



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 305 OF 2012

PETER MAKAU MUSYOKA1ST PETITIONER

ELIJAH MUTUA MAKANGA..... 2ND PETITIONER

JACOB MBYA MUSYOKA.....3RD PETITIONER

FRANCIS KITHOME KITHEKA.....4TH PETITIONER

ANDREW KASEE MWINZI.....5TH PETITIONER

NICHOLAS MUNYWOKI MWASA.....6TH PETITIONER

**(SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE MUI COAL BASIN LOCAL
COMMUNITY)**

VERSUS

THE PERMANENT SECRETARY,

MINISTRY OF ENERGY.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

AND

FENXI MINING INDUSTRY

COMPANY LIMITED.....1ST INTERESTED PARTY

GREAT LAKES CORPORATION LIMITED.....2ND INTERESTED PARTY

JINGU GROUP CHINA3RD INTERESTED PARTY

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 34 OF 2013

ERIC MUTUA.....1ST PETITIONER
DR. TITUS KIVAA P.M.....2ND PETITIONER
PROF. PAUL MUMO KISAU.....3RD PETITIONER
DR. GIDEON WATHE NZAU.....4TH PETITIONER
FLORENCE MUTWALI KITONGA.....5TH PETITIONER
PARTICIA KISIO KIMANZI.....6TH PETITIONER
JOSEPH MUTHUI NZUNI.....7TH PETITIONER
MARGARET MUNYOKI.....8TH PETITIONER
SOLOMON KIMANZI KIVOTO.....9TH PETITIONER
EUNICE KELI WAMBUA.....10TH PETITIONER
DAVID KILONZO MAWEU.....11TH PETITIONER
JOHN KIMAKIO MUTIA.....12TH PETITIONER
NZOMO MULATIA.....13TH PETITIONER

THE MUI COAL PROJECT BLOCKS C AND D

LIAISON COMMITTEE.....14TH PETITIONER

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF ENERGY AND PETROLEUM.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF MINING.....2ND RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....3RD RESPONDENT

THE HON ATTORNEY GERENERAL.....4TH RESPONDENT

AND

FENXI MINING INDUSTRY COMPANY LIMITED.....1ST INTERESTED PARTY

GREAT LAKES CORPORATION LIMITED.....2ND INTERESTED PARTY

COMMISSIONER OF MINES & GEOLOGY.....	3 RD INTERESTED PARTY
THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....	4 TH INTERESTED PARTY
MUI MINES AND MINERAL LIMITED.....	5 TH INTERESTED PARTY
THE LAW SOCIETY OF KENYA.....	6 TH INTERESTED PARTY
INSTITUTION FOR LAW & ENVIRONMENTAL GOVERNANCE.....	7 TH INTERESTED PARTY
KITUO CHA SHERIA.....	8 TH INTERESTED PARTY
KITUI COUNTY GOVERNMENT.....	9 TH INTERESTED PARTY

RULING

INTRODUCTION

1. This matter relates to two Constitutional Petitions respecting the prospecting for and extraction of coal deposits in the Mui Basin in Kitui County. The first Petition (*titled Constitutional Petition number 305 of 2012, hereinafter "Petition 305 of 2012"*) was initially brought by six members of the Mui Coal Basin Land Community on their own behalf and that of other members of the Mui Community.
2. Petition 305 of 2012 asked for relief for the Petitioners and the Community they represent based on five main grounds:
 - a. Alleged contravention of Article 10 of the Constitution in the award of the tender to explore, exploit, or develop the Mui Coal Basin Blocks C and D and specifically that the award was done in secrecy, without due diligence to confirm the awardee's technical capabilities and in a manner devoid of public participation as envisaged in the Constitution;
 - b. Alleged contravention of Article 35 of the Constitution (guaranteeing freedom of information) in the manner in which the tendering and concessioning of Mui Basin Coal Blocks was done;
 - c. Potential breach of Article 40 of the Constitution (guaranteeing right to private property) based on the apprehension that the Government would compulsorily acquire private property to facilitate the coal mining;
 - d. Alleged breach of or the likely violation or infringement of the right to a clean and healthy environment contrary to Articles 42 or 70 of the Constitution based on the apprehension that the methods to be deployed in the coal mining would lead to environmental degradation;
 - e. Threat to health contrary to Article 43 of the Constitution from the effects of coal mining.
3. A single Judge (Justice George Dulu) initially granted conservatory orders aimed at preserving the *status quo* (practically to guarantee that the mining would not start before the issues had been canvassed *inter partes*). Ultimately, at the Petitioners' instance, Petition 305 of 2012 was certified by Justice Lillian Mutende (who took over the matter from Justice Dulu) as raising a substantial question of law under Article 165(4) warranting the constitution of a three judge bench to hear the matter. That certification was done in spite of and despite spirited opposition from the interested parties.
4. The Honourable Chief Justice directed that the matter be heard by a three judge bench consisting of Justices Lillian Mutende (Presiding), Jaden Thurairara and George Odunga. Due to the absence of Justice Odunga for extended periods owing to his participation in election petitions in Mombasa, the Chief Justice subsequently directed Justice Joel Ngugi to replace the Justice

- Odunga on the bench.
5. Subsequently, the present bench entertained and granted an application to consolidate Petition 305 of 2012 with a new Petition filed respecting the same subject matter (that is, the prospecting for and extraction of coal deposits in the Mui Basin in Kitui County). That new Petition was brought by thirteen (13) members of the Community and a Committee styled as “The Mui Basin Coal Project Blocks C and D Liason Committee” (*hereinafter*, “*Petition 34 of 2013*”). The two Petitions were consolidated on 5th of September, 2013.
 6. Petition 34 of 2013 added a number of prayers to those canvassed in Petition 305 of 2012. In particular, Petition 34 of 2013 seeks some declaration with certain Constitutional implications including:
 - a. A declaration that the County of Government of Kitui must be involved in the negotiations of the terms and conditions of the Coal Mining Agreement and, in particular, that the County Government must be involved in determining the appropriate levels of sharing of the benefits/profits of the Coal Mining Project;
 - b. A declaration that the law requires that the Coal Mining Agreement must be approved by Parliament before its execution;
 - c. A declaration that the Petitioners and the community ought to be involved in the negotiations for the Coal Mining Agreement as part of their right to participation.
 7. There is no doubt that there has been much public interest in this coal mining matter; and for good reason: the Coal Mining Project is likely to affect both the environmental and economic landscape of the region. Indeed, in giving its directions in the matter on 16th July, 2013, this Court observed that “[G]iven the importance of the case and the public interests involved, leave is given for any groups of individuals with expertise in the matter to come into the case as *amicus curiae*.” Consequently, at least two *Amicii* have been permitted into the Consolidated Petition.
 8. The Consolidated Petition is, for all intents and purposes, ripe for hearing and the Court had given directions that the parties file all their documentations in the matter in readiness for the substantive hearing. However, a number of developments, including representations that the parties were attempting an out of court settlement, delayed the hearing of the matter.

APPLICATION TO SET ASIDE ORDERS TO CONSOLIDATE THE PETITIONS AND TO WITHDRAW PETITION 305 OF 2012

9. It is in light of this procedural posture that Mr. Apollo Muinde on behalf of his clients (the Petitioners in Petition 305 of 2012) has brought the present application. He seeks the leave of the court to set aside the order of the Court dated 5th September, 2013 consolidating Petition 305 of 2012 with Petition 34 of 2013) and then to withdraw Petition 305 of 2012.
10. The main ground upon which Mr. Muinde bases his application are that his clients (the Petitioners in Petition 305 of 2012) are of the view that the five main issues that Petition 305 of 2012 sought to address have now been resolved and that it was now pointless to pursue the petition. In particular, Mr. Muinde argues that the fears his clients had about the threat of environmental degradation cannot be ventilated at this stage since the fears remain speculative before any actual work has begun and in light of a promise made to them that a proper Environmental Impact Assessment will be undertaken.
11. Further, the Petitioners in 305 of 2012 are of the view that since the Concession Agreement they opposed in the first instance have already been signed, some aspects of their Petition has been overtaken by events. As to the Benefits Sharing Agreement, it is now their considered position that under the Constitution all minerals belong to the National Government anyway – implying that their original demand for a guarantee in the shares was a non-starter legally. Mr. Muinde indicated that although he had no documentary evidence to demonstrate that members of the Community overwhelmingly support the withdrawal of the case so that the Coal Mining Project can take off, such was the case as demonstrated by the Community members’ participation in many local *Barazas* called to discuss the issue. The bottom line, Mr. Muinde urged the Court, is that the members of the Community – including the Petitioners in Petition 305 of 2012 – now want the Coal Mining Project to take off so that they can take advantage of the economic benefits it will unleash in the area including employment opportunities for the community members.
12. Mr. Moimbo for the Attorney General supports Mr. Muinde’s application and indicates that since

- Petition 34 of 2013 will remain in place, there should be no anxiety about the effects of the withdrawal. Mr. Saende appearing for the Third Interested Party in Petition 305 of 2012 (Jingu Group of China) as well as holding brief for both Mr. Imende for the 1st Interested Party (Fenxi Mining Industry Company Limited) and Ms. Kariithi for 2nd Interested Party (Great Lakes Corporation Limited) was of the same view and similarly supported Mr. Muinde's application.
13. Mr. Nyamu, advocate for the Petitioners in Petition 34 of 2013 is of a slightly different view. He argues that since the Petitions have already been consolidated, if the individual petitioners in Petition 305 of 2012 do not intend to be involved in the Petitions going forward, their names can be expunged and directions given as to the issue of costs. Mr. Nyamu wishes to distinguish the case from a Representative Suit: he argues that although the case was brought for the benefit of the public, it is not a representative suit meaning that individual petitioners can withdraw from the Petition and the Petition would still remain intact for hearing and disposal. Mr. Makundi, representing the Law Society of Kenya is of similar views as Mr. Nyamu.
 14. On the other hand, Mr. Waikwa Wanyoike, appearing for Katiba Institute, and Mr. Laban Osoro, for Kituo cha Sheria, both *Amicii* in the Consolidated Petition, oppose the application by Mr. Muinde. Mr. Waikwa reminds the Court that this matter has been certified as raising a substantial question of law under Article 165(4) of the Constitution. He points out that the matter as brought under the public interest provisions of the Constitution and therefore the Court must ask itself what public interests were involved and if they are likely to be adversely affected by a withdrawal.
 15. Mr. Waikwa refers the Court to Rule 27 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter, "Article 22 Rules", after the Article in the Constitution by virtue of which the Honourable Chief Justice made the Rules) and argues that before the Court allows an application to withdraw a Constitutional Petition brought alleging the contravention of the Bill of Rights, the Court must consider the juridical effects of the withdrawal.
 16. Mr. Waikwa's argument is that considering that this is a public interest litigation, there will be some adverse juridical effects if the application is allowed as prayed. In particular, he points out that Petition 34 of 2013 is, at its core, based on freedom on information. Therefore, he argues, it is narrower than Petition 305 of 2012 and a lot will be lost if the latter is withdrawn. In addition to the legal issues that would dissipate with the withdrawal of Petition 305 of 2012, Mr. Waikwa is concerned that the evidence used to support that Petition, and which was imported into the Consolidated Petition will now be lost.
 17. Mr. Waikwa also disputes that the issues addressed in Petition 305 of 2012 have been resolved. In particular, he argues that both the issue of the right to a clean environment and benefits sharing are still live and need to be resolved. He argues that the fact that no environmental harm has occurred yet does not make the issue unripe for determination as Mr. Muinde implies since the Constitution is clear that one can bring a Petition based on the "likely" or "threatened" injury to the right to a clean environment. He relies on Articles 3, 22(1), 42, and 258 of the Constitution.
 18. Similarly, Mr. Waikwa disputes the interpretation that Mr. Muinde gives to the Constitutional position that minerals belong to the National Government as implying that the local community in Mui Basin have no legal right to challenge the government's determination of how the minerals will be exploited.
 19. Mr. Osoro similarly urges the Court to only allow the withdrawal if it is satisfied that the application for withdrawal is not made in bad faith; that no issues canvassed in the Consolidated Petition would be left pending and unresolved; and whether the overriding duty to serve the interests of the community are affected. He is particularly concerned about the evidentiary effect of the desired withdrawal given that the Consolidated Petition is, to a large extent, based on the affidavit evidence of the Petitioners in Petition 305 of 2012.

THE LEGAL TEST FOR WITHDRAWAL IN PUBLIC INTEREST LITIGATION

20. The singular legal question raised is the application is the following: when can a petitioner in a Public Interest Litigation be permitted to withdraw a petition?
21. None of the parties – Petitioners, Respondents, Interested Parties or *Amicii* – doubt that this is a Public Interest Litigation. Indeed, Mr. Waikwa Wanyoike, Learned Counsel for the *Amicus*

Curiae (Katiba Institute), pointed out to the court that the matter at hand had already been certified as raising a substantial question of law for purposes of the formation of a three-judge bench by the Honourable Chief Justice. Similarly, as pointed out above, at the time of consolidating the Petitions, all the parties had agreed that this matter is one that affects public interest. None of the parties or counsels that appeared before us contests the public interest nature of this case. It is readily obvious that the rights of significant members of a class of the community in Mui Basin have a pecuniary, environmental, health and other legally cognizable interests in the matter at hand.

22. The legal rule most relevant to the application at hand is the rule codified in Rule 27 of the Article 22 Rules. It provides that:

27. (1) A petition may –

- a. on notice to the Court and to the Respondent, apply to withdraw the petition; or
- b. with leave of the Court, discontinue the proceedings.

(2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.

(3) Despite sub-rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue proceedings.

23. The Rule applicable is straightforward: a party can withdraw proceedings with the leave of the Court and the Court shall consider the juridical effects of the withdrawal in permitting or withholding such leave. One obvious rendering of this rule, urged by Mr. Waikwa, is that the Court shall not permit the withdrawal where such withdrawal would have adverse juridical effects on the public interests involved in the matter.

24. The considerations which a court should take into account when asked to permit a petitioner in a Public Interest Litigation to withdraw were succinctly expressed by the Supreme Court in the Indian Case of ***S.P. Anand v H.D. Deve Gowda (1996) 6SCC 734*** thus:

Here we must mention that in PIL cases, the petitioner is not entitled to withdraw his petition at his sweet-will unless the court sees reason to permit withdrawal. In granting the permission the Court would be guided by considerations of public interest and would also ensure that it does not result in abuse of the process of law. Courts must guard against possibilities of such litigants settling the matters out of the court to their advantage and then seeking withdrawal of the case. There are umpteen ways in which the process can be abused and the courts must be aware of the same before permitting withdrawal of the petition.

25. It is clear that our Rule 27(3) cited above is a crystallization of the reasoning in this case, which we now adopt. The test requires a court to only permit a withdrawal of a Petition where the court is satisfied that the juridical effects of the withdrawal will not be adverse to the public interest or the interests of any individuals involved. Differently put, the test is simply that a court will only permit a petitioner to withdraw a Public Interest Litigation matter upon being satisfied that none of the following conditions, which our Rules call “juridical effects”, are present:

- a. *That the public interest initially presented in the case will not suffer as a result of the withdrawal.* Differently put, the question to ask here is whether the public interest concerns which were to be addressed in the case will suffer adverse effects resulting from the withdrawal of the suit. If the public interest would be compromised or diminished in any way or if the withdrawal of the suit would make it strategically, technically or procedurally more arduous to establish, articulate or consider the public considerations in the case, it follows that public considerations would counsel against leave to withdraw the petition.
- b. *That there is no abuse of the process of the law.* Here the court will look to see if the

party seeking to withdraw acted in good faith both at the time of filing the suit and at the time she seeks to withdraw. In particular, acutely conscious of the role of Public Interest Litigation, the Court will test to see if there is any inkling that the party seeking to withdraw does so in order to personally benefit from the case, or its publicity. This is to ensure that, in the words of the Supreme Court of India in ***Sheela Barse v Union of India AIR 1988 SC 2211*** and cited to us by Mr. Waikwa, “a person or body of persons cannot approach the Court with ulterior motive or design to wrench some personal benefit by putting another within the clutches of law and using the court for a device only to that end but not interested with the result of the petition.”

- c. *That the case at hand is not an exercise in futility.* If the case has been overtaken by events or the points pressed by the petitioners are moot, it would be absurd to insist that they case proceeds even if initially it was dripping with public interest.

APPLYING THE LEGAL TEST TO THE CASE AT HAND

26. We will now apply the legal test articulated above to the circumstances at hand. The arguments made before us, the uncontested facts and procedural posture of the case reveal the following:

- a. That the issues canvassed in the Petition 305 of 2012 were matters that raised substantial questions of law under the Constitution (see the Ruling of the Court dated 27th February, 2013).
- b. That, as pointed out above, this is a matter of immense public interest and important (see paragraphs 2, 7 and 21 above).
- c. That some of the issues raised in Petition 305 of 2012 are not raised in Petition 34 of 2013. Indeed, three of the issues flagged by Petition 305 of 2012 are not at all at issue in Petition 34 of 2013 namely: right to property; right to a clean environment; and right to health. There are questions whether the right for the local community *qua* community to participate in mineral extraction is an issue for determination in Petition 34 of 2013 as well yet it is an issue in Petition 305 of 2012.

27. Needless to say, the foregoing paragraph, without more, establishes that there will be adverse juridical effects on the public interest if the application to withdraw is permitted. We agree with the Learned Counsels for the *Amicii* that the suit will be rendered narrower with the withdrawal of Petition 305 of 2012 and it will, therefore, compromise or diminish in some non-trivial way the ability of the parties to establish, articulate or consider the public considerations in the case. In reaching this conclusion, our analysis has been influenced by our view that we do not agree that all the issues raised in Petition 305 of 2012 have either been rendered moot or are sufficiently addressed by Petition 34 of 2013. As Learned Counsels for the *Amicii* pointed out, there are significant factual and legal questions left unresolved about the contours of the right of local communities to participate and receive information related to mineral extraction as well as their rights to benefit economically from such extraction. We, of course, note Mr. Muinde’s (re)considered position that the latter issue is not arguable; yet we point out that that Learned Counsels for the *Amicii* disagree. Finally, we note that a cursory review of the documents filed in the matter, reveals that it is obvious that Petition 305 of 2012 became the inherent conceptual super-structure; the skeletal scaffolding upon which all the other parties to the case crafted and constructed their positions in the Consolidated Petition. It would be unfair and prejudicial to the parties to withdraw that conceptual super-structure at this late hour.

28. Therefore, we conclude that a withdrawal of Petition 305 of 2012 will have adverse juridical effects on the equities and interests of the public and decline to permit its withdrawal.

29. We are, however, persuaded that there is a distinction between withdrawing Petition 305 of 2012 and permitting the individual Petitioners in that Petition to withdraw their further participation in the Consolidated Petition. It would be unfair and foolhardy to compel un-interested Petitioners to persist in a Constitutional Petition they have lost interest in or one they feel their grievances have already been adequately addressed. We will therefore follow the cue provided by the persuasive authority in the ***Sheela Barse Case*** (cited above) and permit that the individual Petitioners in 305 of 2012 be permitted to individually withdraw from the Consolidated Petition and that their names be deleted from the Consolidated Petition for purposes of future proceedings.

ORDERS OF THE COURT

30. In the result, the Court makes the following orders:

- a. **That** the oral application by the Petitioners in Petition 305 of 2012 to set aside the Order of the Court of 5th September, 2013 (ordering the consolidation of Petition 305 of 2012 with Petition 34 of 2013) is hereby declined;
- b. **That** the oral application by the Petitioners in Petition 305 of 2012 to withdraw that Petition is, also, declined;
- c. **That** the Petitioners in 305 of 2012 are hereby allowed, in their individual capacities, to withdraw from further participation in the proceedings of the Consolidated Petition and that their names be deleted from the record for purposes of future proceedings in the matter; and
- d. **That**, for purposes of determining and allocating costs in the Consolidated Petition, the timing of the application by the Petitioners in Petition 305 of 2012 be taken into account.
- e. **That** the matter be set for hearing as a matter of priority given the immense public interest involved.

DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of MARCH, 2014.

_____	_____	_____
L.N. MUTENDE	J. M. NGUGI	B.T. JADEN
JUDGE	JUDGE	JUDGE