



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC PETITION CASE 12 OF 2019

IN THE MATTER OF ARTICLES 22 (1) AND (2),(C) 50. (1) AND 258 (1) AND (2) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1 (1),2 AND (3) ,10 (2),69,70,73 (10) (B),129 (1) AND (2),153,(4),232 (10 (D),(E) AND (F) 259 (10 AND (3) OF THE CONSTITUTION.

IN THE MATTER OF THE ALLEGED VIOLATION OR RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 24,27,40,43,46 AND 47 OF THE CONSTITUTION.

BETWEEN

NYATIKE MINERALS MARKETING CO-OPERATIVE SOCIETY LIMITED..PETITIONER

VERSUS

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

DIRECTOR OF MINES AND GEOLOGY.....2ND RESPONDENT

KHALIF ABDI HASSAN.....3RD RESPONDENT

H-NUO KENYA COMPANY LIMITED.....4TH RESPONDENT

READY CONSULTANCY COMPANY LIMITED.....5TH RESPONDENT

HON. ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT

A. Introduction

1. At the heart of the present petition is land reference number Muhuru/Kadem/Macalder/498 (hereinafter referred to as the suit land). The same is situate in Macalder Ward in Nyatike sub-County within Migori County. The suit land is allegedly a public land registered in the name of the defunct South Nyanza County Council.
2. The Petitioner is a registered Co-operative Society and has mounted the instant petition for and on behalf of the public and in the public interest for the people of the Constituency and it's future generation who eke out a living as small scale gold and copper miners and diggers. The petitioner is represented by learned counsel, Mr. M. Odero of Okongo Wandago and Company Advocates.
3. The 1st respondent is the Cabinet Secretary for Mining established under **the Constitution of Kenya, 2010 as read with section 12 (1) of the Mining Act,2016.**
4. The 2nd respondent is a statutory office established under **section 17 (1) of the Mining Act.**
5. The 6th respondents is the principal legal adviser to the Government of Kenya as provided for under **Article 156 (4) (a) of the**

Constitution (supra).

6. The 1st, 2nd and 6th respondents are represented by learned litigation counsel, Esther Opiyo.

7. The 3rd respondents is a director of the 4th and 5th respondents who are limited liability companies incorporated in Kenya and whose shareholders and directors are engaged in the alleged illegal gold and copper mining on the suit land. The 3rd, 4th and 5th respondents are represented by learned counsel, Mr. Ken Omolo and Mr. Edward Kisia.

8. On 11th December 2019, this court determined an application by way of the Notice of motion dated 15th October 2019 filed simultaneously with the petition in terms of interim orders of 31st October 2019 for the maintenance of status quo in respect of the suit land. This court further directed that the petition be heard by way of affidavit evidence and written submissions pursuant to consent of counsel for the respective parties in this petition.

B.The gist of the Petitioner's case :-

9. By a thirty eight (38) paragraphed petition dated 16th October 2019 and filed on 22nd October 2019, the petitioner is seeking the following reliefs and orders.

a. A declaration that LR NO. Muhuru/Kadem/Macalder/498 is a public land belonging to government and current mining activities being undertaken thereon by the respondents are illegal and violates the law.

b. A declaration that right to life and protection under Article 26, the right to dignity under article 28 and the economic and social rights under article 43 of the residents of Nyatike Constituency, and its members, who eke out a living through gold mining in Macalder area has been contravened and is being contravened by 1st and 2nd respondents who have allowed foreign nationals to undertake and operate illegal mining activities in the area on LR number Muhuru/Kadem/Macalder/498 to the exclusion of the residents of Nyatike who are being deprived of their means of livelihood.

c. A declaration that the refusal to allow and eviction of the petitioners members from undertaking gold mining in Macalder area on LR number Muhuru/Kadem/Macalder/498 at the old mining site and allowing non Nyatike residents and foreigners to illegally undertake the same from the same land is a contravention of their right to protection of law and their right not to be discriminated against under Articles 27 and 56 the Constitution as the same has resulted in petitioners members and Nyatike Constituents being denied an opportunity to eke out a living.

d. A declaration that the mining activities being undertaken by 3rd, 4th and 5th respondents in Macalder area at the known old mining site on LR number Muhuru/Kadem/Macalder/498 without licenses violates the constitution and law is ultra, vires the Mining Act and the Forest Act and are thus illegal null and void.

e. An order restraining the 3rd, 4th and 5th respondents from continuing with illegal and unlawful mining activities at the old mining site on LR. Number Muhuru/Kadem/Macalder/498 Macalder area, Nyatike Constituency.

f. An order that 3rd, 4th and 5th respondents to remove forthwith from any plants, machineries, equipment, implements, tools etc which they erected at the on gold mining site on LR number Muhuru/Kadem/Macalder/498 in Macalder area, Nyatike Constituency.

g. An order that the 3rd, 4th and 5th respondents do pay compensation and royalties to the people of Kenya, for and on behalf of the inhabitants of Nyatike Constituency for the illegal mining activities they have undertaken on Muhuru/Kadem/Macalder/498 and such compensation if paid to be applied in public projects and facilities.

h. The 3rd, 4th and 5th respondents do pay the costs of this petition.

i. And the petitioner will further and forever continue praying to this court for and on behalf of her members and Nyatike constituents in general for appropriate reliefs as this court may deem fit and just to grant over and concerning Muhuru/Kadem/Macalder/498

10. Briefly, the petitioner claims inter alia, that the suit land is a public land rich in minerals. That the 3rd, 4th and 5th respondents are engaged in illegal mining and collection of tailings from the suit land which is public trust land registered in the name of the defunct South Nyanza County Council. That the 3rd, 4th and 5th respondents do not have either a permit or a license issued in accordance with the law and do not have mineral rights over the area and the suit land on which they are currently undertaking the illegal mining.

11. The petitioner further claims that the suit land is classified as public land under **Article 62 (1) of the Constitution of Kenya, 2010 and by Article 62 (3)** of the same Constitution, minerals are vested in and are held by the National Government in trust for the people of Kenya inclusive of Nyatike Constituency residents. That the 3rd, 4th and 5th respondents did not comply with the provisions of the **Mining Act 2016 and Environmental Management and Coordination Act, 2012 (1999 Cap 387)** thus provoking the instant petition.

12. The petition is premised on thirty five (35) paragraphed supporting affidavit sworn on even date by Micheal Okweto Wanjira, a member of the petitioner. Essentially, the contents of his affidavit reiterate the contents of the petition.

13. By a five (5) paragraphed further affidavit sworn on 3rd December 2019 and filed in court on even date further to Rule 11 (1) of the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013 and pursuant to leave granted by the court on 27th November, 2019, the deponent of the supporting affidavit to the petition also deposed that the petitioner is duly registered as a Cooperative Society under the Co-operative Societies Act (Cap 490 Laws of Kenya). That the petitioner was registered as such per the certificate of Registration issued to the petitioner on 28th January 2014 and marked as MOW 1 (PExhibit 1). He further deposed that the 3rd, 4th and 5th respondents are undertaking illegal gold mining in Macalder area from formerly a gold mine site situate in the suit land as revealed in a letter dated 27th April, 2019 by the Regional Mining Officer J.N. Kuria and marked as "MOW" (PExhibit 2).

14. On 27th December 2019, learned counsel for the petitioner filed submissions dated 27th November 2019, whereby reference was made to **Articles 10, 62 (1) (f), 42 and 70 of the Constitution of Kenya 2010** and termed the mining undertaken by the 3rd, 4th and 5th respondents on the suit land, illegal. To buttress his submissions, counsel relied on the decision of **Mohamed Hussein Haji-vs- Abdi Noor Shariff Ahmed and 5 others (2018) eKLR** and this court's decision in **Tom Mboya Odege -vs- Cabinet Secretary, Ministry of Petroleum and Mining and 3 others (2019) eKLR** hence urged this court to allow the petition.

C. The 1st and 2nd Respondents' case in brief

15. The 1st, 2nd and 6th respondents supported the petition by way of the 1st and 2nd respondents' replying affidavit sworn on 5th December, 2019 by **Joseph Ng'ang'a Kuria** a Senior Superintending Geologist in charge of the Regional Mining office, Migori under the state Department of Mining in the Ministry of Petroleum and Mining. He deposed inter alia, that the 3rd, 4th and 5th respondents have no mining licenses or permission to carry out mining activities on the suit land in the area. That the mineral dealers (processing) licensee registration number DRH/2019/0505 is not a valid mining license, prospecting license, prospecting permit or mining permit for want of format of dealers (processing) license, among others. That the two letters addressed to Khalif Hassan for Ready Consultancy Limited reference MOM/CR/15/42 dated 6th May 2019 and 14th June 2019 are not qualified as a Mineral right to prospect or mine because the holder has not met the obligation within the law.

16. On 18th December 2019, learned counsel for the 1st, 2nd and 6th respondents filed 4-paged submissions dated 17th December 2019 in support of the petition whereby counsel referred to the orders sought in the petition as well as cited **sections 6, 10, 11, and 159 of the Mining Act (supra) and Legal Notice number 88 part 7 (2) (h) of 2017**. To fortify her submissions, counsel relied on **Mohamed Haji and Tom Odege cases (supra)** and urged this court to allow the petition.

D. The 3rd, 4th and 5th Respondent's case

17. By a twenty four (24) paragraphed replying affidavit sworn on 26th November, 2019 and filed on even date by the 3rd respondent, a director of the 4th and 5th respondents, it was the contention of the 3rd, 4th and 5th respondents that this petition is totally useless and only useful for academic purposes hence sought its dismissal with costs. That they were duly authorized by the 1st respondent to venture into gold processing business through Ready Consultancy at the old Macalder Mines located at Nyatike as disclosed in copies of a letter reference MOM/CR/15/42 dated 14th June, 2019, a memo dated 13th June 2019, a letter dated 13th January, 2019, a letter dated 14th August 2019 and a report dated 8th October 2019 marked as "KAH", "KAH-2", "KAH-3", "KAH-4" and "KAH-5" respectively.

18. The 3rd, 4th and 5th respondents further stated that they partnered with the local community through their Copper Hill Sacco Limited with the principle objective of empowering the community. That even though the minerals herein are public property held in trust for the people, their activities on the suit land are in accordance with the law of the land.

19. In their 18-paragraphed submissions dated 18th December 2019 and filed in court on even date, the 3rd, 4th and 5th respondents through their counsel, Mr. Ken Omollo identified and analysed in their favour, issues (i) to (vii) for determination herein. The issues included whether the 3rd, 4th and 5th respondent are carrying out mining activities on the suit land without a mining licence from 1st respondent and consent of the County Government of Migori and the National Land Commission (NLC) and whether the locals are benefitting from the mining activities. Counsel cited sections 12 to 17, 20 and 21 of the Mining Act, 2016 and that the petitioner has not proved the claim herein as provided for under **sections 107 to 110 of the Evidence Act Cap 80 Laws of Kenya**.

20. Counsel further cited **sections 2, 4, 12, and 27 (1) of the Co-operative Societies Act (Cap 490 Laws of Kenya)** and termed the petitioner a busy body. Counsel buttressed his submissions by **Anarita Karimi Njeru -vs- Republic (No.1) (1976-80) 1 KLR 1272 at 1275, Matemu Mumo -vs- Trusted Society of Human Rights Alliance and 5 others (2013) eKLR 1 KLR, Communication Commission of Kenya -vs- 5 others -vs- Royal Media Services Limited and 5 others (2014) eKLR and other authorities**.

21. Additionally, learned counsel, Mr. Edward Kisia for the 3rd, 4th and 5th respondents in his 3-paged submissions dated 19th December 2019 and filed on even date, made reference to the reliefs sought in the petition and urged the court to dismiss the petition with costs. Counsel relied on the cases of **Peter Makau Musyoka and 19 others -vs- PS Ministry of Energy and 14 others (2014) e KLR and Tim Busienei and 2 others -vs- Director General Nema and another (2007) eKLR** and submitted that he petitioner has not established rights under section 13 of the Mining Act, 2016 for the grant of orders sought in the petition.

E. Issues for Determination

22. It is trite law that issues for determination in a suit generally flow either the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints Limited -vs- Falcon Grounds Limited (2006) 2EA 385**.

23. The **Black's law Dictionary 10th Edition** at page 1663 defines the term "suit" thus:-

“Any proceedings by a party or parties against another in a court of law” (Emphasis laid)

24. The instant petition being a proceeding was mounted under the cited Constitutional provisions for this court’s determination. Having considered the entire petition, the replying affidavits, and rival submissions including issues framed therein and bearing in mind the Court of Appeal decision in **Galaxy case (supra)**. I am of the considered view that the issue for determination in this petition are whether:-

a. Is the instant petition competent?

b. Are the 3rd, 4th and 5th respondents carrying out gold mining activities on the suit land in accordance with law?

c. Is the petitioner entitled to the reliefs sought herein?

F. Analysis and determination:

25. As regards issue number (a), the petitioner is described in the petition as a registered Co-operative Society. It is discernable from it’s supporting affidavit that the petition is lodged for and on behalf of the public and in the public interest.

26. In the 1st and 2nd respondents’ replying affidavit at paragraph 18, it is deposed that that instant petition is made:-

“That the application made by the petitioner to this honourable court is sincere in good faith, for the public good and will save resources held in trust by the Government for the people”

27. Conversely, in the 3rd, 4th, and 5th respondents’ replying affidavit at paragraph 22, the 3rd respondent deposed inter alia;

“That the petitioner lacks legal capacity to present this petition since it is not lawfully registered as a Cooperative Society”

28. In the further affidavit sworn by Micheal Okweto Wanjira for and on behalf of the petitioner, it is deposed at paragraph 2 that the petitioner is duly registered as a co-operative society under the **Co-operative Societies Act Cap 490 laws of Kenya**. That the petitioner was registered as such on 28th January 2014 as revealed in the certificate of registration issued to the petitioner on 28th January 2014 and marked as “MOW1” annexed to the affidavit.

29. To that extent, the 3rd, 4th and 5th respondent’s contention that the petition is incompetent, fails. It is pretty clear that the petitioner is legally registered to initiate the petition.

30. On the issue of illegal mining, the petitioner stated that the 3rd, 4th and 5th respondents did not apply for and obtain a licence issued in accordance with the law by the authorized officials. That the mining activities undertaken by the 3rd, 4th and 5th respondents are in utter disregard of legal procedures and processes laid down in the **Mining Act No. 12 of 2016 and the Environmental Management and Coordination Act No. 8 of 1999 (EMCA)**.

31. The 1st and 2nd respondents were very emphatic at paragraphs 8 to 17 of their replying affidavit that the activities carried out by the 3rd, 4th and 5th respondents on the suit land, were illegal. That the documents marked as “KAH 1” to KAH5” are not prospecting licence or Mining licences or permits as required under the **Mining Act (supra)**.

32. Essentially, the 1st, 2nd and 6th respondents support the entire petition. Their replying affidavit and submissions speak volumes thereof.

33. It is not in dispute in this petition that the suit land is public land. Under **Article 62 (1) (f) of the Constitution of Kenya, 2010**, public land is all minerals and minerals oils as defined by law. It is deposed at paragraph 18 of 3rd, 4th and 5th respondent’s replying affidavit that minerals are property.

34. The 3rd, 4th and 5th respondents merely denied the petition. They relied on “KAH 1 to 5” in response to the petition.

35. According to letter marked as “KAH 1” addressed to the 3rd respondent by the 1st respondent, the 3rd respondent’s expression of interest to use of gold tailings at Macalder Old mines in Nyatike was approved vide a letter dated 16th May 2016. However, the 3rd respondent did not annex the latter letter to his response to the petition to prove that he was licenced to undertake mining and collection of tailings from the suit land.

36. Moreover, the letter marked as “KAH1” reads in part that :-

“Please note that you are required to align your operations within the Mining Act, 2016 as soon as possible.” (Emphasis added)

37. **Section 12 (3) of the Mining Act (supra)** provides:-

“No person shall deal in minerals unless he has been registered as a dealer and has been issued with a mineral dealers licence by commissioner”

38. In the supporting affidavit and further affidavit including paragraphs 13 and 3 respectively, the petitioner deposed that the 3rd, 4th and 5th respondents are undertaking illegal gold mining in Macalder area from the suit land without mining rights, mining licence and or permits as required under the Mining Act 2016. The petitioner’s assertions is also supported by a letter dated 27th April, 2019 by the Regional Mining Officer marked as “MOW 2” annexed to the further affidavit.

39. At paragraph 16 of their replying affidavit, the 1st and 2nd respondents urged this court to reject the letter “KAH 1” attached to the 3rd, 4th and 5th respondent’s replying affidavit as the same is not a licence or at all. That the said letter (KAH 1) does not confirm with the Mining Act and the Mining (licence and permit) Regulations,2017 as deposed at paragraph 15 of the 1st and 2nd respondent’s replying affidavit.

40. The petitioner deposed at paragraph 18 of the affidavit in support of the petition that mining is one of those projects to undergo environmental impact assessment under the second schedule of the **Environmental Management and Coordination Act (EMCA)**. I note the said schedule as well as sections 63 and 65 of EMCA on environmental impact licence and transfer of the same.

41. The 3rd, 4th and 5th respondents stated that they are undertaking legal mining on the suit land and that the petitioner as well as any other person should embrace the said mining. That the 3rd, 4th and 5th respondents are not foreigners. That the 3rd respondent is a Kenyan while the 4th and 5th are companies incorporated in Kenya under the **Companies Act (Cap 490)** as appreciated by the petitioner at paragraph 6 of the petition.

42. Besides, I note the terms **“Intragenerational equity”, “precautionary principle”, “Intergenerational equity”** and **“sustainable development”** as defined under section 2 of EMCA and the **Black’s Law Dictionary 10th Edition**. I am guided by the said principles, among others, as provided for under **section 18 of the Environment and Land Court Act, 2015 (2011)**.

43. The preamble to the **Constitution of Kenya,2010** makes provision for intra generational equity and intergenerational equity. I am conscious of the national values and principles of governance which include equity, participation of the people and sustainable development under **Article 10 of the Constitution of Kenya, 2010**. The purpose and principles of the Constitution shall be protected and promoted by all including this honourable court pursuant to **Article 159 (2) (e) of the Constitution (supra)**.

44. It is trite law that this is a court of law and a court of equity. Thus, the reliefs, orders and directions given in this Judgment are aimed at the delivery of substantive justice to all parties having legal and equitable interest in the suit land; see **Macharia Mwangi Maina and 87 other –vs- Davidson Mwangi Kagiri (2014) eKLR**.

45. Respect and protection of the environment is further premised under **Article 9 (1) (b) of the Constitution of Kenya 2010**, the National Anthem which in its second stanza (see second schedule) reads, inter alia:-

Swahili Lyrics

English translation

“ Nchi yetu ya Kenya “And our homeland of Kenya

Tunayoipenda

Heritage of splendour

Tuwe tayari Kuilinda” firm may we stand to defend”

46. In view of the foregone discourse, I am of the considered view that the 3rd, 4th and 5th respondents be precluded from carrying out the illegal mining activities on the suit land in the spirit of determination to sustain the environment which is our heritage as commanded by the Constitutional as well as legislative provisions and case law cited hereinabove. I find the 3rd, 4th and 5th respondents reply to the petition unsubstantiated and the same fails. Therefore the petitioners’ assertion herein that the respondents have violated their constitutional rights is quite steadfast, cogent and has been proved against the respondents on balance of probabilities.

47. Wherefore, Judgment be and is hereby entered for the petitioner against the respondents in terms of orders (a),(b),(c) (d) (e) (f) and (h) and (i) as sought in the petition dated 16th October 2019 and filed in court on 22nd October 2019.

48. For the avoidance of doubt, relief number (g) sought in this petition is provided for under **Article 23 (3) (a) of the Constitution of Kenya,2010**. However, in view of the nature of the entire petition and considering the obtaining circumstances, the appropriate alternative remedy hereby granted in lieu of compensation as sought in the petition, is the restoration of the environment in respect of the suit land to its position before the illegal mining activities undertaken by the 3rd, 4th and 5th respondents and that the said restoration shall be supervised by the **National Environmental Authority (NEMA)** within the next ninety (90) days from this date.

49. It is so ordered.

DELIVERED, SIGNED and DATED in open court at **MIGORI** this **28th** day of **January 2020**.

G. M. A. ONGONDO

JUDGE

In the presence of:

Ms. Okota holding brief for Mavin Odera learned counsel for the petitioner.

Ms. Opiyo learned counsel for the 1st, 2nd and 6th respondents

Mr. Edward Kisia learned counsel for the 3rd, 4th and 5th respondents.

Tom Maurice – Court Assistant