



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PET. NO. 39 OF 2019

BETWEEN

PETER NZEKI & 14 OTHERS.....PETITIONERS

AND

BASE TITANIUM LIMITED & 4 OTHERS.....RESPONDENTS

RULING

1. This ruling is in respect of the preliminary objection by the 1st respondent that this court has no jurisdiction to hear this dispute as presented in the petition. That in terms of the provisions of Section 153 (6) and Section 155(b) of the Mining Act, the jurisdiction to hear and determine disputes relating to claims for compensation after the commencement of mining operations, and where negotiations between aggrieved parties and the 1st Respondent have failed, is conferred on the Cabinet Secretary for Mining, and further that in terms of Section 158(8), the jurisdiction to hear disputes relating to claims for compensation or resettlement prior to commencement of mining operation or the exercise of mining rights is conferred in the Cabinet Secretary for Mining.

2. Mr. Oyatsi, learned Counsel for the 1st Respondent in his submission filed on 23rd October, 2019 cited the case of **Samuel Kamau & Another –v- Kenya Commercial Bank and two others – Sup. Ct. Civil Application No. 2 of 2011** in which the Supreme Court stated jurisdiction “.....*goes to the to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.*”

He submitted that where Parliament has passed a statute that creates rights, obligation and statutory mechanism for resolution of disputes, the aggrieved party must follow or comply with the statutory procedure as prescribed in the statute, and only invoke the constitution, and cited Article 2 (4) of the Constitution and relied on the case of **Speaker of National Assembly – v- Karume (1992) KLR 425**.

3. Mr. Oyatsi submitted that it is plain from the facts pleaded in paragraphs 21 to 28 and 38 of the Petition that the Petitioners’ claims relate to and/or arise from the 1st Respondent’s exercise of its mineral right or rights under the provisions of the Mining Act No.12 of 2016, or the intended extension of the said mineral rights to include areas that are allegedly owned or occupied by certain petitioners, and the petitioners admit that they want or seek to be paid compensation. He submitted that the Mining Act contains specific legislation that governs all grievances and prescribes the proceeding that has to be strictly followed by the petitioners in the resolution or adjudication of such grievances or disputes. Counsel singled out the legislation concerning land surface rights, compensation and disputes specifically provided for under part IX of the statute. That in terms of the said legislation, the jurisdiction to hear and determine the above grievances and disputes is conferred on the Cabinet Secretary under and in accordance with the provisions of Sections 153, 155 and 156 of the Act. Counsel submitted that the right to the court on the issue of compensation is by way of appeal against the order or decision made by the Cabinet Secretary pursuant to the powers vested in the Cabinet Secretary. He specially cited Section 157 of the Mining Act which states as follows:

“Any person aggrieved by any decree, order or decision made or given under the powers vested in the Cabinet Secretary may appeal within thirty days to the High Court.”

4. The 1st respondent’s counsel submitted that the Petitioners have not pleaded that the provisions of the Mining Act are inconsistent with the constitution and therefore null and void in terms of Section 2 (4) of the Constitution. That on the contrary, the petitioners accept the validity of the Mining Act and in fact invoke the said Act in support of their petition, but have failed to apply or follow the clear procedure established under the Mining Act to redress their alleged grievances. That their grievances have not been presented to the Cabinet Secretary for adjudication and/or his decision. It is the 1st Respondent’s submission that the petitioners have no right to access this court in furtherance of their pleaded claims, except by way of appeal as prescribed under Section 157 of the Mining Act. Consequently, that this court has no jurisdiction to hear and determine their grievances as pleaded or presented in their petition except On appeal. The 1st respondent’s advocate relied on the case of **Reuben Mwangela M’itelekwa (suing as the legal representative of the Estate of M’telekiwa M’mucheke) – v- Paul Kigea Nabea & 2Others (2019) eKLR**, and urged the court to uphold the preliminary objection and dismiss or strike out the case with

costs.

5. For the petitioners, in their submissions filed on 1st November, 2019 it was submitted inter alia that the nature of the petition and the reliefs sought are beyond the scope of the Cabinet Secretary. That Article 22 (1) of the constitution allows anyone to approach the High Court (and by extension this court) to seek redress on a violation of the Constitution or where any right in the Bill of Rights is threatened with violation. It was therefore submitted that this court has the jurisdiction to hear and determine the petition as drawn and filed. Further, that Section 154 of the Mining Act also gives the court jurisdiction as one of the mechanisms in dealing with disputes arising from mining rights. It is the petitioners' submission that Section 155 of the Mining Act is not framed in mandatory terms.

6. The petitioners further submitted that the petition raises constitutional issues and as such, only this court has competent jurisdiction to determine. The petitioners' counsel relied on the case of **Daniel N. Mugendi –v- Kenyatta University & Others (2013)eKLR; East African Railways Corp –v- Anthony Sefu Dar-ES-Salaam HCCA No. 19 of 1971(1973) EA 327** cited in **Kenya National Chamber of Commerce & industry – Machakos Branch & Another –v- Music Copyright Society of Kenya (MCSK) & 3 Others (2019) eKLR** and case of **Council of County of Governors –v- Lake Basin Development Authority & 6 Others (2017)eKLR** and urged the court to dismiss the 1st Respondent's Preliminary Objection.

7. I have considered the submissions rendered in support and against the preliminary objection. The only issue to determine is whether this court has no jurisdiction to entertain the suit. The 1st Respondent argues that this court has no jurisdiction to hear and determine the dispute. The 1st Respondent contends that under the Mining Act, the jurisdiction to hear and determine grievances and disputes such as those raised in the petition herein is conferred on the Cabinet Secretary under and in accordance with the provisions of Sections 153, 154 and 155 of the Act. That the petitioners have no right to access this court in furtherance of their pleaded claims except on appeal as provided for under Section 157 of the Act.

8. The case before this court is constitutional petition alleging violation of various rights enshrined in the constitution, including the right to property as provided for under Article 40 of the Constitution, a right to have inherent dignity and the right to have the dignity respected and protected as provided under Article 28, the right to clean and healthy environment as provided for under Article 42 and the economic and social rights under Article 43 and the right to fair administrative action as provided for under Article 47 of the Constitution.

9. There is no denial that besides the alleged violations of their rights as stated above, the petitioners dispute relate to mining rights under the Mining Act. It is also not in dispute that disputes under the mining Act may be referred to the Cabinet Secretary for determination under Section 155 of the Act. However, Section 154 (c) is also clear that a dispute arising as a result of a mineral right issued under the Act may be determined "through a court of competent jurisdiction."

10. Under Article 162 (2) (b) of the Constitution, this court has the mandate to hear disputes relating to the environment and the use of, and occupation of, and title to land. Section 13(1) of the Environment and Land Court Act provides that this court has both original and appellate jurisdiction to hear all disputes relating to the environment and land. Section 13 (2) (a) provides such disputes to include disputes relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. Section 13 (2) (e) makes it clear that what is set out in paragraph (a) to (d) thereof is not conclusive. The same provides that ELC can hear any other dispute relating to the environment and land, including disputes relating to mining and minerals. Therefore in my considered view, unlike the Cabinet Secretary, this court is the only one mandated to hear and determine applications for redress for denial, violation or infringement of, or threats to right and fundamental freedoms relating to the environment and land. Therefore it is my finding that the preliminary objection raised by the 1st Respondent is not merited. The same is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 10th day of March 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mwenja for Petitioners

Mrs. Nyange holding brief for Oyatsi for 1st respondent

No appearance AG for 2nd, 3rd and 5th respondents

No appearance for 4th respondent

Yumna Court Assistant

C.K. YANO

JUDGE