 of the Mining (Dealing in Minerals) Regulations, 2017.
61. In order to deal with the issue with ease, a reproduction of the above provisions becomes necessary, and as follows: -

Section Export of minerals:

117:

1. A person shall not export a mineral otherwise than in accordance with an export permit granted by the Cabinet Secretary.
- (2) The holder of—
 - (a) a mineral right;
 - (b) a mineral dealer's licence; or
 - (c) a diamond dealer's licence,may apply to the Director of Mines for an export permit in the prescribed form.



3. The grant of an export permit to a person in accordance with this Act shall not exempt the person from an obligation to comply with the requirements of any other law relating to the export of minerals.
 4. Where diamonds are exported pursuant to a permit issued under this section, such export shall conform to the international best practices.
 - (5) The Cabinet Secretary may make Regulations to govern value addition on minerals.
62. Regulation 20 of the Mining (Dealing in Minerals) Regulations, 2017 provides as follows: -
20. Application for an export permit:
- (1) Subject to Section 171(2) of the Act, an application for the grant of an export permit shall be made to the Director of Mines by completing Form EP 1 as set out in the Second Schedule.
 - (2) Every export or shipment of a mineral shall require an export permit.
 - (3) The application shall include the following—
 - (a) the name, source, quantity, grade and value of the mineral to be shipped or exported;
 - (b) the name, address of the purchaser or consignee and destination where the mineral is to be shipped or exported;
 - (c) the sales or marketing agreement between the applicant and the buyer if any;
 - (d) a refining contract or off-take agreement where the applicant has signed such an agreement; and
 - (e) the royalty liability for that consignment.
 - (4) An export permit shall be signed by the Cabinet Secretary or an officer authorised by the Cabinet Secretary.
63. The above two provisions set the legal stage upon which applications for export permits may be made and granted. Section 117(1) of the *Mining Act* vests the power to grant an export permit on the Cabinet Secretary.
64. Regulation 20 of the Mining (Dealing in Minerals) Regulations, 2017 provides the procedure in application for the grant of an export permit. The application is to be made to the Director of Mines by completing Form EP 1 as set out in the Second Schedule.
65. Therefore, an Applicant for an export licence must begin with an application to the Director of Mines. The application must be accompanied by the requirements in Regulation 20(3).
66. It is, then, the Cabinet Secretary who finally rests with the discretion to grant the licence. The regulation requiring the application to be lodged to the Director of Mines does not ipso facto accord the Director of Mines the power to grant the licence. The power to grant the licence is statutorily anchored on the Cabinet Secretary under Section 117 of the *Mining Act*. The Mining (Dealing in Minerals) Regulations, being a subsidiary legislation cannot, therefore, override the parent statute.
67. The Petitioner's contention that it is the Director of Mines who is to grant the export licence and not the Cabinet Secretary, therefore, lacks any legal leg to stand on. It is for rejection.



68. The issue is, hence, answered in the affirmative. The Court will now consider the next issue.

b. Whether the impugned directive contravene Article 47 of *the Constitution* for want of conformity with lawfulness, reasonableness and procedural fairness:

69. Regulation 20(3) of the Mining (Dealing in Minerals) Regulations, 2017 gives the contents of the application for the licence. The provision uses the words 'shall include' thereby meaning that the listed requirements are not exhaustive.

70. As a recap, the requirements under Regulation 20(3) are as follows: -

- (a) the name, source, quantity, grade and value of the mineral to be shipped or exported;
- (b) the name, address of the purchaser or consignee and destination where the mineral is to be shipped or exported;
- (c) the sales or marketing agreement between the applicant and the buyer if any;
- (d) a refining contract or off-take agreement where the applicant has signed such an agreement; and
- (e) the royalty liability for that consignment.

71. The impugned directive introduced the following further requirements to accompany an application for an export licence: -

- i. An Inspection Report from Mineral Audit and a Geologist from the Department of Geological Survey;
- ii. That no application would be considered without an inspection report;
- iii. That the weight and market value arrived at in the expert opinion of the inspections;
- iv. That there be photographic evidence of minerals being exported and computation of royalty payable.

72. Responding to the contention that the Cabinet Secretary did not act within the calling under Article 47 of *the Constitution* in coming up with the additional requirements, the Respondents argued that the additional requirements were merely internal administrative directions which did not require public engagement.

73. To ascertain if the Respondents position is holding, this Court will look at Article 47 of *the Constitution* in discussing the constitutional doctrine of public participation.

74. The High Court in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR comprehensively dealt with the issue of public participation and in light of Article 10 of *the Constitution*. The Court stated as follows: -

116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions.



117. *The Constitution* also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

118. Expounding on Article 10 of *the Constitution*, the Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR held that:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR while referring to the South African decision in Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

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 participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10th Edition defines 'consultation' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.



121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

122. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR the Court addressed the concept of consultation in the following manner: -

.... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.
124. The importance of public participation cannot be gainsaid. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (supra) while dealing with the aspect of public participation in lawmaking process stated as followed: -

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.



125. In *Matatiele Municipality v President of the Republic of South Africa (2)* (CCT73/05A), the South African Constitutional Court stated as follows: -

A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...

126. The South African Constitutional Court in *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 discussed the importance of public participation as follows: -

...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)* referred to *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. In *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others (supra)* the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.



- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012. In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

- d. Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e. Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
- f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

75. The Court in *William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others* case (supra) further dealt with the instances in which a State corporation requires to undertake public engagement and those instances which do not call for such. The Court defined the requisite threshold as follows: -

133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the ‘internal operational decisions concept’. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.
134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.



135. The issue is not foreign to our Courts. In *Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party)* [2020] eKLR, the Petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the Respondents argued that Section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process. Rika, J, expressed himself as follows:

Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in *Robert N. Gakuru & Others v. Governor Kiambu County & 3 others* [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall



definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of *the Constitution*, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.
76. Whereas the decision in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR* dealt with a state corporation exercising statutory power, the threshold adopted by the Court apply in the circumstances of this case and in equal measure. In other words, a decision taken in exercise of executive authority may have to be subjected to public participation or not depending on its resultant effect.
77. As held in the above case, if the decision ‘only impacts on the normal and ordinary day-to-day operations of the entity.....subjecting ... to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.’
78. The converse is also correct. As held ‘the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.’
79. Returning to the matter at hand, this Court notes that the Mining (Dealing in Minerals) Regulations, 2017 is a subsidiary legislation. Such must have gone through the extensive process of public participation and Parliamentary approval as contained in the *Statutory Instruments Act*, No. 23 of 2013 prior to enactment.
80. Parliament was very deliberate in using the words ‘shall include’ in Regulation 20(3) of the Mining (Dealing in Minerals) Regulations, 2017. That connotes further that there may be some further requirements that may be added to the originally approved ones. However, such requirements can only be those which ‘only impacts on the normal and ordinary day-to-day operations of the entity’, if they are not to attract public engagement. To the contrary, if the further requirements ‘are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public’, then such call for public engagement.
81. The question which now begs for an answer is under which category do the additional requirements in the impugned directive fall. There is no doubt that the impugned additional requirements affect the Applicants for the export licence. The Applicants are to incur further expenses in a bid to comply with the additional requirements raised in the impugned directive. Such additional requirements, therefore, ‘are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public’.



82. It, hence, turns out that whereas the Cabinet Secretary has a window to add into the requirements for application for export licences, the addition must be limited to only such additions that are purely operational decisions whose effect does not transcend the borders of the public body or agency into the arena of, and have significant effect on the major sector players, stakeholders and/or the public. Such should be those that aid the institution to carry out its normal and ordinary day to day operations and no more.
83. In this case, therefore, the additional requirements in the impugned directive are caught up by want of compliance with Articles 10 and 47 of *the Constitution* on public engagement.
84. Article 47 of *the Constitution* states as follows: -
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.
85. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. Section 5(1) thereof provides that: -
- (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—
 - a. issue a public notice of the proposed administrative action inviting public views in that regard;
 - b. consider all views submitted in relation to the matter before taking the administrative action;
 - c. consider all relevant and materials facts; and
 - d. where the administrator proceeds to take the administrative action proposed in the notice—
 - i. give reasons for the decision of administrative action as taken;
 - ii. issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and
 - iii. specify the manner and period within which such appeal shall be lodged.
86. Section 2 of the Fair Administrative Act defines an ‘administrative action’ and an ‘administrator’ as follows: -
- ‘administrative action’ includes -
- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or



- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.

87. Addressing itself to these provisions, the Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015)eKLR held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

88. The South African Constitutional Court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98* 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

89. The High Court in *Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti* [2018] eKLR had the following to say: -

- 25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

- a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.



- b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.
- c. Irrationality and proportionality- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*:

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

- 90. From the foregoing discussion, there is no doubt that the impugned directive is an administrative action. In sum, it is an administrative action because it affects the legal rights and interests of the Applicants for export licences. As such the directive had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.
- 91. The impugned directive did not conform to the requirements of Article 47 of *the Constitution* and Fair Administrative Actions Act as far the additional requirements are concerned. At a minimum, to meet the constitutional and statutory threshold, the Respondents had to do the following: -
 - a. Give notice of the intended directives to the public;
 - b. Afford an opportunity for the public to be heard on the question; and
 - c. Give reasons for the decisions made – in this case, the impugned directive.
- 92. None of these happened. For this reason alone, the impugned directive is constitutionally infirm.

Disposition:

- 93. Flowing from these findings and conclusions, the disposition of the Petition is as follows: -
 - a. The claim that the Cabinet Secretary Ministry of Mining cannot consider an application for export licence, but only the Director of Mines was not proved and is hereby dismissed.
 - b. The claim that the additional requirements that should accompany applications for export licences as contained in the impugned directive by the Cabinet Secretary dated 7th September, 2017 was in violation of Articles 10 and 47 of *the Constitution* for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the additional requirements in the impugned directive constitutionally infirm. They are hereby quashed.
 - c. All the other prayers in the Petition fail and are hereby dismissed.
 - d. This being a public interest litigation, each party will bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.



A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for the Petitioner.

N/A for the Respondents.

