REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NUMBER 165 OF 2015

IN THE MATTER OF THE MINING ACT (CAP 306, LAWS OF KENYA)

AND

IN THE MATTER OF REVOCATION OF SPECIAL LICENCES NUMBERS 122 AND 202, HELD BY MID MIGORI MINING COMPANY LIMITED, BY THE CABINET SECRETARY, MINISTRY OF MINING ON 20TH APRIL, 2015

AND

IN THE MATTER OF AN APPLICATION BY MID MIGORI MINING COMPANY LIMITED AND RED ROCK RESOURCES PLC FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC ..……..…….....…..…….……APPLICANT

AND

THE CABINET SECRETARY,

MINISTRY OF MINING……..…....…….……...1ST RESPONDENT

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

AND

MIGORI COUNTY GOVERNMENT…….…...….INTERESTED PARTY

EX PARTE:

MID MIGORI

MINING COMPANY LIMITED…..…....1ST EX PARTE APPLICANT

RED ROCK RESOURCES PLC…….2ND EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 29th May, 2015, the *ex parte* applicants herein, **Mid Migori Mining Company Limited** and **Red Rock Resources Plc** sought the following orders:

> **1) THAT an Order of PROHIBITION do issue directed at the Respondents prohibiting them from implementing the decision, embodied in a letter dated 20th April, 2015 under the hand of the 1st Respondent, which revoked the Special Licences Numbers 122 and 202 granted by the Commissioner of Mines and Geology ("the 2nd Respondent") to the 1st Ex Parte Applicant on 26th April, 1988 and 18th October, 1995 respectively.**
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> **2) THAT an Order of CERTIORARI do issue to remove into the High Court and quash the decision, embodied in a letter dated 20th April, 2015 under the hand of the 1st Respondent, which revoked the Special Licences Numbers 122 and 202 granted by the Commissioner of Mines and Geology ("the 2nd Respondent") to the 1st Ex Parte Applicant on 26th April, 1988 and 18th October, 1995 respectively.**
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> **3) THAT an Order of prohibition do issue directed at the Respondents prohibiting the Respondents and each of them from issuing any orders, notices and directions, or making any decisions adverse to the Ex Parte Applicants' rights under Special Licences Numbers 122 and 202 aforesaid, before due and full compliance with all of the legal requirements relating to the revocation of exclusive prospecting licences.**
>
> **4) THAT an Order of *mandamus* do issue directed at the Respondents and each of them compelling them to perform their statutory duty as stipulated under the provisions of Section 27 of the Mining Act (Cap 306, Laws of Kenya) and avail an opportunity to the Ex Parte Applicants to respond to each and every ground or concern which the Ministry of Mining might have concerning the conduct of the Ex Parte Applicants' exploration activities in respect to the exclusive prospecting rights contained in Special Licences Numbers 122 and 202 prior to any decision being taken in connection therewith.**
>
> **5) THAT an Order of *mandamus* do issue directed at the 2nd Respondent compelling him (subject to Order No. 4 above) to perform his statutory duty as required under the provisions of Section 13(4) of the Mining Act (Cap 306, Laws of Kenya) and issue renewals for the Special Licences Numbers 122 and 202 held by the 1st Ex Parte Applicant.**
>
> **6) THAT an Order of *mandamus* do issue directed at the 2nd Respondent compelling him to perform his statutory duty as required under the provisions of Section 39 of the Mining Act (Cap 306, Laws of Kenya) and to conduct the expeditious consideration of the 1st Ex Parte Applicant's application for a mining lease.**
>
> **7) THAT an Order do issue that the costs of this Application be awarded to the Ex Parte Applicants.**

Ex Parte Applicant's Case

2. According to the ex parte applicants, the 2nd Applicant, by virtue of a farm-in agreement with the 1st

Applicant entered into on 14th August, 2009, ("the Agreement") became involved in exploration activities as authorised and endorsed by Special Licences Numbers 122 and 202 granted by the Commissioner of Mines and Geology ("the 2nd Respondent") to the 1st Applicant on 26th April, 1988 and 18th October, 1995 respectively ("the Special Licences").

3. Under the agreement, it was deposed, the 2nd Applicant acquired 15% shareholding of the 1st Applicant from Kansai Mining Corporation Limited, the 1st Applicant's parent company and under clause 3.5 of the Agreement, the 2nd Applicant became the manager of the 1st Applicant's mining property and was bound by all the obligations and liabilities in respect of the mining property including but not limited to taking over the conduct of all the exploration activities. Further, the 2nd Applicant released Kansai Mining Corporation Limited from and against all loss damage, liabilities, claims and costs whenever and however arising. Consequently, the 2nd Applicant undertook the performance of certain obligations in compliance with the provisions of the Special Licences and the ***Mining Act*** (Chapter 306, Laws of Kenya) (hereinafter referred to as "the Act") which obligations included, but were not limited to, extensive work programmes, substantial expenditure obligations, payment of the Special Licences' renewals and rents, comprehensive reporting to the Ministry of Mining, technical capacity building, provision of employment to and maintaining good relationships with the local community and various corporate social responsibilities and to date, the 2nd Applicant has diligently performed the said obligations.

4. It was averred that the 2nd Applicant was assured by the Ministry that as long as the 2nd Applicant conducted exploration and showed progress, the Ministry would support it and grant renewals to its local partner, the 1st Applicant. Indeed, the office of the 2nd Respondent, at the time occupied by **Dr. Bernard K Rop**, at a community *Baraza* held near the Mikei Camp on 23rd November, 2009 and the local Member of Parliament, upon a later visit to the prospecting site, commended the 2nd Applicant's commitment to fulfilling its obligations and its significant achievements in this regard and that the office of the 2nd Respondent specifically urged the local community to cooperate with the 1st Applicant on account of the 2nd Applicant's involvement in the exploration activities and expressly communicated the Ministry's recognition of the Applicants' efforts towards a final feasibility study to determine the viability of establishing a mine in the area.

5. It was however averred that on 6th May, 2015, the 2nd Applicant received a letter dated 20th April, 2015 from the 1st Respondent addressed to the 1st Applicant which advised that upon considering the 1st Applicant's 'appeal', the Special Licences had been revoked and referred to an earlier letter dated 6th January, 2015 from the 2nd Respondent, which was referred to as a 'termination notice' transmitting an earlier decision. The letter dated 20th April, 2015 stated that the facts adduced by the Applicants during a meeting between the Applicants' officials and the Respondents held on 31st March, 2015 had been tabled before the Ministerial Licensing and Advisory Committee ("MLAC") at its meeting on 8th April, 2015 on which considerations it made findings which, *inter alia,* were that:

a) The 1st Applicant has held the areas under the Special Licences for over 26 years without concluding the exploration programmes;

b) The 1st Applicant had never done any exploration work by itself since the grant of the said licences, but has only been getting into joint ventures. It has all along been an intermediary;

c) The 2nd Applicant is partly to share blame for the alleged non-performance by the 1st Applicant on account of its shareholding in the latter;

d) The 1st Applicant has been obtaining renewals of licences through promises of heavy investment in exploration work;

e) The 'Kensai-Red Rock syndicate' has no adequate finances and capability to conclude the

exploration work as required; and

f) The 1st Applicant had not indicated how it intended to address the frosty relations with the community, land owners and the local leaders which strained relations led to complaints to Parliament, subsequent investigations and the negative report on the 1st Applicant by the Parliamentary Sub-Committee on Environment and Natural Resources.

6. It was averred that the 1st Respondent then proceeded to state that on the basis of advice received from MLAC, that the 1st Applicant's 'appeal' be declined against the intended revocation of the Special Licences, the 1st Respondent upheld the 'earlier decision' of MLAC that the Special Licences be revoked.

7. It was however the applicants' case that since there was no termination decision notified by the letter dated 6th January, 2015, there could not therefore be any appeal arising therefrom. The letter dated 6th January, 2015 did not notify the Applicants of the 'earlier decision' by MLAC to revoke the Special Licences but was simply a notice to show cause as to why the Special Licences should not be revoked. The impression created by the 1st Respondent's letter of 20th April, 2015 that any decision had been made which was the subject of an appeal to the 1st Respondent was therefore erroneous and has no factual basis.

8. It was contended that the letter dated 20th April, 2015 ignored the grounds for the notice to show cause set out in the letter dated 6th January, 2015 and the fully adequate responses to them vide correspondence and at the meeting between the Applicants' officials and the Respondents held on 31st March, 2015. It proceeded to ignore the work demonstrably done on the Special Licences over recent years and adduced wholly new grounds for revocation, principally that the 1st Applicant had never done any exploration work but had only operated through joint ventures as an intermediary, which grounds the Applicants did not receive an opportunity to adequately respond to prior to the decision.

9. According to the Applicants, the letter dated 6th January, 2015 stated the grounds for possible revocation of the Special Licences as being a failure to comply with the requirement to complete a feasibility study and apply for a mining lease or to make progress towards the same in reports up to July 2014 and in reply thereto, the 2nd Applicant pointed out *inter alia*:-

a) That the 1st Applicant had applied for the renewal of the Special Licences on 20th December, 2012 and the 2nd Respondent, in a letter to the 1st Applicant dated 23rd February, 2013, in response to the 1st Applicant's application for the renewal of the Special Licences, had requested for the annual ground rent and renewal fees for the Special Licences, which fees the 1st Applicant had promptly forwarded on 28th February, 2013.

b) That the requirements stated in the letter dated 6th January, 2015 were to be in the licence renewal applied for which despite numerous requests for confirmation, had never issued.

c) That the said letter was the first true confirmation that renewal could be presumed, albeit without boundaries or conditions being stated.

d) That it was therefore impossible for the conditions to apply or be complied with.

e) That notwithstanding the difficulty of operating under these conditions and uncertain status, the 1st Applicant had carried out as much work as it could. Further, this had been summarised in reports submitted to the Ministry, most recently dated October 2014, which the 1st Respondent ignored.

10. It was contended that the statements in the letters dated 6th January, 2015 and 20th April, 2015 also

ignored the crucial fact that the 1st Applicant had applied for a mining lease on 14th August, 2012 and that the progress of the said application stalled prior to and during the period in which the country's general elections were conducted after which the Ministry ignored letters and discussions referring to the application. Ultimately, if the licence renewal documentation had been issued in 2013, as had been previously indicated by the Ministry, the Applicants would have carried out their programmes to completion in a timely fashion and this would have in turn enabled the Applicants to submit a second mining lease application. To the applicants, the alleged non-compliance in this regard is entirely on account of the 2nd Respondent's inordinate delay thereby making the 1st Respondent's impugned decision unsustainable. Consequently, by asserting, in the letter dated 6th January, 2015, that the 1st Applicant had not applied for a mining lease, and reiterating, in the letter dated 20th April, 2015, that it had not completed any exploration programmes and moved towards mining, the 1st Respondent was acting irrationally thereby rendering any decision purportedly based on such a flimsy ground, unreasonable and illegitimate.

11. It was averred that the 1st Applicant presented evidence that had come to light that on 17 February, 2011 entirely illegal rights over the Special Licences had been given by letter from the Ministry of Mining to a third party, **Ngira Exploration and Mining Works Limited**, without the 1st Applicant's knowledge informing the recipient of the need for co-operation with the 1st Applicant. Further, the 1st Applicant had presented evidence that following the mining lease application a second illegal letter had been issued on 8 February 2013 to the same party doing away with references to the 1st Applicant and pretending there was some justification under the ***Mining Act*** for grants of mining rights not by license but by letters of authorisation. The 1st Applicant wrote to expand on the illegality of this on 2nd May, 2013, in light of the fact that the area in which **Ngira Exploration and Mining Works Limited** had been purportedly authorised to operate fell under the exclusive prospecting licence under the 1st Applicant's Special Licences. According to the applicants, the 1st Respondent in a meeting with the applicants' representative on 26th June, 2013 in London at a Mining on Top Conference, listened and expressed goodwill that he would look into the matter. However, in a subsequent meeting with the Applicants' representatives on 7th October, 2013, he was dismissive and maintained that the Ministry had acted properly in issuing the letters of authorisation to **Ngira Exploration and Mining Works Limited** which position he reiterated in a letter dated 28th October, 2013.

12. It was the applicants' case that the 1st Respondent clearly misapplied the law in relation to the letters of authorisation dated 17th February, 2011 and 8th February, 2013, defiantly upheld the grant of mineral rights by letter over an area within the 1st Applicant's Special Licence area and for which the 1st Applicant had applied for a mining lease and further delayed the consideration of the 1st Applicant's application for the renewal of the Special Licences.

13. Though the 1st Applicant responded to the letter dated 28th October, 2013 vide its letter dated 22nd November, 2013 further expounding the illegality of the 1st Respondent's actions which letter was not responded to, it was not until the aforesaid meeting of 31 March, 2015 that the 1st Respondent finally conceded that the letters of authorisation to **Ngira Exploration and Mining Works Limited** were entirely illegal and blamed the office of the 2nd Respondent, particularly **Mr. Moses Masibo** for misadvising him on the matter. To the Applicants, apparently as a consequence of these scandalous irregularities and in order to cover them up, no tangible action had been taken up on the 1st Applicant's application for a mining lease. They contended that while a mining lease application has been submitted and is presumed to be receiving due process, the underlying Special Licences should not be undergoing revocation.

14. The Applicants asserted that the new grounds cited in the letter dated 20th April, 2015 were, to a large extent, utterly misguided and factually incorrect. Further, the said grounds are unclear as to how the Applicants, jointly or severally, are in breach of the terms of the Special Licences or why there ought to be grounds for revocation. The said new grounds raised for the very first time in the 1st Respondent's

letter dated 20th April, 2015 conveying the impugned decision are as follows:

a) The 1st Applicant has held the areas under the Special Licences for over twenty-six (26) years without concluding the exploration programmes.

b) The 1st Applicant has never done any exploration work by itself since the grant of the said licences, but has only been getting into joint ventures. It has all along been an intermediary.

c) The 1st Applicant's ownership is indicated as Kansai Mining Corporation at 84.9% shares and the 2nd Applicant at 15%. This implies that Kansai Mining Corporation has majority stake in the 1st Applicant but with no significant exploration results and attributes since it entered the partnership in 2002.

d) The 2nd Applicant's shareholding in the 1st Applicant translates to 47.26% (from 15% direct shareholding and 38% stake in Kansai Mining Corporation, which holds 84.9% of the shares in the 1st Applicant). This implies further that the 2nd Applicant as a majority shareholder in the 1st Applicant is partly to blame for non-performance of the obligations under the Special Licences.

e) There appears to be no connection between Red Rock Kenya Limited and either the 2nd Applicant or Kansai Mining Corporation, the ultimate owners of the 1st Applicant.

f) The 1st Applicant has been obtaining renewals of the Special Licences through promises of heavy investment in exploration work.

g) The 1st Applicant's indication in the meeting on 31st March, 2015 that it would be looking for a partner on a joint venture basis to undertake and finalise the exploration work is a further affirmation that the 'Kansai-Red Rock syndicate' has no adequate finances and capability to conclude the exploration work as required.

h) The 1st Applicant had not addressed how it intended to address the frosty relations with the local community, land owners and local leaders. The strained relations had led to complaints to Parliament and subsequent investigations leading up to the negative report on the 1st Applicant by the Parliamentary Sub-Committee on Environment and Natural Resources.

15. The applicants maintained that they had at all times complied with all the Ministry's requirements and the standards as stipulated in the Special Licences and the ***Mining Act*** and therefore there was no rational basis, and none had been shown, upon which either of the Applicants' technical and/or financial capacity to competently and satisfactorily perform their exploration activities could be questioned.

16. Based on legal advice, the applicants asserted that the above mentioned irregularities leading up to the 1st Respondent's letter dated 20th April, 2015 brazenly contravene the express provisions of the ***Mining Act*****, Cap 306, Laws of Kenya**, with a specific emphasis on the strict procedure for the revocation of an exclusive prospecting licence. They therefore contended that the Respondents are bound to adhere to the applicable statutory provisions strictly and specifically, to call for, consider and act upon such adequate cause as shown by the Applicants. Consequently, the Respondents' actions and the 1st Respondent's decision, as outlined above, are tainted with procedural impropriety, illegality and are *ultra vires* the powers donated to the 1st Respondent by the said Act to the extent that:

a) The clear intention of section 27 of the Act is that a holder of an exclusive prospecting licence, such as the Applicants, is in law entitled to notification of the precise grounds upon which its licence is sought to be revoked and to be given a reasonable and adequate opportunity to show cause why the proposed revocation should not be effected.

b) The 2nd Respondent did, pursuant to the provisions of the said section issue the letter dated 6th January, 2015 and specified the grounds upon which revocation was sought and it was in respect of those grounds only that the 1st Applicant was required to show cause.

c) The grounds contained in the letter dated 6th January, 2015 were that the 1st Applicant had not shown any progress towards finalization of the feasibility studies and applied for a mining lease as per its quarterly report of May to July 2014.

d) The Applicants showed cause by way of a response and in a meeting and in accordance with section 27 of the ***Mining Act***, the 1st Respondent's decision was awaited.

e) However, what came from the 1st Respondent vide his letter dated 20th April, 2015 was not his decision based on the grounds previously notified by the 2nd Respondent, and in respect of which the Applicants had shown cause, but was a tabulation of fresh and brand new grounds upon which the 1st Respondent proceeded to render his decision to revoke the Special Licences.

f) Paragraph 25 herein-above sets out the fresh and brand new grounds introduced for the first time and in respect of which the Applicants were not afforded an opportunity to show cause as mandatorily required under section 27 of the Act.

g) The procedure prescribed under Section 27 of the Mining Act was therefore flouted with the result that:

i) The Applicants were denied its constitutional right to a hearing before the Special Licences were revoked.

ii) The 1st Respondent's decision was therefore illegal and ultra vires as the same was taken in clear breach of statutory requirements.

iii) In the absence of compliance with the prescribed procedure, the 1st Respondent's decision is clearly irrational and unjustifiable.

iv) In the result, the Applicants were denied their right to a fair and administrative process as required under Article 47 of the Constitution.

17. In addition to the foregoing, the decision is also illegal and against the law for the following reasons:

1) The purported reliance by the 1st Respondent upon the advice and findings of MLAC is utterly unfounded.

2) As per Section 27 of the ***Mining Act,*** Cap 306, Laws of Kenya, the decision should be the 1st Respondent's own and not the Committee's. The 1st Respondent cannot therefore delegate his powers and responsibility in this regard.

3) Indeed, the 1st Respondent chairs the said Committee and therefore stands in a prime position to influence any findings made by the Committee. The Committee is accordingly not independent in any manner whatsoever as the 1st Respondent seeks to insinuate in his letter dated 20th April, 2015.

4) The Committee is not provided for in the **Mining Act,** Cap 306, Laws of Kenya but was initially established to play an advisory role for the Ministry's executive decisions. It initially had true inter-ministerial representation to competently cater for the varied interests in the mining industry and its membership was comprised of the following:

i) Permanent Secretary of the Ministry (Chairman of the Committee);

ii) Commissioner of Mines and Geology (Secretary);

iii) Chief Mining Engineer;

iv) Chief Geologist;

v) Representative from the Ministry of Local Government;

vi) Representative from the National Environment Management Authority;

vii) Representative from the Kenya Wildlife Service; and

viii) Representative from the Kenya Chamber of Mines.

5) However, the 1st Respondent reconstituted so that presently the Committee comprises exclusively of the Ministry's employees and officers. The said employees and officers report, ultimately, to the 1st Respondent. They are therefore controlled by the 1st Respondent and cannot 'advise' him on the issues arising herein. The current members of the Committee are:

i) Mr. Najib Balala, Cabinet Secretary (Chairman of the Committee);

ii) Mr. Shandrack Kimomo, Acting Commissioner of Mines and Geology;

iii) Mr. Raymon Mutiso, Acting Director of Mines;

iv) Mr. Crispin Lupe, in charge of Cadastre;

v) Ms. Margaret Ngatia, from the Explosives Department;

vi) Ms. Jennifer Halwenge, in charge of the Explosives Department;

vii) Mr. Paul Marie, Economist;

viii) Mr. Charles Mwangi, Acting Director of Administration;

ix) Mr. Said Athman, Advisor to the Cabinet Secretary; and

x) Ms. Widad Sherman, Personal Assistant to the Cabinet Secretary.

18. The applicants reiterated that the aforesaid decision to revoke the Special Licences is tainted with procedural impropriety to the extent the Respondents have failed to adhere to the required legal requirements with regard to revocation of exclusive prospecting licences. It was further contended that the 2nd Respondent has, contrary to the Applicants' legitimate expectations, neither renewed the Special Licences nor conducted the expeditious consideration of the 1st Applicant's application for a mining lease contrary to his public duty and that this unexplained and unjustifiable inaction has impeded the optimum exercise of the Applicants' exploration activities and can only be construed as a *mala fides* attempt to the create an impression that the Applicants are not being diligent in the conduct of their obligations.

19. In the applicants' view, the Respondents' actions, which infringe upon the Applicants' rights have rendered the Applicants' operations particularly expensive and redundant and this is particularly so in light of the significant investment the Applicants have made to date in payments for machinery, labour, taxes, royalties and other costs related to their operations between the years 2009 and 2015 totaling over GBP 10,000,000 (British Pounds Ten Million), which operations the 1st Respondent has materially impeded.

20. The applicants disclosed that a demand notice from their Advocates on record requiring the revocation of the aforesaid decision, an opportunity for the Applicants to respond to each and every ground or concern which the Ministry might have concerning the conduct of their exploration activities, renewals for the Special Licences Numbers 122 and 202 and the expeditious consideration of the 1st Applicant's application for a mining lease had already been effected upon the 1st Respondent, as the individual in charge of the Ministry of Mining, which demand had neither been responded to nor complied with.

21. The applicants therefore asserted that it is within the powers of this Court to quash the impugned decision and to compel the Respondents to comply with the law and to discharge their respective public duties. As no other remedy exist at law to compel the Respondents to carry out their aforesaid public duty, it was the applicants' case that the only recourse available to the Applicants is the present Application hence it is in the interests of justice and equity that the Orders sought in this Application be granted.

Respondent's Case

22. The application was opposed by the Respondent.

23. According to the Respondent, in 1988 the applicant applied for a special prospecting licence (SL) in Migori and was granted SL No. 122 on 1st April, 1988, for purposes of prospecting to delineate and quantify mineral resources in the licence area. After delineating area with economic mineral deposit, through exploration activities, under SL, the Licensee is required to apply for a Mining License over the delineated area. It was however averred that the commissioner of Mines and Geology (CMG) got concerned over the delays by the company in concluding exploration exercise and on 14th May, 2009 wrote to the company through their partner, Kansai Mining Company, directing it to accelerate and finalize delineation of mineralized zone and surrender the rest within one year.

24. It was disclosed that in 1995 the applicant applied again for another SPL which was granted on 18th October, 1995 as SPL No 202. However, the community in the area where the Applicant was conducting the prospecting activities raised concerns with regard to:

(i) Consents not sought from the community

(ii) Length of time the Applicant had taken with exploration activities

)iii) Failure to conclude exploration and proceed to actual mining

(iv) Oppression of the community as a result thereof

(v) Denial of employment opportunities which would have led to the community's development.

25. Similarly, the Member of Parliament in the said area raised the community's concerns in Parliament and an investigation on 1st applicant's activities was carried out pursuant to which a report was prepared wherein the Parliamentary Hansard Report of 14th August, 2012 recommended a review of Applicant's SPL renewal. This review was as result of Applicant's exploration operations having taken more than 20 years without any sign of completion.

26. It was averred that once again the 2nd Respondent (Commissioner of Mines & Geology (CMG) advised Applicant to finalize their feasibility study and apply for a mining lease within one year with effect from 15th February, 2013 but the applicant failed to honour its own undertaking thereby necessitating the Commissioner of Mines Geology to issue a show cause letter dated 6th January, 2015 to which the applicant responded vide their letter dated 28th January, 2015 in which they did not object to the contents of the letter dated 6th January, 2015 after which the Applicant requested for a meeting with

the 1st Respondent (Cabinet Secretary) who met them on 31st January, 2015 and listened to their plea on the two special prospecting licence.

27. It was contended that subsequently the Cabinet Secretary constituted a ministerial technical team to further listen to Applicant's pleas on the SPLs which team listened to Applicant's comprehensive submissions on the SPLs after which the Cabinet Secretary placed the applicant's issue before Ministry Licensing Advisory Committee for deliberation.

28. The Respondents averred that on 20th April,2015 the Cabinet Secretary wrote to 1stApplicant giving them the rationale for revocation of their Special Prospecting Licences, and this was after the Applicant's audience with Cabinet Secretary and a technical team.

29. It was therefore the Respondents' case that the Applicant was given adequate audience by the Ministry and the Commissioner and the right procedure was followed before the revocation of the licence. According to the Respondents, the Ministry Licensing Advisory Committee (MLAC) is an administrative body within the Ministry that deals with licensing and concessions management and advises the Cabinet Secretary from time to time on matters brought for his consideration and/or intervention. However, being advisory, the Cabinet Secretary is not obliged to implement its advice.

30. The Respondents asserted that the Applicants have sought concession now and again whenever their licence is about to expire and they have always been accommodated.

31. It was therefore the Respondents' case that they complied fully with section 27 of the ***Mining Act***, chapter 306 in the letter dated 20th April, 2015 and that the procedures adopted and employed by Cabinet Secretary were apt, sufficient, within his powers and fit for purpose implementing mining law.

32. The Respondents further averred that the Ex parte Applicant ought to have appealed the decision of the Cabinet Secretary under section 93 of the ***Mining Act*** rather than proceeding to court for Judicial Review orders that are not available to the Ex parte Applicant since Judicial Review applies to public law claims and the instant matter involves public interest which supersedes all other interests. It was therefore contended that this being a judicial review application it offends the provisions of section 9(3) of the ***Fair Administrative Action Act*** 2015.

33. The 2nd Respondent maintained that it is statutorily mandated to independently exercise state powers with respect to matters of mining and to prohibit him will interfere with the aforesaid constitutional and statutory powers.

Interested Party's Case

34. The application was similarly opposed by the interested party herein, Migori County Government.

35. According to the County Government, the Ex-Parte Applicants had been granted Special (exploration) licences No. 122 and 202 by the 2nd Respondent herein on 26th April 1988 and 18th October 1995 respectively for purposes of prospecting for gold on mining sites which were later renewed on several instances and which sites are within the jurisdiction of the County Government. However, the 1st Ex-Parte Applicant has never done any exploration work by itself since the grant of the said licenses but has only been getting into joint ventures in violation of the provisions of the Special Licenses. Further, the 1st Ex-Parte Applicant has been exploring the said mining sites under the special licenses over the last 20 years without concluding the exploration works.

36. It was averred that the Special Licenses were granted subject to special conditions, covenants and restrictions enumerated thereunder which conditions the 1st Ex-Parte Applicant failed to comply with hence the revocation of the licenses. It was averred that the special licenses held by the 1st Ex-Parte Applicant had been renewed on reliance given by the Ex-Parte Applicants of heavy investments in

exploration work but which promises has never been honoured. In addition vide the said letter the 1st Ex-parte was required to apply for a mining lease under Section 39 of the ***Mining Act*** within one year from the said date and the 1st Ex-Parte Applicant has failed to successfully obtain the same.

37. It was the County Government's case the revocation of the Special Licenses by the 1st Respondent was done in accordance with section 27 of the ***Mining Act*** (Cap 306) which section does not require the Minister to issue notice to the holder of the license before revoking the same and in compliance with the law the Commissioner called upon the 1st Ex-Parte Applicant to show cause why his license should not be revoked Upon hearing and putting into consideration the cause shown by the 1st Ex-Parte Applicant, the Cabinet Secretary was of the opinion that the cause shown was inadequate and revoked the licenses granted to the 1st Ex-Parte Applicant in accordance with the provisions of the Act.

38. It was disclosed that the mining sites in question are held on ancestral community land in Migori County and such land is classified as community land in light of Article 63 of the Constitution of Kenya, 2010 and that the land is held in trust of the people of Migori by the County Government of Migori. It was asserted that the said exploration activities have been carried out to the exclusion, participation and benefits of the local community and the land owners therein contrary to the provision of Article 69(h) of the Constitution which provides for utilization of the environment and natural resources for the benefit of the people of Kenya. Further, section 29 of the Act requires that where the prospecting right are in respect of a location which is situated in Trust land, no such renewal shall be granted except with the consent of the County Council (now County Government) within whose jurisdiction such Trust land is situated.

39. It was disclosed that the Cabinet Secretary having taken into consideration the principles of public trust, sustainability of environment, in exercise of his authority under the Constitution and on the basis of the information and facts placed before him was justified to revoke the licenses granted to the 1st Ex-Parte Applicant. Toe the County Government failure by the 1st Ex-parte Applicant to conclude the exploration works in the last twenty (20) years, hinders the Interested Party to effectively perform its roles as obligated by Article 186 as read together with the Fourth Schedule of the Constitution particularly implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation and forestry which do occur on community land.

40. It was therefore contended that the Applicant's Application is misplaced and lacks basis on ground that pursuant to Article 66 of the Constitution, the State reserves the right to regulate the use of any land or any interest in or right over land in the interest of the public. Further, any investment in properties should benefit the local community and their economies. To that extent the Cabinet Secretary actions are justifiable within the provisions of the law.

Determinations

41. I have considered the application, the verifying affidavit, the replying affidavit and the submissions made herein.

42. The first issue for determination is whether this Court has the jurisdiction to entertain this matter. In support of the position that this Court has no jurisdiction the Respondents relied on Article 162(2)(b) of the Constitution as read with Article 165(5)(b) thereof and section 13(1) of the ***Environment and Land Court Act***.

43. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and**

nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

44. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

45. In this case it is contended that these proceedings ought to have been instituted in the ELC. The respondents' issue on jurisdiction as I understand it is twofold. The first ground for questioning the jurisdiction of this Court is the existence the ELC. Article 165(3) of the Constitution provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

……

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

46. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

47. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

48. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

49. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

50. However, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

51. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which *fall within the jurisdiction of the courts contemplated in Article 162(2)* aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to "*determine the jurisdiction and functions of the courts contemplated in clause (2)*", Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30th August 2011.

52. In Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others** this Court appreciated that while the High Court's jurisdiction is founded under Article 165 of the Constitution, it is certainly not erroneous to argue that the jurisdictions of the courts established pursuant to Article 162(2) are mainly statutory. Likewise, the courts contemplated by Article 162(2) unlike the High Court are statutory creatures even though their status is equivalent to that of the High Court which is itself a creature of the Constitution. The jurisdiction of these two courts, as directed by Article 162(3) of the Constitution was to be determined by Parliament and as regards the ELC, which is the court of relevance to the instant application, the jurisdiction was set out under section 13 of the ***ELC Act***.

53. It is important at this stage to reproduce the evolution of the said provision since the enactment of the said Act. The original section 13 as enacted on 27th August, 2011 read as follows:

1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes :

a. relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to environment and land under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

5) The court shall have supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the constitution.

6) For the proposes of subsection (7) (v) the court may call for the record of any proceedings before ay subordinate court, body, authority or local tribunal exercising judicial or quasi-judicial functions, or a decision of any person exercising executive authority referred to in subsection 7(b) and may make any order or give any directions it considers appropriate to ensure the fair administration of justice.

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just, including: -

a) Interim or permanent preservation orders including injunctions;

b) Prerogative orders

c) Award of damages

d) Compensation

e) Specific performance

f) Restitution

g) Declaration or

h) Costs".

54. Vide Act No. 12 of 2012, the ***ELC Act*** was however amended inter alia at section 13 as to the jurisdiction and power of the court which section 13 currently provides as follows:

1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes:

a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just, including: -

a) Interim or permanent preservation orders including injunctions;

b) Prerogative orders

c) Award of damages

d) Compensation

e) Specific performance

f) Restitution

g) Declaration or

h) Costs".

55. The effect of the said amendment was that the supervisory jurisdiction of ELC over subordinate, judicial and quasi-judicial tribunals under Article 165(6) as well as the jurisdiction to determine matters of a constitutional nature involving environment and land generally was taken away. Parliament, it would seem, however clothed the ELC with jurisdiction to deal with constitutional matters touching on a clean and healthy environment only but not other constitutional matters, including matters touching on other fundamental rights.

56. However based on the decision of **Majanja, J** in the case of **United States International University vs. Attorney General HCCP 170 of 2012 [2012] eKLR** in which the learned Judge adopted the position of the Constitutional Court of South Africa in the case of **Gcaba vs. Minister of Safety & Security CCT 64/08 (2009) ZACC 26,** the Court in ***Musimba Case*** (supra) held that with regard to matters constitution it is now settled that the ELRC and, a fortiori, the ELC can adjudicate and determine matters constitution. This was the position adopted by the Court of Appeal's *dicta* in **Daniel N. Mugendi -v- Kenyatta University & 3 Others CACA No. 6/2012[2013] eKLR,** a decision handed down after the 2012 legislative amendments to the ***ELC Act***, where the said Court expressed itself as hereunder:

"**In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land**

with any claims of breaches of fundamental rights associated with two subjects".

57. Therefore both in **United States International University –v- Attorney General** (supra) and **Daniel Mugendi –v- Kenyatta University** (supra) the courts returned the verdict that the High Court could not deal with and determine matters where a purely labour and industrial dispute also had constitutional issues arising. The same position must apply with respect to the ELC.

58. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held in **Patrick Musimba vs. The National Land Commission and Others**: (supra):

> **"…it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationalistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised."**

59. The ***Musimba*** decision therefore concluded on this issue that:

> **"…both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limit the High Court's jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court's jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in *Mugendi* expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land."**

60. In my view, the same position must apply with respect to judicial review proceedings.

61. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Mohammed Ibrahim, JSC** in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR**:

> **"A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court".**

62. In this case, it is clear that the dispute falls squarely within the provisions of section 13(2)(a) of the ***ELC Act*** which deals with disputes *relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.* It is also a dispute *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.*

63. The reliefs sought herein arise out of a determination of the issues falling within the said provisions and the applicants' contended right to be heard stem from their yet to be determined aforesaid interest. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in **Peter Oduor**

Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012,[para. 29-30] where it was held:

> "**The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework".**

64. It is therefore clear that the Court established under Article 162(2)(b) has the jurisdiction to hear and determine the instant dispute which revolves around "*mining, minerals and other natural resources*". Under Article 160(1) of the Constitution the judiciary is subject to the Constitution. Since the Constitution has expressly divested the High Court of the powers to hear and determine disputes which fall squarely within the jurisdiction of the courts with similar status established pursuant to Article 162(2) of the Constitution, such as the Environment and Land Court, this Court would be acting in the excess of its jurisdiction if it entertained such disputes.

65. In this case since the subject matter falls within the jurisdiction of Environment and Land Court as established under the ***Environment and Land Court Act*** and similarly the remedies sought herein are capable of being granted by the said Court, it is my view that this Court ought not to entertain this matter and grant the orders sought herein.

66. Where the Court has no jurisdiction, the Court has to down its tools. That begs the question what order should the Court make in such circumstances. This Court has held that both the High Court and the ELC have a concurrent and or coordinate jurisdiction. It is my view that in the circumstances of this case, it would not advance the course of justice to terminate these proceedings. In **United States International University –v- Attorney General HCCP 170 of 2012 [2012] eKLR,** the Judge transferred the matter to the ELRC for hearing. A similar decision was arrived at by this Court in **Republic v Chairman, National Land Commission & 2 others ex-parte Peter Njore Wakaba & Macharia Kinyanhui [2016] eKLR** in which this Court held that:

> **"In this case, I am not satisfied that the applicants case is completely removed from the jurisdiction of this Court though I am satisfied that the dispute can be properly dealt with by the ELC…"**

67. In **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the Court of Appeal appreciated that:

> **"…the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out."**

68. It is my view that there is, in this case, an alternative to striking out which is to remit the matter to the Court where the dispute belongs since this Court and the ELC have a concurrent and or coordinate jurisdiction. In order not to prejudice further proceedings before the ELC, I will decline to deal with the other issues which were raised by the parties to these proceedings.

69. Before concluding this matter I must deprecate the fact that both the Respondents and the interested party in their submissions referred to authorities but for reasons not known to the Court the copies were not furnished. Counsel as officers of the Court are expected to furnish the Court with copies of the decisions they rely on and ought not to simply throw excerpts of decisions at the Court and expect the Court to scavenge for the same. Such conduct must be deplored by this Court.

70. In the premises the order which commends itself to me and which I hereby make is that these proceedings be heard and determined by the ELC since the said Court is a Court of equal status as the High Court.

71. Orders Accordingly.

Dated at Nairobi this 13th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njoroge Regeru for the ex parte applicant

Miss Kinyanjui for the interested party

CA Mwangi