



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 12 OF 2016

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE
22 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 22, 23, 27, 40, 47,
159 (2) (D), 165 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

ARM CEMENT LIMITED

(FORMERLY ATHI RIVER MINING COMPANY).....PETITIONER

VERSUS

COUNTY GOVERNMENT KILIFI.....RESPONDENT

RULING

[Notice of Motion Application dated 11th May, 2016]

1. At the time of filing this petition on 12th May, 2016 the Petitioner, ARM Cement Limited (formerly Athi River Mining Company), filed a Notice of Motion brought under Rules 23 (1) and 24 (1) of the Constitution of Kenya Practice and Procedure Rules, Articles 22, 23, 27, 40, 47, 159(2)(d), 165 and 258 of the Constitution seeking orders against the Respondent, the County Government of Kilifi, as follows:

“(a) That this application be certified as urgent and service in the first instance be dispensed with due to the urgency of the matter.

(b) That the Honourable Court be pleased to issue conservatory orders suspending/staying the implementation/enforcement of the unilateral decision made by the Respondents on 12.10.15 and 20.4.2016 and further restraining the Respondents from blocking and/or in any way restraining the Petitioner’s trucks from using and/or accessing the public rural road, linking the road identified as No. E930 to the Pipeline Road, Chauringo area of Rabai District also known as Timboni-Quarry Road situate within the County of Kilifi, pending the hearing of this application inter-partes.

(c) That the Honourable Court be pleased to issue conservatory orders suspending/staying the implementation/enforcement of the unilateral decision made by the Respondents on 12.10.15.

(d) Costs.”

2. The application is supported by the grounds on its face and the affidavit sworn by the Applicant's Public Relations Officer, Christopher Kengah on 11th May, 2016.

3. The Respondent opposed the application through an affidavit sworn on 5th September, 2016 by its Chief Officer of Roads, Transport and Public Works, Mr. Kenneth Charo Kazungu.

4. There is a temporary conservatory order which was issued on 12th May, 2016 when the matter first came to Court. The advocates on record for the parties agreed to proceed with the matter by way of written submissions.

5. An issue has arisen as to whether this Court has jurisdiction to entertain this matter. The Respondent's averment that this Court lacks jurisdiction to deal with the matter is twofold. Firstly, that this is a land dispute and its resolution belongs to the Environment and Land Court. Secondly, that no breach of rights has been disclosed and this is a matter that ought to have been subjected to the ordinary civil jurisdiction of this Court.

6. Whether this Court has jurisdiction to entertain this matter is an issue that should be addressed promptly. Jurisdiction is the key that opens the door of substantive issues in a case for the court's scrutiny. Without jurisdiction, a court or tribunal has no power to proceed to hear a matter. As was stated in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, a court of law should down its tools in respect to a matter before it the moment it holds the opinion that it is without jurisdiction.

7. I will start by addressing the first limb of the jurisdictional objection as it may as well dispose of this application. Two of the orders sought by the Applicant in the petition are:

“c. An order of certiorari to bring into this court and to quash the decision of the Respondent to block the Petitioner's Trucks from using and/or accessing the Public Rural Road, linking the road identified as No. E930 to the Pipeline Road, Chauringo area of Rabai District also known as Timboni-Quarry Road situate within the County of Kilifi.

d. An order of prohibition to issue as against the Respondent to prohibit the Respondent from implementing its decision of 12/10/15 and 20/4/2016 and/or in any way unlawfully restraining the Petitioner's trucks from using and/or accessing the public rural road, linking the Road identified as No. E930 to the Pipeline Road, Chauringo area of Rabai District also known as Timboni-Quarry Road situate within the County of Kilifi.”

8. A perusal of the petition and the instant application points to the fact that the Applicant is aggrieved by the decision of the Respondent to deny it the use of a certain road within the County of Kilifi.

9. Under Section 12 of the Environment and Land Court Act, 2011, the Environment and Land Court is given wide powers on matters touching on land and environment. The powers extend to both public as well as private land. The issue here is one of use of public land namely a road. The matter is therefore one for determination by the Court established by the Constitution and statute to hear such a dispute.

10. It is immaterial whether the petition raises issues of violation of constitutional rights as well as questions touching on the use of land. In **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR** the Court of Appeal held that:

“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 on these matters, the same should go for the Environment and Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”

11. What I have said is sufficient to point to the fact that this Court lacks jurisdiction to entertain this matter. Having so found, I can no longer go further to interrogate whether the petition herein raises issues of breach of constitutional rights. That is a matter to be addressed by the Court empowered to hear this matter.

12. The Respondent has urged this Court to dismiss the petition for lack of jurisdiction. In **Maggie Mwaniki Mtalaki v Housing Finance Company of Kenya [2015] eKLR** Anyara Emukule, J dismissed a petition for lack of jurisdiction. However, in the already cited case of **Daniel N. Mugendi**, the Court of Appeal set aside the order of this Court (Mumbi Ngugi, J) dismissing the petition and substituted it with an order transferring the matter from this Court to the Industrial Court [now the Employment and Labour Relations Court]. I find an order of transfer to be a just order in this matter. This matter is therefore transferred to Environment and Land Court at Malindi. Costs will abide the determination of the petition.

Dated, signed and delivered at Malindi this 5th day June, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT