



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. ELC 84 OF 2011**

**IN THE MATTER OF: AN APPLICATION BY KUTIMA  
INVESTMENTS LTD FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW ORDERS CERTIORATI AND PROHIBITION**

**AND**

**IN THE MATTER OF: HIGH COURT CIVIL CASE NO. 990 OF  
1999**

**AND**

**IN THE MATTER THE MINING ACT, CHAPTER 306, LAWS OF  
KENYA**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**COMMISSIONER OF MINES & GEOLOGY..... RESPONDENT**

**EX-PARTE.....KUTIMA INVESTMENTS LIMITED**

**AND**

**MUTHONI KIHARA.....1<sup>ST</sup> INTERESTED PARTY**

**MUTHONI KIHARA**

**MINING CO. LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 7<sup>th</sup> October 2011, the *ex parte* applicant herein, **Kutima Investments Limited**, seeks the following orders:
  1. **That this application be certified urgent and heard ex-parte in the first instance.**
  2. **That pending the hearing and determination of this application, there be a stay of the decision of the respondent to grant and/or renew mining locations and/or mining licenses to the interested parties over the Applicant's land known as Land Reference Number 12199/4, Taita Taveta.**
  3. **That pending the hearing and determination of this application, the Interested Parties, their workers, officers, employees, agents, servants or any other person claiming through them be restrained from entering or remaining upon the Applicant's land known as land Reference Number 12199/4, Taita Taveta.**
  4. **That an order of Certiorari be granted removing into the High Court for the purpose of being quashed the decision of the respondent (contained in the letter dated 22<sup>nd</sup> September, 2011) to grant and/or renew mining locations and/or mining rights or licenses to the 2<sup>nd</sup> Interested party over the Applicant's land known as land reference Number 12199/4, Taita Taveta.**
  5. **That an order of Certiorari be granted removing into the high Court for the purpose of being quashed the decision of the Respondent (Contained in the letter dated 22<sup>nd</sup> September, 2011) to grant or renew mining locations and/or mining rights or licenses to the 2<sup>nd</sup> Interested party over the Applicant's land known as Land Reference Number 12199/4, Taita Taveta and the Certificates of Renewal issued to the 2<sup>nd</sup> interested party in respect of claims numbered 1 – 4 and 1 – 10 be similarly quashed.**
  6. **That an order of Prohibition be granted prohibiting the respondent, his officers employees, servants or agents and any other person acting under him from issuing or purporting to issue any prospecting or mining rights or licenses to the interested parties or to any other person over the Applicant's land known as land reference number 12199/4, Taita Taveta without the consent of the Applicant.**
  7. **That an order of Prohibition be granted prohibiting the Interested parties, their officers, employees, agents, servants or any other person claiming through them from entering or remaining upon the applicant's land known as land Reference Number 12199/4, Taita Taveta.**
  8. **That costs of this suit be provided for.**

#### **EX PARTE APPLICANT'S CASE**

2. The application is based on the following grounds:

1. **Abuse of Power and Excess of Power**

The 1<sup>st</sup> respondent has gravely abused and exceeded the power conferred upon his office under the Mining Act, Cap 306 by purporting to issue or renew mining licenses over privately owned land without the consent of the applicant contrary to express provisions of the same Mining Act upon which he purports to be the impugned decision.

2. **Flagrant breach of a Court Order**

- i. The 1<sup>st</sup> respondent has purported to renew or issue mining licenses over the suit land when he is fully and directly aware that there is in existence a court order expressly barring him from doing so.
- ii. Similarly, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents sought and obtained from the 1<sup>st</sup> respondent mining licenses over the suit land when they both knew that there is in place court orders restraining them from entering or remaining on the suit land and they were also aware that the 1<sup>st</sup> respondent had been restrained from issuing any mining licenses over the suit land.

### **3. Unreasonable, capricious and oppressive decision**

**The 1<sup>st</sup> Respondent's decision to issue to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents mining licenses over the Applicant's land is not only unreasonable and capricious but is also oppressive in that while the 1<sup>st</sup> respondent claimed, in his letter conveying the decision, to have sought the legal opinion of the Attorney general's office, the Applicant, as the owner of the land concerned, was never heard in the matter and the purported renewal or granting of the licenses was given without the Applicant's consent as is required under the Mining Act, Cap. 306.**

### **4. Public good and Public Interest**

**It is against public good and public interest for persons in authority whose powers are granted and expressly delimited by law, and whose purpose is to safeguard rights and interests of the citizens of Kenya to blatantly disregard the law and ignore court orders which they are aware of.**

3. The application is supported by a verifying affidavit sworn by **Saul Joel Mwangola**, the applicant's Managing Director on 4<sup>th</sup> October 2011.
4. According to the deponent, the Applicant is the registered proprietor of the land known as land Reference Number 12199/4, Taita Taveta (hereinafter referred to as the suit land) on which land the Applicant runs the businesses of a ranch with large herds of livestock, runs the business of mining and prospecting for minerals under license issued by the Commissioner of Mines and has about 200 workers working within the land. It is deposed that the suit land has been the subject of litigation as between the Applicant (as Plaintiff) and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents (as Defendants) in High Court civil Suit No. 990 of 1999 and that pursuant to applications filed in the said case by 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, the Applicant's suit was struck out on 26<sup>th</sup> April, 2005. The Applicant, being aggrieved by that decision, filed Civil Appeal no. 117 of 2005 which is still pending before the Court of Appeal. In order to preserve the land from any interference by any of the Respondents herein pending the hearing and determination of his appeal, the applicant moved the High court for restraining order to stop the 1<sup>st</sup> Respondent herein from issuing mining licenses over the suit land without the Applicant's consent and to restrain the 2<sup>nd</sup> respondent herein from entering upon or remaining on the suit land pending the hearing and determination of the appeal by the applicant which application for injunction pending appeal was heard and allowed by the High Court on 19<sup>th</sup> September, 2005 at which ruling the 1<sup>st</sup> and 2<sup>nd</sup> respondents were duly represented. However, a year later, the 1<sup>st</sup> and 2<sup>nd</sup> respondents simultaneously filed separate but similar applications seeking orders to set aside and discharge the injunctions granted by the court on 19<sup>th</sup> September, 2005 which application was heard and dismissed by a ruling delivered on 18<sup>th</sup> December, 2009. According to the deponent therefore, the said orders of injunction given by this Court's Civil Division on 19<sup>th</sup> September, 2005 are still in force and the respondents herein are full aware of the same. Despite that out of the blues and in almost unusual move, the 1<sup>st</sup> respondent, by a letter dated 22<sup>nd</sup> September, 2011, informed the applicant and the 3<sup>rd</sup> Respondent that he had decided to cause the Mining Locations of **Muthoni Kihara** in Kutima Ranch (L.R. No. 12199/4) to be renewed. To the deponent, he had no concern about the applicant's own extensive mining and ranching activities, or the consequences of a potential threat to public order by allowing strangers to invade land having a presence of over 200 workers most likely to be in a state of agitation. It is further averred that the 1<sup>st</sup> respondent cynically alleged in his said letter that he had now sought the legal opinion of the Attorney General's office before reaching the purported decision to renew the mining licenses over the suit land. The said action in the deponent's view was given to give a cloak of legality to an intended disobedience of a court order and commission of an act of impunity well beyond the powers granted to the 1<sup>st</sup> respondent under the Mining Act and to create an apparent defence, in advance, to a blatant breach of the law. Following his purported decision to renew/issue mining licenses to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents over the suit land, the 1<sup>st</sup> respondent did issue to the 3<sup>rd</sup> Respondent herein two certificates of renewal of registered Mining locations over the Applicant's land to last until 19<sup>th</sup> August, 2012. It

is the applicant's position that it does not know and has never dealt with **Muthoni Kihara Mining Co. Ltd**, the 3<sup>rd</sup> respondent herein, while the 2<sup>nd</sup> respondent is a party to the case in which the High Court gave restraining orders on 19<sup>th</sup> September 2005 and that by purporting to issue or renew mining locations in the name of a new entity, **Muthoni Kihara Mining Co. Ltd**, (hereinafter referred to as the Company) , the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not only pursuing a diversionary strategy but also attempting to create an alternative way to circumvent the existing restraining orders. In the deponent's view, the late, sudden and unexplained introduction of new licenses in the name of a new party in the form of limited liability company, the respondents were attempting to strategically introduce a new face into the litigation for future legal protection and for the purposes of protecting the illegal activities of the Respondents away from the individual who had been at the centre of the litigation. It is further averred that 1<sup>st</sup> respondent's decision to renew or issue mining licenses over the Applicant's land without the Applicant's consent was made in flagrant disobedience or a court order whose existence the Respondents are fully aware of and based on the advice received from the applicant's legal advisers, the deponent believes that the 1<sup>st</sup> respondent has no authority or power under the **Mining Act**, cap 306 to grant or to renew a mining license over private land unless the owner of the land gives consent since the property in issue is exclusively private land. The deponent believes that that the 3<sup>rd</sup> Respondent is a Company purposely formed by the 2<sup>nd</sup> Respondent in her attempt to circumvent court order given in HCC No. 990 of 1999 and the court ought to intervene and stop the 3<sup>rd</sup> respondent from being used to contravene a court order hence this is a fit and proper case where the court should protect the Applicant's rights over its land known as Land Reference Number 12199/4, Taita Taveta by the grant of the orders sought herein. It is deposed by the deponent that when he became aware of the 1<sup>st</sup> Respondent's decision to renew/grant mining licenses over the Applicant's land, he visited the 1<sup>st</sup> Respondent's office and met the Acting commissioner, **Mr. Moses N. Masibo** from whom he demanded that the illegal decision be rescinded. The 1<sup>st</sup> respondent has however refused to rescind his decision despite being aware of the orders given by the High Court on 19<sup>th</sup> September, 2005 but has instead purported to suspend the licences instead of revoking them an act which is strange and meaningless.

5. There was also a supplementary affidavit sworn by the same deponent on 7<sup>th</sup> November 2011 in which he stated that when the Respondent first communicated his decision to renew the mining locations on the Applicant's land the respondent stated that he was basing his decision on an opinion of its legal representative, the Attorney General, who has been acting for it in all proceedings relating to the dispute between the applicant and the 1<sup>st</sup> Interested Party and that more particularly his decision was based on the facts that HCCC No. 990 of 1999 had been concluded in favour of the 1<sup>st</sup> Interested party and further that the court of Appeal had dismissed the applicant's application for injunction pending appeal, and that, therefore, it was open to him to renew the licenses. It was however the deponent's position that same High Court which struck out HCCC No. 990 of 1999, did grant an injunction pending appeal on 19<sup>th</sup> September 2005 at last until the appeal is heard and concluded; that the respondent and the 1<sup>st</sup> interested Party's attempt to set aside the injunction pending appeal was declined by the High Court on 18<sup>th</sup> December 2009 and that injunction is, therefore, still in force and will remain in force until the appeal (No. 117/2005) is heard and determined; and that a concurrent application for injunction filed in the court of Appeal under Rule 5(2) (b) was not dismissed but was struck out because it came for hearing after the High court had already granted the injunction sought and the court stated that it could not deliberate upon the application or grant a second injunction. It is further deposed by the deponent that immediately after he received the Respondent's letter conveying this decision to renew the licenses, he gave the Respondent a copy of the Injunction Order of 19<sup>th</sup> September 2005 and the ruling of 18<sup>th</sup> December 2009 refusing to set aside the injunction, and the Court of Appeal ruling of 8<sup>th</sup> December 2006 upon receipt of which the respondent immediately wrote to all interested parties suspending the licenses on the ground that he had been misled to renew the licenses and he also expressed his fear that he had acted in contempt of court when he renewed the licenses. It was therefore the deponent's view that the Preliminary Objection by the respondent has no basis and is only meant to camouflage or support an illegality.

## RESPONDENT'S CASE

6. In response to the Motion, the respondent on 4<sup>th</sup> November 2011 filed the following grounds of a notice of preliminary objection:
  1. **That the application offends the provisions of the Law reform Act section 8 & 9 thereof and order 53 rule 6 of the Civil Procedure Rules as the decision sought to be quashed was made in 1984 and therefore the applicant is guilty of laches.**
  2. **That the application is an abuse of the process of the court as the matter is *res judicata*, High Court having decided the rights of the interested parties in HCCC No 990 of 1999.**
  3. **That the application is *sub judice* due to the pendency of an appeal from the High Court civil suit No 990 of 1999 being east Africa Court of Appeal No 117 of 2005.**
  4. **That having failed to challenge the issuance of the licence by way of Judicial Review it would be abuse of the process to challenge renewal by the said action.**
  5. **That the application offends the provisions of the Law reform Act section 8 & 9 thereof and order 53 rule 6 of the Civil Procedure Rules as the decision sought to be quashed was made in 1984 and therefore the applicant is guilty of laches.**
  6. **That the application is an abuse of the process of the court as the matter is *res judicata*, High Court having decided the rights of the interested parties in HCCC No 990 of 1999.**
  7. **That the application is *sub judice* due to the pendency of an appeal from the High Court civil suit No 990 of 1999 being east Africa Court of Appeal No 117 of 2005.**
  8. **That having failed to challenge the issuance of the licence by way of Judicial Review it would be abuse of the process to challenge renewal by the said action.**
7. The respondent also filed a replying affidavit sworn by **Moses Njiru Njeru**, the Superintending Inspector of Mines and the Warden of Mines in the Mines and Geological Department, Ministry of Environment and Mineral Resources on 14<sup>th</sup> November 2011 in which it was deposed that whereas it is not in dispute that the Ex parte Applicant is the registered owner of Land Reference No. 12199/4 transferred to him on 13<sup>th</sup> December 1994 by **Peter Mwamburi Saul**, the said parcel was excised from land reference Number 12199 granted to **Patrick Joel Mwangola** and **Peter Mwamburi Saul** on equal shares for a term of 45 years from 1<sup>st</sup> September 1988 subject to Grant Number C.R. 19057. However, Land Reference No. 12199/4 was granted subject to Section 28 of the Land Titles Act Chapter 282 and Section 83, 84 and 92 of the Government lands Act Chapter 280. It is deposed that the deceased was granted consent by the original lessee of land Reference No. 12199/4 on 22<sup>nd</sup> December 1985 and that the mining location registered by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were originally granted to the deceased and were transferred to his widows after his demise in accordance to the ruling on Civil Application No. 242 of 1993 at the High court of Mombasa. According to the deponent, the ex Parte Applicant, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties have distinctively demarcated and registered mining concessions within land Reference Number 12199/4 and that the Applicant has registered locations Numbers 1829/1-8 and 1830/1-4 while the 2<sup>nd</sup> Interested Party has registered locations numbers 1406/ 1-10; 1407-5; 1409/1-10; 1408/1-10 and 1439/1-4. In his view, the two sets of mining concessions are distinct, dissimilar and that none of the registered locations overlap with each other and the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties are not trespassers on Land Reference No. 12199/4 as the above mining locations were pegged in 1985 in accordance with Section 28 of the **Mining Act** Chapter 306 of the Laws of Kenya and registered in 1989. The deponent avers that applicant has admitted that High Court Civil suit No. 990 of 1999 was discharged and determined on 26<sup>th</sup> April 2005 and a decree issued on 11<sup>th</sup> May 2005 and that its application for injunction at the Court of Appeal on 5<sup>th</sup> may 2005 was eventually struck out on 8<sup>th</sup> December 2006 though his appeal is still pending. It is the opinion of the deponent that the 1<sup>st</sup> respondent has acted in accordance with the provisions of Section 79 of the **Mining Act** Chapter 306 of the Laws of Kenya and within his official mandate which requires the Respondent to notify the registered owner of the land which the Respondent duly did a fact to which the ex parte

applicant has admitted in his verifying affidavit.

### 1<sup>ST</sup> AND 2<sup>ND</sup> INTERESTED PARTIES' CASE

8. In opposition to the application, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties on 21<sup>st</sup> October 2011 filed a notice of preliminary objection outlining the following grounds:
  1. **The Notice of Motion dated 7<sup>th</sup> October, 2011 is incurably defective as it simultaneously invokes the Judicial Review and civil Jurisdictions of the High Court.**
  2. **The Honourable court has no jurisdiction to hear and determine the Notice of Motion dated 7<sup>th</sup> October, 2011 as the matters in issues are already the subject matter of two cases namely Nairobi High Court Civil case No. 990 of 1999 Kutima Investment Limited Vs Muthoni Kihara & Commissioner of Mines & Geology.**
  3. **By dint of Article 165(5) and (6) of the constitution this Honourable Court has no jurisdiction to hear and determine the Notice of Motion dated 7<sup>th</sup> October, 2011.**
  4. **Without prejudice to the foregoing this Honourable Court has no jurisdiction to grant prayers 2, 3, 6 and 7 of the Notice of Motion dated 7<sup>th</sup> October, 2011.**
9. The 1<sup>st</sup> interested party also filed a replying affidavit sworn on 4<sup>th</sup> November 2011 in which she deposed that she is the registered owner of Mining locations No. 1406, 1407, 1408, 1409 and 1439 located on L.R. No. 121994 in Taita Taveta District and also a director and the majority shareholder of the Company through which the licences for the said mining locations were recently renewed. According to her, the Notice of Motion dated 7<sup>th</sup> October 2011 is incurably defective, misconceived and an abuse of the Court process and unfounded in law and fact and that besides the objections set out in the Notice of Preliminary objection dated and filed on 21<sup>st</sup> October, 2011 on behalf of the 2<sup>nd</sup> Interested Party and herself she objects to the Motion on the grounds that the allegation by the ex parte applicant that the Company and the 1<sup>st</sup> interested party have invaded its land and commenced excavations in readiness to start illegal mining on the land is a blatant falsehood as they have lawfully entered their mining locations to carry-out duly licensed mining activities; that allegations that the actions of the respondent and the Interested Parties are in breach of this Court's orders given on 19<sup>th</sup> September, 2005 in HCCC No. 990 of 1999 are false as the said orders have already lapsed and assuming that the same were in force the ex parte applicant is enjoined by law to institute contempt of court proceedings in the said suit as opposed to these judicial review proceedings; that the application by the ex parte applicant is based on gross misapprehension of the mining laws and assumption that there were valid orders restraining the respondent from performing his statutory functions; and that ex-parte Applicant has concealed material facts. It is deposed that whereas the ex-Parte Applicant is the registered proprietor of land known as L.R. No. 12199/4 Taita Taveta in which it is duly authorized by the Government to carry-out the business of a ranch the suggestion that it is licensed to carry-out the business of mining and prospecting for minerals in the entire land is untrue because it can only do so in specific mining locations and the Commissioner of Mines and Geology has the power to allow other persons to carry-out similar business in specific mining locations. It was the opinion of the deponent that the ex parte applicant had not disclosed its mining locations in order to continue misleading this Honourable Court that it is entitled to prospect and mine in the entire land L.R. No. 12199/4 while in truth, the Company has mining locations in the said land which it is entitled by law to carry-out mining operations. According to the deponent, the background of the above litigation which the ex-parte applicants has mischievously failed to set out in his affidavit is as follows the deponent is one of the widows of **Joseph Kibugi Kihara** (hereinafter referred to as the Deceased) who died on 26<sup>th</sup> April, 1987. Between 1983 and 1985 the Deceased applied for registration of mining locations within Choke Ranch in a property known as L. R. No. 12199 (Grant No. L. R. 19057) which was registered in the names of **Patrick Joel Mwangola** and **Peter Mwamburi Saul** who gave a letter of consent in support of the late **Kihara's** application for grant of prospecting and mining rights upon which the deceased duly obtained the prospecting rights from the Commissioner of Mines and Geology, the Respondent herein. Upon the demise of

the Deceased, his interest, rights and mining titles over/in the said mining locations were transferred to his family and the deponent continued carrying out mining activity in land reference No. 12199 situated in then Taita Taveta district in accordance with the existing laws, Government regulations and approvals and by a Ruling dated and delivered in 1994 by this Honourable Court in Mombasa High Court Misc. Civil Application No. 242 of 1993 the award of the Commissioner of Mines bequeathing the subject mining locations to the deponent was confirmed. However, in or about 1994 the ex parte applicant herein acquired ownership through purchase of the land in which the said mining locations stand namely Land reference No. 12119/4 and soon after soon after the said applicant acquired ownership of L.R. No. 12199/4, where the deponent's mining locations are situate, it embarked in a scheme to coerce the deponent to give up her mining rights which she had legally obtained but she refused to compromise or surrender her rights and privileges secured, inter-alia, by Section 2, 4, 7(1), (d), 30 and 79 of the **Mining Act** Cap 306 Laws of Kenya. It is deposed that as early as 1995 the commissioner of Mines and geology had, by a letter dated 30<sup>th</sup> march, 1995 informed the ex parte applicant that it had no power to interfere with registered and legal prospecting and mining operations where an original owner of the subject land had duly given consent. By the ex parte applicant's letter dated 17<sup>th</sup> November, 1997 addressed to the then Head of Public Service, it set out the basis of its encroachment and interference with the deponent's mining locations under the guise of seeking assistance to ward off alleged illegal miners but by a letter dated 16<sup>th</sup> December, 1997, a Mining Engineer, wrote to the Respondent on the issues raised in the ex parte applicant's letter dated 14<sup>th</sup> November, 1997. However, in May, 1999 the ex parte applicant instituted Nairobi High Court Civil Case No. 990 of 1999 **Kutima Investment Ltd. Vs Muthoni Kihara and Commissioner of Mines** against the respondent herein and the deponent in which suit the principal reliefs sought by the ex parte applicant were general damages against the deponent for alleged illegal mining on its land and restraining orders against the Respondent and the deponent relating to mining operations located on its land. The Respondent and the deponent then made an application seeking to strike out the suit which application was head and the suit struck out by a ruling dated 26<sup>th</sup> April, 2005 though the ex parte applicant has filed a Notice of Appeal against the said decision. According to the deponent, in view of the serious injustices occasioned upon her by the applicant she tried to seek the assistance of the Government to stop the ex parte applicant's illegal action in extraction of minerals and destruction of her mining locations but the pendency of various restraining orders have been cited as grounds for inaction hence her continuing peril. Following the dismissal of the suit and as a result of the deponent's complaints, by a letter dated 4<sup>th</sup> July, 2005 the district Geologist, Taita Taveta District, confirmed to the Respondent that the ex parte applicant was mining in the subject mining locations despite the Court orders then in force and by a letter dated 7<sup>th</sup> July, 2005 the then Minister for Environment and Natural Resources confirmed that the Ministry had not licensed the ex parte applicant to prospect for and mine minerals in the area under mining locations No. 1406, 1407, 1408, 1409 and 1439. Further complaints however did not yield any response and upon being advised by her advocates the deponent believes that the illegal actions of the ex parte applicant and its cynical view of the law and the court processes amount to unadulterated contempt of the law and authority of the courts that have occasioned a miscarriage of justice upon her and her family. While admitting that in Nairobi HCCC No. 990 of 1999 the Applicant accused her of unlawful mining on its land, it is the deponent's position that the legality of the subject mining locations has never been challenged and certainly cannot be challenged in this judicial review proceedings and that the ex parte applicant had selectively annexed relevant copies of the pleadings, ruling and orders while omitting to exhibit others. While agreeing with paragraph 5 of the Verifying Affidavit, the deponent contended that the Applicant proceeded with an application of injunction at the Court of Appeal on 5<sup>th</sup> May 2005 which application was heard and determined by being struck out on 8<sup>th</sup> December, 2006. However, the pending Civil Appeal No. 117 of 2005 was filed on the 25<sup>th</sup> day of May, 2005. According to the 1<sup>st</sup> interested party, it is mischievous for the ex-parte applicant to allege that the 1<sup>st</sup> respondent has exhibited unusual eagerness to sanction acts of trespass on the ex-parte Applicant's land and for positions he has taken in Court. To her since no evidence has been given for those serious allegations paragraph 7 of the Verifying Affidavit should be struck-out and in her view, the ex parte applicant is actually the party that has been unlawfully mining with impunity in the mining locations held by her and on various

occasions the workers and agents of the ex parte applicant have been either arrested or charged in court for illegal mining activities on the subject mining locations. According to the deponent, the Orders of injunction given by this court in HCCC No. 990 of 1999 are not in force and that the same have expired by dint of Order 40 Rule 6 of the **Civil Procedure Rules**. Further the court of Appeal in its ruling of 8<sup>th</sup> December, 2006 struck-out an application for injunction by the ex-parte Applicant hence the ex parte applicant has no basis to assert that there are Orders of injunction in its favour and if indeed it believes those assertions nothing stops it from moving the civil division of this Court in HCC No. 990 of 1999 to canvass those grievances instead of instituting judicial review proceedings. According to the 1<sup>st</sup> respondent, mining rights of the ex-parte applicants and the Interested Parties are demarcated and that the mining locations of the ex parte applicant are distinct from her mining locations and none of those mining locations overlap each other. To her the ex- parte applicant is labouring from the misapprehension that merely because it is the registered proprietor of L.R. No. 12199/4 Taita Taveta no other person or entity can have lawful mining locations therein. In the deponent's view, there is absolutely no danger of a breach of peace and public order so long as the 1<sup>st</sup> respondent respects the Rule of law and does not incite the local people to interfere with the interested parties' mining rights operated under the law a direction which has been given by the OCS Wudanyi Police Station to prevent the agents of the directors of the ex parte applicant from undertaking illegal actions within the mining locations of the Second Interested Party. According to the deponent, as soon as this Honourable court issued its order on 24<sup>th</sup> October, 2011 barring mining activities on the subject mining locations and upholding the interested parties' right to remain in occupation thereof, the Applicant caused/sent its armed workers and agents to take possession of some of the areas in the mining locations and in a clear contempt of the said orders and brazen attempt to intimidate the interested parties. In her view, the 1<sup>st</sup> Respondent acted lawfully and in consideration of all relevant facts and circumstances in renewing the deponent's mining licences and that when the mining locations were renewed there were no restraining orders in force and so there was no reason to circumvent them and that there is nothing in law to prevent the First respondent from renewing her mining locations in the name of a Company in which she owns the majority of shares and she is a director and neither the Company nor herself needed to have dealt with the Applicant or the deponent of the verifying Affidavit before the commissioner could renew the mining licences.

10. There was a further replying affidavit sworn by the same deponent on 21<sup>st</sup> November 2011 in which she confirmed that by a ruling delivered on 8<sup>th</sup> December, 2006 the Court of Appeal struck-out an application for injunction by the ex parte applicant. She however reiterated that Order of 21<sup>st</sup> October, 2008 had already lapsed and that the position stated in the Respondent's letters dated 31<sup>st</sup> December, 1995 and 22<sup>nd</sup> September, 1998 did not correctly reflect the legal position because consent and mine can only be given once and subsequently a transfer of any parcel of land with mining location is subject to the provisions of the **Mining Act**, Cap, 302 and insisted that the ex-parte applicant refused to move out his works from the mining locations.
11. Apart from the foregoing there was a replying affidavit sworn on behalf of the 2<sup>nd</sup> interested party by **Godfrey Kamau Kihara**, its director on 7<sup>th</sup> November 2011. According to the deponent, the Company was registered under the **Registration of Business Names Act**, Cap 499 and that as early as 1997 the existence of the Company was known to all interested parties in so far as the subject mining locations are concerned. According to him, in 2001 the said business enterprise was incorporated as a limited company. It is further deposed that 2<sup>nd</sup> Interested party is the holder of mining locations 1406, 1407, 1408, 1419 and 1439 located on L.R. no. 121994. To the deponent and based on legal advice from his advocates the Notice of Motion dated 7<sup>th</sup> October, 2011 is incurably defective, inter – alia, because the application is founded on a civil suit namely HCCC No. 990 of 1999 in which the 2<sup>nd</sup> Interested Party was not a party; the orders sought by the ex-Parte applicant are not available against the Company in judicial review proceedings; the reliefs sought by the ex-parte applicant are barred under both the **Mining Act**, Cap 306 and the **Law Reform Act**, Cap 26; and reliefs sought by the ex-Parte Applicant are *res judicata* and barred by the **Limitations of Actions Act**, Cap 22. The deponent further denies the allegations of the ex-Parte Applicant to the effect that the Company in conjunction with the first Interested party sought and obtained mining licenses over the suit property despite there being Court orders in force and avers

that the mining locations in issue were registered way back in 1984 and therefore the ex-Parte applicant is indirectly trying to challenge decisions and rights conferred before it purchased the land where the mining locations are situate and that by a letter dated 26<sup>th</sup> October, 1994 the former owner of the land where the mining locations are situate confirmed that he had given the requisite consent to the late **Joseph Kihara Kibugi** whose family has had lawful interest in the subject mines and the same have been dealt with in accordance with the law. It is further denied that 1<sup>st</sup> and 2<sup>nd</sup> Respondents were trying to circumvent existing restraining orders in the renewal of mining locations in the name of the Company because as far as the Company is concerned there were no orders in force and if so, the Ex-parte Applicant is free to raise the matter before the Court which granted those orders. To the deponent, ex- parte Applicant is engaging in gross abuse of the court process because its suit namely HCCC No. 990 of 1999 was long struck-out and in any event the said suit has nothing to do with the legality of the mining locations registered in favour of the family of the late **Kihara**.

### **APPLICANT'S SUBMISSIONS**

12. It was submitted by **Mr Raiji**, on behalf of the ex parte applicant that section 7(1) of the ***Mining Act*** (hereinafter referred to as the Act) clearly stipulates that the Commissioner cannot issue a Mining/prospecting licence on private land without the consent of the landowner and reliance was placed on **John Gitonga Kihara & Others vs. Kasigau Ranching Co. Ltd Civil Appeal No. 134 of 1994** and based on ***Salmond on Torts***, it is submitted that under a bare licence no interest in property passes and that a licence of this kind may either be gratuitous or contained in a contract for valuable consideration and revocable at will. It is therefore submitted that the Commissioner cannot issue or renew a prospecting or mining licence to any person on private land without the consent of the landowner and even where such consent is given but is withdrawn by the landowner then the prospector/miner would become a trespasser and must forthwith be evicted from the land. It is submitted that as at the time the Commissioner issued the Licences to the interested parties on 22<sup>nd</sup> September 2011, he had no authority to do so as such authority had been taken away by the Court until the applicant's appeal was heard. It is therefore submitted that in issuing Licences to the interested parties, the Commissioner quite clearly acted in excess of the jurisdiction granted to him under the Act and his action must be stopped by the Court.
13. It is submitted that as the Company was admittedly incorporated on 29<sup>th</sup> June 2001 during the pendency of this dispute and the order barring the Commissioner from issuing licences over the applicant's land without the applicant's consent, the issuance of such licence to the Company was an act of impunity on the part of the Commissioner as he had no powers to do so.
14. On the issue of time bar it is submitted that the orders sought in the Motion relate to the Licence issued on 22<sup>nd</sup> September 2011 and that in any case the 2<sup>nd</sup> recipient of the licence, the Company, was not in existence in 1984 and could not possibly have been issued with such licence.
15. On the twin issues of *res judicata* and *sub judice*, it is submitted that after the striking out of the suit, fresh orders were issued and continued to bar the Commissioner from issuing the Licence and also restrained the 1<sup>st</sup> interested party from entering the applicant's land pending the hearing of the appeal of the appeal hence the said issues do not arise.
16. On the issue whether the temporary orders granted has lapsed, it is submitted that the said orders were to be in existence till the determination of the appeal which is still pending. In the applicant's view, since the suit had been struck out the provisions of Order 40 rule 6 are inapplicable.
17. The applicant contends that its property is protected by Article 40 of the Constitution hence the respondent's action violates this Article. To the applicant its proprietary rights over his land are indefeasible by any third party stranger to the title except in limited circumstances under section 23 of the ***Registration of Titles Act*** hence the respondent's action amounts to a violation of the rights protected by the Act. By not affording the applicant an opportunity to be heard before issuing the licences an act which directly touched on the applicant's rights, it is submitted that the Commissioner violated the rules of natural justice in so doing. To the applicant the Commissioner, in issuing licences exercises quasi-judicial powers and is therefore under a duty to adhere to the rules of natural justice and to act fairly. Further at the time of the issuance of the said licences the Commissioner had no powers to do so having been barred from doing so by the Court. In any case

he had no powers to issue the licences without the applicant's consent. Accordingly, it is submitted that the Commissioner acted in excess of the authority conferred on him by the Mining Act and in breach of the rules of natural justice hence the orders sought ought to be granted.

### **RESPONDENT'S SUBMISSIONS**

18. On behalf of the respondent it was submitted, by **Mr Terer**, that the application for judicial review is between the same parties and over the same subject matter as High Court Civil Case No. 990 of 1999 which was over the renewal of licences issued by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> defendant, which was dismissed. It is submitted that the applicant's appeal is substantially similar to the application before the court and is between the same parties in the instant application. Relying on **Benja Properties Limited vs. Savings and Loan Kenya Limited [2005] eKLR**, it is submitted that due to the overlap of issues in two suits therein, the suits should not be allowed to proceed concurrently and therefore the plaintiff's application was stayed. Relying on **Abdul Kassim Hassanali Gulamhussein Khala vs. Southern Credit Banking Corporation [2006] eKLR**, it is submitted that since there is an appeal pending the applicant should pursue the pending appeal.
19. It is further submitted that the present application offends section 6 of the Civil Procedure Act since it is founded on matters between the same parties and over the same subject matter as Civil Appeal No. 117 of 2005 pending in the Court of Appeal and part from citing the two aforesaid cases the respondent relied on **Patrick Kirono Mwaura vs. Kenya Commercial Bank [2006] KLR** and submitted that where two suits have substantially the same issues of fact and law, it is only fair to the defendants that the parties should have issues resolved in one suit. Relying on section 4 of the ***Mining Act*** Cap 306 and section 28 of the ***Land Titles Act***, Cap 282, it was submitted that any minerals found on the land are not the property of the land owner but that of the state at whose discretion rights are to be allocated. To the respondent, the applicant itself is a beneficiary of the discretion of the authority mandated to confer and renew mining rights that is the respondent and that no automatic right to prospect lies by virtue of the discovery of precious metals or minerals on any piece of property in Kenya. Based on section 83 and 84 of the ***Government Lands Act*** Cap 280 Laws of Kenya, it is submitted that a right reserved to the Government under section 83 may be exercised by any person or persons authorised by the Minister or by or under any Act or law relating to mines or minerals and the proper authority as per section 4 of the Act is the Commissioner of Mines and Geology hence the respondent acted within its statutory mandate in the execution of its official mandate since the respondent informed the applicant of its intention to renew the licence in fulfilment of section 79 of the Act. According to the respondent judicial review is concerned not with the merits of the case but in the manner in which a particular decision has been arrived at and reliance was placed on **Republic vs. National Environment Management Authority & Another [2006] eKLR** and **Chief Constable of North Wales Police vs. Evan [1982] 1 WLR 155 AT 1160**.
20. It was further submitted that since the applicant has based his application on a breach of a court order granted in HCCC No. 990 of 1999, instead of filing these proceedings the applicant should have filed contempt of court proceedings hence the application is frivolous, vexatious and an abuse of the court process and should be dismissed with costs.

### **INTERESTED PARTIES' SUBMISSIONS**

21. On behalf of the interested parties it was submitted by **Miss Mwangi** that the invocation of two separate and distinct jurisdictions under Order 53 and 40 of the ***Civil Procedure Rules*** renders the Notice of Motion incurably defective since the orders available under the two jurisdictions are not the same. To the interested parties at issue are complex issues revolving around the rights of the Interested Parties vis-à-vis those of the ex parte applicant in respect of mining locations whose adjudication and resolution cannot be fairly ventilated through a judicial review application hence a full trial would be necessary.
22. It is submitted that in light of the admission of the pendency of Nairobi High Court Civil Case No. 990 of 1999 and Civil Appeal No. 117 of 2005 the applicant was enjoined to move the Court in either of those cases hence this matter is *sub judice*.

23. According to the interested parties, pursuant to Article 165(5)(b) as read with Article 162(2)(b) of the Constitution, this Court has no jurisdiction to hear and determine new cases as section 30 of the Act allows it only to conclude pending cases hence the Court ought to hold that it has no jurisdiction to hear and determine this case.
24. It is further submitted that in the absence of a suit prayers, 2, 3 6 and 7 of the Motion dated 7<sup>th</sup> October 2011 are not available to the applicant since Order 53 of the **Civil Procedure Rules** is a special jurisdiction which is distinct from the **Civil Procedure Rules** and the ex parte applicant cannot seek orders which are not available under the special jurisdiction. According to them all the minerals and mineral oil are vested to the Government and not to landowners as assumed/alleged by the applicant. It is the interested parties' case that the respondent had a duty to effect judicial decisions that resulted in both civil suit no. 199 of 1999 and Civil Application No. 120 of 2005 as well as section 79 of the **Mining Act**.
25. It is the interested parties' view that the Motion is defective since it seeks leave; the format is incorrect since the ex parte applicant ought to be the last party; inclusion of orders which are not under Order 53; the application is based on defective motion and verifying affidavit.
26. It is their case that since the interested parties had valid mining locations registered prior to the applicant's acquisition of the suit premises, their locations are protected under the law. Further the said locations are protected as interest rights over the suit premises subject to Article 40 of the Constitution of Kenya, 2010.
27. To them the failure by the applicant to disclose material facts in the verifying affidavit render the application defective and incompetent and an abuse of the court process.
28. It is submitted that this Court cannot sit as an appeal Court and review judicial decisions of the High Court in civil case No. 990 of 1999 contrary to Article 162(1), 165(5)(a) of the Constitution.
29. It is their contention that the Respondent had nothing to bar him from renewing the mining locations of the interested parties since no further or extra consent was required by the time the applicant acquired the suit premises as the interested parties had already been granted legally registered mining locations.

## **DETERMINATIONS**

30. The first question for determination is whether in light of the pending proceedings this matter is res judicata. In **Lotta vs. Tanaki [2003] 2 EA 556**, it was held *inter alia* that the objects of the doctrine "is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme....therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."
31. In this case it is clear that the Nairobi High Court Civil Case No. 990 of 1999 (hereinafter referred to as the Civil Case) was between the ex parte applicant herein as the plaintiff and the 1<sup>st</sup> interested party and the Respondent herein as the defendants. The second respondent herein was not a party to the said proceedings. However the mere fact that a new party has been added cannot ipso facto be a basis for evading the doctrine. But if it is true that the matters complained of in the present application arose subsequent to the delivery of the earlier ruling and could not therefore be the subject of that earlier application, the plea of *res judicata* would not be available. In **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhajjee (1932) 14 KLR 28** it was held that:

**“However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of SIRI RAM KAURA VS. M J E MORGAN CIVIL APPLICATION NO. 71 OF 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:**

*“The principle of estoppel per rem judicatam may apply to a decision made in the course of execution proceedings and not in a suit. It may be assumed that the principle would apply to other interlocutory applications. The binding force of the previous judgement depends not upon the provision of the Indian Act (which corresponds to section 7 of the Kenya Civil Procedure Ordinance); but upon general principles of law...The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application. The admission by the appellant that he was without assets and could not pay the cost was a fact which entirely changed the aspect of the case, and the respondent could not, by reasonable diligence, have discovered that fact when he made the first application for security for costs because the appellant could not then be found: the officers of the court had failed to find the appellant and the respondent did not know where he was. It has not been suggested, or if it has, there is no evidence to support the suggestion, that the respondent could have discovered whether the appellant had or had not assets sufficient to pay the costs without*

*interrogating the appellant. There was no receiving order in bankruptcy or anything of that kind which a search would have brought to light. The circumstances at the date of the first application were that the appellant's whereabouts were unknown and it was not known to the respondent and could not by reasonable diligence be ascertained whether he could or would not pay the costs: the circumstances at the date of the second application were that he had been traced and had admitted on oath that he had no assets and could not pay. That was an entire change in circumstances and the principle of res judicata did not prevent the learned Vice-President from making the order which he made on the second application...The power to order security for payment of costs under rule 60 of the Court of Appeal Rules is a discretionary power which, under the rule, may be exercised at any time. It is, of its nature, a discretion intended to be exercised according to the circumstances existing at the time of the hearing of the application and can be exercised again if the circumstances change materially”.*

32. In this case the 2<sup>nd</sup> interested party was incorporated as a limited liability company in the year 2001. Accordingly it was not possible for it to be made a party in those proceedings. Apart from that the cause of action in these proceedings accordingly to the applicant arose on 22<sup>nd</sup> September, 2011 following the decision of the Respondent to renew the impugned licences.
33. It is also clear that the Civil Suit was struck out for being incompetent. Clearly the matters in dispute were not determined on merits as the matter was not heard. *Res judicata*, it is trite, only applies where a matter has been determined on merits and not where the matter is disposed of by the Court due to want of competence. See **The Tee Gee Electrics & Plastics Co. Ltd. vs. Kenya Industrial Estates Ltd. Civil Appeal No 333 of 2001 [2005] 2 KLR 97** and **Jairo Angote Okonda vs. Kenya Commercial Bank Ltd. Civil Appeal No. 216 of 1999.**
34. A suit which is struck out cannot be said to have been heard and determined on merits. *Res judicata* only applies to situations where a matter has been heard and finally determined. In my view a matter cannot be said to have been heard and finally determined if the same was struck out since in such cases there is no “*res*” capable of being “*judicata*”. See **Ngoni-Matengo Co-Operative Marketing Union Ltd vs. Alimahomed Osman [1959] EA 577** and **Uhuru Highway Development Limited vs. Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996.**
35. With respect to the matter pending before the Court of Appeal, the issue in contention is whether or not the Civil Suit was properly struck out. That cause of action cannot in my view be said to be the same as the cause of action in the present proceedings. Accordingly the doctrine of *sub judice* does not apply.
36. Apart from the foregoing whether or not the doctrine of *res judicata* applies to judicial review is moot. *Res Judicata*, strictly speaking is provided under section 7 of the ***Civil Procedure Act*** which in the preamble to the Act is “*An Act of Parliament to make provision for procedure in civil courts*”. However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**
37. In **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Therefore strictly speaking section 7 of the ***Civil Procedure Act*** does not apply to judicial review proceedings. In fact in **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that *res judicata* does not apply to judicial review. See also **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.**
38. This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would

amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the *Civil Procedure Act* as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

**“Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional.” See **The Reform of Civil Procedure Law and Other Essays in Civil Procedure (1982) By Sir Isaac J H Jacob and WEA Records Limited vs. Visions Channel 4 Limited & Others (1983) 2 All ER 589; R vs. Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No. 1183 of 2004.****

39. As was stated by Kimaru, J in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009:**

**“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.**

40. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* would be applicable.

41. This then leads me to the issue whether the said principles apply to this case. It is conceded that the earlier suit was struck out.

42. It was further submitted that in these proceedings the applicant has invoked both the Court’s civil jurisdiction and its judicial review jurisdiction. It is true that Judicial review jurisdiction is a

special jurisdiction which is neither civil nor criminal and the **Civil Procedure Act** does not apply and that it is governed by sections 8 and 9 of the **Law Reform Act** being the substantive law and Order 53 of the **Civil Procedure Rules** being the procedural law. Section 8 of the **Law Reform Act** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. Accordingly other remedies which are ordinarily available under purely civil law such as declarations do not fall under the purview of judicial review since Judicial review is only concerned with the reviewing of the decision making process and not the merits of the decision. See **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

43. In this case however, the orders sought which were in the nature of civil remedies were interim orders which are no longer consequential. The only orders which concern the Court in this decision are judicial review orders. Accordingly nothing turns upon that issue.

44. That leads me to the issue whether the orders sought herein ought to be granted.

45. It is not disputed that the ex parte applicant is the registered proprietor of LR No. 12199/4, the subject suit land. Under section 7(1)(m) of the Act private lands are excluded from prospecting and mining except with the consent of the owner thereof. Under Article 64 of the Constitution provides:

***Private land consists of—***

***(a) registered land held by any person under any freehold tenure;***

***(b) land held by any person under leasehold tenure; and***

***(c) any other land declared private land under an Act of Parliament.***

46. Article 40(3) of the Constitution provides as follows:

***The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***

***(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***

***(i) requires prompt payment in full, of just compensation to the person; and***

***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

47. It follows that for the state to deprive a proprietor of land of his interests therefore the same can only be done in accordance with the law and the Constitution. With respect to mining and prospecting it is clear that the said process cannot be undertaken without the consent of the proprietor of a private land which it is clear the suit property falls under. However under section 7(3) of the Act:

***Where any consent required under subsection (1) is unreasonably withheld or the Minister considers that any withholding of consent is contrary to the national interest, the Minister may take such steps as are necessary under the law relating to the compulsory acquisition of land or rights or interests in land to vest the land or area in question, or rights or interests in such land or area, in the Government or on behalf of the Government; and thereafter such land or area shall cease to be land excluded from prospecting and mining under subsection (1).***

48. It follows that where the proprietor does not consent to his land being used for prospecting and

mining the State can only resort to the process of compulsory acquisition thereof as provided under the law. Whereas it is correct that minerals found on the land are not the property of the land owner but that of the state it is my view that the State is not entitled to simply enter into private land and deprive the proprietor thereof without following the due process of the law.

49. In this case it is however argued that the former proprietor had given consent to the Mining and Prospecting on the suit parcel of land hence the respondent was entitled to renew mining licence at the expiry of the consented licence without the applicant's consent. In **Kasigau Ranching (DA) Ltd vs. John Gitonga Kihara & Others Civil Application No. NAI 105 of 1998** the Court expressed itself as follows:

**“But, Mr Oluoch for the respondent, was at pains to argue, that as the Department of Mines & Geology had granted to the respondents a licence to mine on the property of the applicant, they were entitled to carry out their mining operations regardless of the lack of consent on the part of the applicant...Section 7(1)(m) of the Act simply provides that private lands are excluded from prospecting and mining except with the consent of the owner thereof. This section does not help the respondents. On the contrary, it exempts private lands from prospecting and mining except with the consent of the owner. Section 7(2) of the Act authorises the Minister to decide whether or not a particular land is excluded under the section (from prospecting and mining), but, it does not authorise the Minister to send prospectors and miners from going onto the land without the consent of the owner thereof.”**

50. In **John Gitonga Kihara & Others vs. Kasigau Ranching Co. Ltd.** (supra) it was held:

**“The defendants had been granted a licence which had expired and there was no evidence of any renewal of such licence. Upon the plaintiff withholding his consent the defendants were clearly trespassers.”**

51. It follows that even if the person from whom the applicant obtained his title had given his consent to the prospecting and mining upon the expiry of the licence, the interested parties became trespassers and the respondent was not entitled to renew the said licence without the consent of the applicant since the consent ceased to exist when the licence for which it was given expired. The fact that a proprietor has given his consent to mining and prospecting on his land does not mean that the consent continues in perpetuity as that would have the result of depriving the proprietor thereof of his land without the due process of law. Accordingly a transferee of land who holds land subject to existing encumbrances only has his interest encumbered to the extent of the lifespan of the existing licence.

52. It is therefore my view and I so hold that the respondent had no power to renew the impugned licence without the consent of the applicant.

53. To make matters worse, the 2<sup>nd</sup> interested party was not a beneficiary of the earlier licence and in renewing the licence to include the 2<sup>nd</sup> interested party the respondent in effect unilaterally expanded the scope of the licence outside the scope contemplated by the parties to the consent.

54. With respect to the issue whether the licence was renewed in contravention of an existing court order, in **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs.**

**Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

55. Again it is trite that the remedy will not be granted where there are alternative legal remedies which are more convenient, beneficial and effectual. In this case, it is clear that the applicant could have invoked the remedies under the contempt of Court procedure. Accordingly had that been the only ground for seeking the remedies sought herein I would have in the exercise of my discretion declined to grant the orders sought herein.

56. It follows that the Notice of Motion dated 7<sup>th</sup> October 2011 succeeds.

**ORDERS**

57. According to the orders that commend themselves to are as follows:

1. **An order of Certiorari is hereby issued removing into the High Court for the purpose of being quashed the decision of the respondent (contained in the letter dated 22<sup>nd</sup> September, 2011) to grant and/or renew mining locations and/or mining rights or licenses to the 2<sup>nd</sup> Interested party over the Applicant's land known as land reference Number 12199/4, Taita Taveta which decision is hereby quashed.**
2. **That an order of Certiorari is hereby granted removing into the High Court for the purpose of being quashed the decision of the Respondent (Contained in the letter dated 22<sup>nd</sup> September, 2011) to grant or renew mining locations and/or mining rights or licenses to the 2<sup>nd</sup> Interested party over the Applicant's land known as Land Reference Number 12199/4, Taita Taveta and the Certificates of Renewal issued to the 2<sup>nd</sup> interested party in respect of claims numbered 1 – 4 and 1 – 10 and the same is hereby similarly quashed.**
3. **An order of Prohibition is hereby issued prohibiting the respondent, his officers employees, servants or agents and any other person acting under him from issuing or purporting to issue any prospecting or mining rights or licenses to the interested parties or to any other person over the Applicant's land known as land reference number 12199/4, Taita Taveta without the consent of the Applicant or without following the due process of the law.**
4. **The costs of this application are awarded to the applicant.**

58. I however decline to grant prayer 7 of the Notice of Motion as the said order is directed to the interested parties yet judicial review orders are directed to public bodies and not to private individuals.

**Dated at Nairobi this 1<sup>st</sup> day of November 2013**

**G V ODUNGA**

**JUDGE**

*Delivered in the presence of:*

*Mr Kiara for Mr Raiji for the ex parte applicant*

*Mr Terer for the respondent*

*Mr Ngachu for the interested parties*