



**Rarieda Artisinal Miners Savings and Credit Co-operative Society Ltd & another v
Amlight Resources Company Limited & 5 others; National Environmental Management
Authority & 2 others (Interested Party); Nicholus (Intended Interested Party) (Environment
and Planning Petition 1 of 2024) [2025] KEELC 4544 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND PLANNING PETITION 1 OF 2024**

**AE DENA, J
JUNE 16, 2025**

BETWEEN

**RARIEDA ARTISINAL MINERS SAVINGS AND CREDIT CO-OPERATIVE
SOCIETY LTD PETITIONER**

AND

ABIDHA NICHOLUS APPLICANT

AND

**AMLIGHT RESOURCES COMPANY LIMITED & 5 OTHERS & 5 OTHERS & 5
OTHERS & 5 OTHERS RESPONDENT**

AND

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY & 2
OTHERS INTERESTED PARTY**

AND

ABIDHA NICHOLUS INTENDED INTERESTED PARTY

*(Pursuant to section 1A & 1B of the Civil Procedure Act and Order 12
Rule 7 of the Civil Procedure Rules and all enabling provisions of the law)*

RULING

1. This ruling is the subject of 5 applications namely;-
 1. Notice Motion dated 20/09/2024 by Abidha Nicholus 1st Intended Interested Party.



2. Notice of Motion dated 30/09/2024 brought by Mr. Chrisphine Omollo Owalla 2nd intended Interested Party
 3. Notice of Motion Application 20/05/2024 by the 1st intended Interested Party for Joinder.
 4. Notice of Motion dated 22/05/2024 by the 2nd intended Interested Party for joinder.
 5. Notice of Motion dated 16/08/2024 by the 1st 2nd 4rd Respondents in EPPET 1 of 2024.
2. On 11/02/2025 this court issued directions that all the above applications would be heard concurrently by way of written submissions. Additionally, that the file EPPET 1 of 2024 to serve as the lead file for purposes of filing documents. Meanwhile both EPPET 1 of 2024 and EPPET 2 of 2024 were consolidated on 13/05/2024.
 3. Ms Esendi for the 1st and 3rd Interested Parties informed the court on 18/09/2024 that they would not be participating in the joinder applications.
 4. Mr Osoro for the 1st 2nd 4rd Respondents in EPPET 1 of 2024 did not oppose the applications for joinder of the Intended Interested parties.

Application Dated 20/09/2024

5. The applicant in the application dated 20/9/2024 seeks the following orders;-
 1. Spent
 2. That the Honourable court be pleased to set aside and/or vacate orders made on 18th September 2024.
 3. That the Application dated 20th May, 2024 be reinstated and the same be listed for hearing on its merits on priority basis.
 4. That costs of this to be in the cause.
6. The application is premised on the following grounds; -
 - a. That on 18th September, 2024 the Honourable Court dismissed the Notice of Motion 20th May,2024 with costs for want of prosecution.
 - b. That this was the first time the application was listed for hearing.
 - c. That unfortunately the applicant was unwell and could not attend Court as he was placed on bed rest.
 - d. That the said application dated 20th May, 2024 raises pertinent issues and ought to be heard on its merits.
7. The application is supported by the affidavit of Abidha Nicholas which rehashes the above grounds. The deponent also attaches medical evidence and further states the application has been made timeously.
8. The application is opposed by the petitioners in EP.PET 2 of 2024 vide the replying affidavit sworn by their counsel on record Agnes Akinyi on 29/01/2025. It is deponed that the applicants account of his failure to attend court is unsubstantiated as the medical evidence has only been mentioned on the supporting affidavit and not attached. That there was no sufficient and plausible cause for the said nonattendance. The court is invited to dismiss the application.



9. Rose Elizabeth Oketch the 1st Petitioner in Petition No. 2 of 2024 swore a replying affidavit on 13/02/25 opposing the application dated 20/09/2024. She depones that the applicant as an advocate of this Court fully aware of the concept of sufficient notice failed to notify the deponents counsel for purposes of being indulged. No medical document was presented evidencing he was unwell. The applicant was not deserving the orders sought.

Application dated 30/09/2024.

10. This application I note has in some instances been erroneously referred to by the court as dated 22/09/2024. After going through the CTS I noted it is dated 30/09/2024. This is an error on the face of the record and have rectified the record appropriately.
11. The application was brought by Chrisphine Omollo Owalla the Intended 2nd Interested Party appearing in person. The application is premised on the grounds that the court dismissed the applicant's application dated 22/05/2025 for non-attendance. The applicant had tried in vain to join the court via the courts link. That the failure of technology is not intentional. The application is also supported by the applicants supporting affidavit sworn on even date which reiterates the grounds set out in the application. Additionally, that he tried to reach the court registry but only found from the CTS that the application had been dismissed. It is deponed he is desirous of prosecuting the application dated 22/5/2024 on its merits.
12. Ms. Akinyi counsel for the petitioners in Petition No. 2 of 2024 in her replying affidavit sworn on 7/03/2025 avers that the 2nd Interested Party allegations that he tried joining the virtual platform to no avail are unsubstantiated. Allegations that he tried to reach the court registry for help were equally unsubstantiated. That the applicant has not shown sufficient and plausible cause for nonattendance to prosecute the application.
13. Rose Elizabeth Oketch the 1st Petitioner in Petition No. 2 of 2024 swore a replying affidavit on 13/02/25 opposing the application dated 30/09/2024. The depositions echo the ones raised by Ms. Akinyi above and I will not repeat them.

Submissions

14. The applications on reinstatement were canvassed by way of written submissions and oral submissions with leave of the court.
15. Mr. Abidha appearing in person relied on his supporting affidavit. He did not file written submissions but made oral submissions. It is submitted that it is within the courts discretion based on the provisions of section 1A and 3A of the [Civil Procedure Act](#) and Order 12 Rule 7 of the Civil Procedure Rules to reinstate his application. That the application for reinstatement was made promptly within two days of the court's order. That the petitioners have not demonstrated that he was not unwell. The applicant urged that he had met the threshold to be granted the orders sought.
16. Ms. Akinyi in addition to her replying affidavit relied on submissions dated 7/3/2025. Counsel reiterated that they did not see evidence that the applicant was unwell unless it was uploaded on the portal but not served. That if the application is allowed it will prejudice her clients by delaying the main petition. That cases should be efficiently fast tracked as justice delayed is justice denied.
17. Mr Areda relied on the submissions dated 7/3/2025 in respect of the application dated 30/9/2025. He concurred with Ms. Akinyis submissions above and reiterated the applicant ought to have alerted counsels by phone. That no logs or text messages were presented in proof of the internet challenges faced.



18. Mr. Owalla appearing in person filed submissions dated 10/3/2025. He reiterated the depositions in his supporting affidavit to the application dated 30/9/2024. He added that network and electricity challenges are common in all the stations and which was beyond him. That evidence can only be by audit of the link which is also beyond him. The court was invited to invoke its discretion under the provisions of Section 1B and 3A of the Civil Procedure Act. That the reasons mentioned amounted to sufficient reasons to allow the application.

Analysis And Determination Of The Applications Dated 20/09/2024 And 30/09/2024

19. I have considered the applications dated 20/9/2024 and 30/9/2024, the responses in opposition thereto and the rival submissions of the parties. The main issue that commends determination is Whether this Court should set aside the orders of 18th September 2024 and reinstate the applications dated 20/9/2024 and 30/9/2024 for hearing on merit.

20. The applications are for reinstatement of the applications dated 20/5/2024 and 22/5/2024 which were dismissed by this court on 18th September 2024 for non-attendance by the applicants. The application dated 20/9/2024 is brought under the provisions of sections 1A, 1B of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules. The application dated 30/9/2024 is brought under the provisions of sections 1A and 1B of the Civil Procedure Act.

21. Order 12 Rule 7 provides as follows; -

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

22. Sections 1A (1) of the Civil Procedure Act provides that the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The court is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.

23. Section 1B of the Civil Procedure Act outlines the duty of the court. It emphasizes the importance of the just determination of proceedings, efficient disposal of business, efficient use of resources, timely and affordable disposal of proceedings, and the use of suitable technology.

24. Arising from the provisions of Order 12 above the power donated to the court is therefore discretionary. It is trite that discretion must be exercised judiciously contingent upon the circumstances of each case.

25. In the case of John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR the court of Appeal held thus; -

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution of Kenya Article 50, coupled with Article 159 of the Constitution on the right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles that should guide the court in deciding on such matter of reinstatement of a suit which the court has dismissed. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where necessary. The same test will apply



in an application to reinstate a suit, and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit were reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

26. Though I note the above related to reinstatement of an appeal which was dismissed for want of prosecution, the principles would in my view apply as long as the power to set aside is permitted in law. The key guidance is that a party approaching the court must demonstrate sufficient reasons for the court to exercise the discretion in their favour. Secondly the court must also weigh if any prejudice will be occasioned to the other parties. The history of the matter before the dismissal order may also be pertinent.

27. What constitutes sufficient cause was discussed in the case of *Optica Kenya Limited v Aya Limited* (Environment and Land Appeal E008 of 2025) [2025] KEELC 3368 (KLR) (24 April 2025) (Ruling) where Yano J stated

‘Sufficient Cause was defined by the Supreme Court of India in *Parimal vs Veena* where the Supreme Court stated as follows: - “sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

28. In the present case it is not disputed that the applications dated 20/5/2024 and 22/5/ 2024 were both fixed for hearing on 18/09/2024. It is also not disputed that both applicants failed to attend during the hearing to prosecute the applications. Mr. Abidha has deponed that he was unwell and the medical facility he was attended at, put him on best rest. The respondents contend that no evidence was tendered as proof in this regard.

29. I note that the court record bears a handwritten letter dated 17/09/2024 on the letter head of Lucky Summer Medical Centre addressed to ‘whom it may concern’. It indicates that Nicholus Abidha had been given 2 days sick off/bed rest in view of his health status and the nature of medication dispensed. The document also has a CTS endorsement verifying it was uploaded in the judiciary case filing portal.

30. I find that the above suffices for purposes of evidencing that Mr. Abidha was unwell. Sickness in my view is a sufficient reason or cause to warrant the exercise of the court discretion in his favor.

31. Moreover based on the history of the matter this court has noted that the application was coming up for the first time for hearing. I’m not in any way suggesting that the first hearing is not important for purposes of progressing a matter. In the present case I did not have any previous history as to the conduct of counsel in the matter to deny him the benefit of doubt.

32. The respondents further contend that they will suffer prejudice since the prosecution of the petition will be delayed. Indeed, the court appreciates the overriding objectives of the [Civil Procedure Act](#) as to



expediting of the cases, but I think the gist of the objectives at the end of the day is to do justice to all parties that come before court by according them the right to be heard.

33. With regards to Mr. Owallas application his main reason was that he tried to log into the virtual court platform but encountered challenges. It is stated that he did not lead the court to any evidence in this regard or that he made attempts to reach the registry. The applicant states that what happens is common in all courts.
34. In the case of *Langat v Director of Land Adjudication and Settlement & 3 others; Sabuni & 180 others (Interested Party) (Environment & Land Petition 26 of 2014) [2023] KEELC 21588 (KLR) (17 November 2023) (Ruling) Justice Nyagaka IUR* faced with an application to set aside an order of dismissal on the grounds that counsel experienced internet challenges to log into the virtual platform persuasively observed as follows;-

‘Even where there is failure of the internet or anticipated network failure, the parties are under obligation to inform the Court as soon as practicable that they are in a problem and unable to log into the virtual session. They do this through calling other colleagues who can have stronger internet to log into the court session and hold brief or inform the court otherwise. They cannot sit back and wait for another day to move the court to set aside proceedings. Moreover, the party has to use technology to demonstrate to the Court that indeed they attempted to log into the court session but failed. For instance, they need to demonstrate through internet logs that they indeed tried to log into the session but failed.’
Emphasis is mine

35. I think the logs above are to check on abuse as parties may use technology as an excuse to gain unnecessary favor. But I think Mr. Owallas explanation is not too remote. What I can state as a court is that indeed we normally have both litigants and advocates alluding to such challenges. While the lawyers have several platforms through which they may be assisted, litigants appearing in person may be limited in this regard. Again, I’m inclined to exercise my discretion to further the rights to hearing as envisaged under Article 48 of *the Constitution*.
36. The upshot of the foregoing is that I find that sufficient reason has been led to warrant the exercise of the courts discretion in favor of the applicants. Consequently, I set aside the order of dismissal of the applications dated 20/5/2024 and 22/5/ 2024 and reinstate the said applications for hearing and determination on merit.

Applications Dated 20Th May 2024 And 22Nd May 2024

37. The above applications having been reinstated I will proceed to determine both of them on merit.

Application dated 20/05/2024

38. This application is brought by Mr. Abidha Nicholus and seeks for leave of the court to join the current proceedings and to participate as an Interested Party and to file relevant documents. The application is premised on the grounds on its face and the supporting affidavit of the applicant.
39. The applicant depones the petition seeks to prohibit unlicensed mining activities in Lumba and Ramba within Rarieda where he hails from and also uphold the right to clean environment. That therefore he is well versed with the issues. That the question of extraction of natural sources also emerges where members of the petitioners have been benefitting to the exclusion of Lumba and Ramba areas.



40. That the orders sought if granted or denied will have a direct impact on the environment, three schools whose particulars are disclosed and lives of members of North Ramba including the applicant and numerous victims who have been allegedly silenced by members of the petitioner. It is averred that the applicant is a beneficiary of the schools and cannot fold his hands to watch the violations being committed.
41. It is deponed that the petitioner is under the watch, control, management and sponsorship of one Isaack Owang who hails from Tanzania, its member No.38 who has been conducting illegal mining since the year 2018. That members of the petitioner having declared they are miners are most unlikely to urge issues touching on their victims within North Ramba sub-location. That the said Isaack Owang supervises terror squads which silences any person with contrary views. That the issues while touching on the fundamental right to a clean and healthy environment are likely to be clouded with Mr. Owangs differences with the respondents either in sour deals or his fear of competition.
42. According to the applicant, being an officer of this court places him at a better position to urge the legal issues affecting the victims of illegal mining who have all along been silenced by members of the petitioners under the command of Mr. Owang.

Application dated 22/05/2024

43. The applicant Mr. Chrisphine Omollo Owalla in the application dated 22/5/2024 seeks leave of the court to join the current proceedings and to participate as an Interested Party and to file relevant documents. The application is premised on the grounds on its face and the supporting affidavit of the applicant. The applicant states he is a resident of Siaya and Executive Director of Community Initiative Action Group Kenya Trust (CIAG-K) whose thrust is founded on the desire to have the poor engage with those in decision making to ensure that natural resources are utilized in the best interest of all stakeholders.
44. The applicant depones that he has been pursuing issues of environmental justice currently focusing on mining activities which are mainly illegal and or unlicensed. That the issues raised in the application are in tandem with the CIAG-K mandate. According to him the Petitioners and the respondent companies were not representing the interests of members of Asembo area who are suffering because of the petitioners and respondents pollution. It is alleged that the firm of Bruce Odeny & Co. Advocates represents Mr. Isaack Owang in two petitions before the ELC where Mr. Owang is accused of illegal mining and dumping toxic waste into River Odundu. That it is insincere for the petitioners whose membership comprises illegal miners to complain about illegal mining by the respondents.
45. It is averred that only CIAG-K which is neutral will better advance the interests of the public in Asembo.
46. The applications were opposed by the petitioners.

Responses to the applications

47. On behalf of Rarieda Artisanal Miners, Wycliffe Odera Ochieng the chairman opposed the application dated 20/5/2024 vide a replying affidavit sworn on 31/05/2024. He depones that Mr. Abidhas claims that he is from Lumba and Ramba areas are not substantiated. Moreover he had already approached the court in Siaya ELC Petition No.2 of 2021 Abidha Nicholus Vs. Attorney General & 5 Others (Previously Siaya Kisumu ELC Petition No.7 of 2020 Abidha Nicholus Vs. Attorney General & 5 Others, whose substance is illegal mining, environmental pollution in the said areas. A copy of the petition is annexed as WOO-1. The applicant seeks to introduce new issues such as the petitioner being



a benefactor of the mining activities being conducted in the area an issue not among the issues in the present petition.

48. It is averred that the issues raised by the applicant touching on Ramba, Kusa and the schools named are well represented by the petitioner and whichever decision arrived at in this petition will be applicable to them and the applicant should not raise the alarm. That the issues deponed in paragraph 8 of the applicants supporting affidavit do not fall within the issues in the present petition and are before another court of competent jurisdiction to hear them.
49. It is deponed that the allegations on the petitioner being under the control of Mr. Isaac Owang are unsubstantiated and the nationality of the members of the petitioners is not an issue in the petition. That the same do not concern the right to clean environment. It is deponed that the said Isaac Owang is a Kenyan. A copy of the national identity card was annexed as WOO-2.
50. In a replying affidavit sworn on 31/05/2024 in response to the application dated 22/05/2024 Wycliffe Odero Ochieng the chairman of the Rarieda Artisanal Miners avers that the applicant has not provided proof of the existence of CIARG-K. The application doesn't demonstrate how he is a person of Interest except he seem to have personal issues with one Isaac Owang. That this is not the forum to address his grievances against the said individual. That the applicant being aware of proceedings in Siaya ELC Petition No.2 of 2021 Abidha Nicholus Vs. Attorney General & 5 Others and his contention that the said Mr. Owang is guilty of carrying out illegal mining activities is the more reason he should apply to be enjoined in the said proceedings.
51. It is further deponed that the issues before this petition do not comprise of the legality of the petitioners activities, and the applicant should institute separate proceedings. That there is no evidence to back up the scandalous and grievous allegation deponed in paragraph 8 of the supporting affidavit. That the applicant is pursuing personal interests against a private person rather than public interest. That having failed to discharge the burden that he is a person of interest in the proceedings, he is not deserving of the orders.

Submissions

52. The petitioners submissions are dated 7/3/2025. The court is referred to the case of Francis Kariuki Muruatetu & Another V Republic & 5 Others [2016] eKLR on conditions to be satisfied by an applicant seeking to be joined to proceedings as an Interested party. It is submitted that Mr. Abidha has failed to establish personal interest proximate to stand out. Any applicant can come to court stating they hail from the subject jurisdiction. There was no evidence to show the applicant comes from Ramba. That the needs of the people of Ramba had been well articulated by the petitioners and there was no need to join them on the basis that he comes from Ramba. The court will be opening endless litigation. That the applicant has interests elsewhere that do not concern this petition.
53. It is contended that the parties being introduced have nothing to do with the issues in the petition and which are very clear. There is an attempt to bring issues raised in another petition into the present petition and which will not assist the court but lead to double work. That Isaack Owang is a stranger to the present proceedings and it was not clear why his nationality is pertinent to the suit there being no nexus. That the applicant seemed to have personal issue with the said Isaack and he must deal with him in person. The court is referred to the case of Communication Commission of Kenya & 4 Others Vs. Royal Media Services (2016)eKLR.
54. It is urged the applicant has failed to set out the prejudice he will suffer were the joinder to be denied. The interests of the people of Ramba are well catered for.



55. Mr. Areda submitted that the issues being raised by the applicant are new issues involving new parties which ought to be canvassed in a separate suit. The allegations that the petition is masked under Isaack is not supported by evidence. That Petition No 2 of 2024 has cured the need for the applicant to help the petitioners. That the 1st 2nd and 3rd petitioners represent the people of Ramba in this regard the court is invited to refer to their supporting affidavits.
56. Mr. Owalla appearing in person submitted that CIARG is the one that champions the rights of the communities. That nature too has rights yet it cannot defend itself and thus the need for his joinder to champion nature's rights. Reliance is placed on Supreme Court of India decision in MKM Rajinsht & Union of India. It is also submitted there is connectivity between nature and culture. The court was also urged to appreciate the concept of planetary boundaries which allow human activities not to go beyond certain limits. That he has approached the court with clean hands to champion the community interests.
57. On the joinder of Mr. Owalla Ms. Akinyi submitted that the applicant has failed to demonstrate interest as there was no proof of registration of CIARG as an NGO and that he is a member thereof. There is no evidence that he has been participating in environmental issues. It cannot be determined if the group would fit within the ambit of the petition. That while the applicant refers to Isaack, the said Isaack is not a party to the suit. That the reference made of Bruce Odeny an officer of this court was scandalous and preemptive since the legality of the mining was yet to be determined by the court. The allegations raised over the nexus between Leonard Okanda and Isaack and the fear of abuse of public information were unsubstantiated. This points to the applicant's interest in personal issues rather than environmental issues. That there ought to be other channels of dealing with the allegations raised against Isaack and not use the disguise of an Interested Party. That the issues raised have nothing to do with the Petition and will only serve to delay the matter,
58. Mr Areda submitted that the reasons given by Mr. Owalla for his proposed joinder were similar to those given by Mr. Abidha. In this regard the court was referred to paragraph C and D of the grounds in the application pointing to obsession with illegal mining activities. That the applicant also raises the issue of the arrest and charging of Isaack Owang. That it was not clear how the applicant was going to further the interest of the community having shown no nexus. The court is urged to revisit the case of Muruatetu.
59. In further response Mr. Abidha submitted that Mr. Areda had indeed admitted the applicant had an interest. That as an advocate he brings skills as a volunteer. In response to Ms. Akinyi it is submitted that the constitutional petition is in rem and an applicant for joinder need not show interest. That no evidence was presented that the applicant comes from elsewhere other than Ramba. No new issues are being introduced as the focus is on environmental injustice. That he has a duty to disclose relevant material and he should not be locked out on this basis. Further that the Mutunga rules seek to avoid multiplicity of suits if the issues are the same. That decision in Communication Commission (supra) supports his case. That any delay can be cured by imposing strict timelines and should not be the reason to lock out the applicant. That the discomfort with the applicant's joinder should be raised within the responses to the applicant's pleadings if allowed.
60. Mr. Owalla submitted in rejoinder that pursuant to article 3 of *the Constitution* and section 3 of EMCA anyone can protect the environment. That he doesn't require to be from Rarieda community to canvass their rights. That the letter dated 19/9/2024 from Nyanza Regional Director of Mining speaks to illegality. That he was not fighting personal wars but CIARG worked everywhere in Kenya. The court is urged to look at the public interest which is greater than the community interest.



Analysis And Determination

61. I have considered both applications for joinder filed by the intended Interested parties, the responses thereto and the rival submissions of the parties. The main issue for determination is whether the 1st and 2nd intended interested parties should be joined to these proceedings as such.
62. The court notes that both the applications dated 20/5/2024 and 22/05/2024 do not indicate the provisions under which they have been filed. The court will however proceed to determine the substance of the applications in the interest of justice. Both the intended interested parties seek leave of the court to join the proceedings, participate as interested parties and file relevant documents.
63. This being a Constitutional petition the court will be guided by the procedure for joinder of an interested party as provided for under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, otherwise known as “the Mutunga Rules”. A party may apply and the court may suo motto also consider joinder of a party. I will also be guided by the various judicial pronouncements made by the courts on the subject.
64. Rule 1 of the Mutunga Rules defines an interested party as follows:
- “Interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’
65. The Supreme Court of Kenya stated in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, that:
- “[18]...an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”
66. In the case of *Francis Kariuki Muruatetu & Another V Republic & 5 Others* [2016] eKLR the Supreme Court set out the elements the court should consider in exercising its discretion to enjoin a party as an Interested Party thus:-
- a) The application would have to disclose the personal interest or stake that the party had in the matter. That interest had to be clearly identifiable and proximate enough to be distinguished from anything that was merely peripheral.
 - b) The prejudice that would be suffered by the non joinder of the intended interested party had to be demonstrated to the court’s satisfaction. The prejudice would have to be one that was not remote but one that was clearly outlined. The party seeking to be enjoined had to demonstrate that the submissions were not merely a replication of what other parties were going to submit to the court.
67. The Supreme Court emphasized as follows
34. Whether or not interested parties were enjoined to a suit, the issues to be determined by the court would still be the issues presented by the principal parties or as framed by the court from the pleadings and submissions of the principal parties. An interested party could not frame its own fresh issues or introduce new issues for determination by the court. The stake that the



interested party was required to have in the matter could not form an altogether new issue introduced to the court.

68. The court has also read the decision in *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR where the Supreme Court cited the case of *Meme v. Republic*, [2004] 1 EA 124, thus:-

‘The High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

69. Firstly I must observe that it is clear from the fore going authorities cited most of which are constitutional petitions that an applicant must demonstrate his interest or stake in the matter he seeks to be enjoined. I would therefore respectfully disagree with Mr. Abidhas submission that the constitutional petition is in rem and an applicant for joinder need not show interest. It was therefore incumbent upon Mr. Abidha to satisfy the court of his interest/stake in the present petition.

70. One of the main grounds articulated by Mr. Abidha is that he hails from North Ramba sub location in Rarieda and he has both direct and indirect interest.

71. The petition in PET E001 of 2024 has been brought by the Rarieda Artisanal Miners Savings & Credit Cooperative Society Ltd whose objective is expressed as ‘to organize and promote the welfare and economic interest of its members in Siaya county. Both the proposed interested parties seeking to be enjoined to these proceedings are not members of the Rarieda Artisanal Miners Savings & Credit Cooperative Society Ltd.

72. Mr. Abidhas concerns which are echoed by Mr. Owalla. Mr. Abidha urges that he is better placed to articulate the issues of the residents who have been affected by the illegal activities of the miners. A people who have been intimidated by the Petitioners as well as the agents and owners of the respondent company who have been violating mining laws since the year 2020. In other words he does not trust the petitioners who may be conflicted.

73. My considered view with regard to the above is that it may resonate with the guidance enumerated in the authorities cited to the extent that the stake of the applicant need not be direct but can also be indirect. It his case that he also brings his expertise as an advocate of this court. But I must observe there are three petitioners in PET No.2 of 2024 who are individuals and who describe themselves as members of Lumba village Ramba Kanjanga areas also neighbors of the respondents. Their claim mirrors that of the other petitioners except that they lean more on the community interest. I have also confirmed they were not part of the people who were present at the meeting of the Rarieda Artisanal Miners herein held in 17/3/2024 and it would appear they are not members. Why is this observation important?

74. The above observation is important because this would resolve the concerns raised by the applicant’s seeking joinder. The court has noted that other than the membership of the Rarieda Artisanal Miners Savings & Credit Cooperative Society Ltd, PET No 2 which has been consolidated herein is brought by individuals hailing from the area the subject of this petition. In my view these capture the broader interests of the other community members as to the mining activities and their effects and which has come out very clearly in the supporting affidavit sworn by Rose Elizabeth Aketch on 16/04/2024. Moreover, none of the three individual petitioners have in response corroborated Mr.



- Abidhas concerns of intimidation. To the contrary they have in my view overcome the alleged concerns of intimidation by approaching the court. I also have no evidence before me showing any of the members of the petitioners or a resident of Ramba raising doubts of the nature raised by Mr. Abidha.
75. On the expertise to be brought in by Mr. Abidha, my view is that it would be different had the petitioners lodged the petitions in person which would warrant a consideration of the expertise Mr. Abidha brings. But of importance to me is that the Petitioners have come to court through counsel on record showing they have confidence in their lawyers. I decline to be drawn into the discourse of the interactions/associations of any lawyers mentioned in these proceedings. It is important that we focus on the substantive issues.
76. The other criteria for consideration by the court is that an applicant must demonstrate to the court's satisfaction the prejudice that would be suffered by the non joinder. I have not seen any deposition in this regard by Mr. Abidha except that he cannot seat and watch the happenings, I have already noted that the concerns for the community and their interests have been taken care of. Even the schools that the applicant is worried about do not exist outside of the community.
77. It has been urged that Mr. Abidha seeks to introduce new issues and which was frowned upon by the court in *Communication Commission of Kenya & 4 Others Vs. Royal Media Services (supra)*. The issues are stated to be tied to proceedings in *Siaya ELC Petition No.2 of 2021 Abidha Nicholus Vs. Attorney General & 5 Others* commenced by Mr. Abidha. It is urged by the petitioners that Mr. Abidha is trying to carry over the issues therein to this petition. Firstly it is important to note that these proceedings were not mentioned by Mr. Abidha in his supporting affidavit. I think the issues raised in that suit must remain to be issues raised therein and the court must focus on the present petition.
78. Mr. Abidha submitted that it is duty to disclose information that would be useful to the court. The court has noted some of this information relates to one Isaack Owang which was to buttress the issue of cartels who control the petitioner. For me this is neither here nor there for the reason that I have already noted the interests of the other community members not being members of the cooperative society herein are well catered for by the other petitioners who have approached this court as individuals.
79. Moreover it not the petitioner's governance structures, foreign membership or shortcomings that are in issue in this petition. That would be a different matter altogether and for a different forum. An Interested party cannot come and take over proceedings by bringing in new issues. This also applies to Mr Owalla.
80. What about Mr. Owalla application? I have noted the close resemblance between the grounds and arguments raised by the applicant in the application dated 20/5/2024 and the application dated 22/5/2024 brought by Mr. Owalla. Many of the observations made hereinabove therefore speak to this application.
81. Mr Owalla has approached court on behalf of Community Initiative Action Group -Kenya Trust (CIAG) who is his employer. He describes himself to be the Executive Director. It is alleged the organization works throughout the republic of Kenya championing environmental issues. At the outset I had no evidence placed before me that the said institution exists in law or even that it is in the process of formation. While Mr Owalla urged that he has been pursuing issues of environmental justice currently focusing on mining activities which are mainly illegal and or unlicensed I had no document such as a trust deed duly registered to authenticate these objectives and that the issues raised are in tandem with CIAG mandate.



82. What I have is some correspondence on a letter head which would be of no evidentiary value for purposes of the legality of the entity and ascertaining its objectives. On this lacuna alone I would hesitate to exercise my discretion in favor of this applicant.
83. It does not matter that the provisions of *the Constitution* enjoin every citizen to protect the environment, there must be a way of screening applicants seeking for joinder. Environmental justice cannot be a blank cheque for allowing any organization joinder. In this regard I will echo the words of Justice S. Munyao in the case of Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR where he persuasively stated that the threshold for joinder of an interested party should not be too low or else it could be prone to abuse. The court reiterates that the interests of the community are well taken care of under PET No.2 of 2024.
84. The upshot of the foregoing is that both the applications dated 20/05/2024 and 22/05/2024 are dismissed. Parties shall bear their own costs.

Application Dated 16/08/2024

85. Vide a Notice of Motion dated 16/08/2024 Amlight Resources Company Limited, Kitigu Resource Company Limited, Amos Mabonga being the 1st 2nd 4th Respondents in ELC EP Petition 1 of 2024 seek the following verbatim orders:-
1. Spent
 2. That this court be pleased to review its orders made on 20th June 2024 to the extent of the undertaking for damages given by the 1st Petitioner/Respondent, Rarieda Artisinal Miners Savings and Credit Co-operative Society Ltd.
 3. That in realization of the orders issued on 20th June 2024, this Court do hereby direct that the 1st Petitioner/Respondent, Rarieda Artisinal Miners Savings and credit Co-operatives Society Ltd, following their undertaking for damages, do deposit a sum of Ksh. 350,000,000 as security into a joint interest earning account in the name of the Petitioner and the Applicants.
 4. That this court be pleased to grant a timeline, not exceeding 30 days or as it may deem fit, for the 1st Petitioner/Respondent to deposit the security failure to which the conservatory orders issued pending hearing and determination of the main petition on 20th June 2024 shall lapse.
 5. That any other orders as this Court may deem fit and just in the circumstances do issue.
 6. Costs of this Application be provided for.
86. The application is premised on the ground on its face and is supported by the affidavit of Amos Mabonga the 4th Respondent sworn with authority of the 1st and 2nd Respondent companies on 16/08/2024. The deponent states he is aware of the operations of the 1st and 2nd Applicants relevant to the matter at hand. The deponent confirms that the 1st Respondent/Applicant is the bearer of a valid mining and related works permit. Copies of the permits are annexed as AM-1.
87. The deponent states the 1st Petitioner/Respondent did plead and demonstrate their willingness to offer an undertaking for damages suffered as a result of the success of their application for conservatory orders. That in acknowledging the undertaking, this court went ahead and ordered that the petitioners in ELC EP Petition 1 of 2024 give an undertaking in damages for any loss that may become due and payable by them as a consequence of the conservatory order.



88. The deponent depones upon advise of counsel on record for the Applicants that the undertaking as it is , lacks certainty as the same cannot be quantified until it is subjected to fresh litigation which is not only tedious and time wasting but an exercise that undermines the principle of there being an end to litigation. That the court has a mandate to ensure finality in litigation and to make orders that are capable of being enforced without necessarily re-opening fresh litigation.
89. That the Applicants operations stand to lose approximately 1,500,000 every single day during the pendency of the main petition. That it is only just and fair that the quantification of the undertaking be based on the approximation to avoid a situation where the orders are punitive and would be constructed to being punishment meted against the applicants pre-maturely. That the uncertainty of the undertaking and the lack of timelines would go on to serve a great deal of injustice to the applicants. No party should be handicapped at the expense of another.
90. It is averred parties are bound by their pleadings and this Court is to give consideration based on what has been pleaded. The Petitioner/Respondent, Rarieda Artisinal Miners Savings and credit Co-operative Society Ltd expressly took it upon themselves to cover damage incurred by the applicants.
91. That the reasons advanced hereinabove gives the court enough justification to review its orders.

Responses to the application

92. The application is opposed by the petitioners.
93. The Petitioner Rarieda Artisinal Miners Savings and credit Co-operative Ltd replied to the application through its chairman Wycliffe Odera Ochieng who swore a replying affidavit on 8/9/2024. It is deponed that the applicants in their replying affidavit to the application dated 15/04/2024 never mentioned they were bearers of a valid mining license and related work permits. That the court only made a decisions based on evidence presented before it.
94. That the application does not fall within the ambit for grant of orders for review since the document applying for the license did not follow the requisite procedure as advised under the letter dated 15/07/2024 by the Ministry of Mining, Blue Economy and Maritime Affairs to apply online. That the documents attached are not mining licenses but Mineral Dealers(Trading) License.
95. That the Mineral Dealers(Trading) License dated 9/7/2024 was in respect to the physical address situated in East Asembo land parcel Siaya/Ramba/874 currently has a restriction lodged on 2/2/2024 barring any dealing thereof. Therefore, the applicants ought not to have applied for the license against the said title. A copy of official search is attached as WOO-1.
96. That an order for security is not a precondition for grant of temporary conservatory orders since such orders bear a more decided public interest connotation to uphold the adjudicatory authority of the court. That even if the order for security was a precondition the same cannot issue in the present case as it would amount to proceeds in furtherance of an illegal activity.
97. It is deponed that the applicants cannot purport to loose the figures given when they did not have the requisite mining licenses at the time of hearing of the petitioners application dated 2/4/2024 coupled with the fact that they had been ordered to cease their mining activities by the relevant authorities. Further that if the same has been obtained and which it has not it cannot apply retrospectively.
98. It is deponed that the amounts of loss of Kshs 1,500,000/- per day have not been substantiated by evidence showing the name, grade, weight of minerals purchased or sold, royalty liability among others as per the terms and conditions of the Mineral Dealers(Trading) License dated 28/06/2024. There is



therefore no basis to pray for the deposit of Kshs. 350,000,000/=. That a requirement to deposit such an amount would defeat the public interest purpose.

99. That the application does not meet the threshold for grant of review orders rendering this court functus officio and the only option is for the applicant would be an appeal. The court is invited to dismiss the application with costs to the respondents.
100. The application is also opposed through the replying affidavit sworn on 5/08/2024 by Rose Elizabeth Aketch the 1st Petitioner in PET. No. 2 of 2024. It is averred on counsels advise that the respondents are in contravention of the provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010 which states that a person aggrieved by an order from which an appeal is allowed but which an appeal is preferred may apply for review. That the applicants had earlier preferred an appeal.
101 It is deponed that the application does not meet the threshold to warrant a review of the decision rendered on 20/6/2024. It has not been demonstrated there is a discovery of new important evidence which after the exercise of due diligence was not within their knowledge or could not be produced by them at the time when the ruling sought to be reviewed was made. Neither have the applicants demonstrated a mistake or error apparent on the face of the record that would necessitate review of the ruling.
102. Referring to the copy Mineral Dealers (Trading) Licence annexed by the applicant indicated to have been issued on 28/6/2024 as being the basis upon which the application is founded, it is deponed that the coordinates to which it relates refer to Nairobi and not Ramba area to which the jurisdiction of this court is subject.
103. The petitioners challenge the applicants mining activities in specified areas and on specific parcels. That no form of mining license touching on the specific areas the subject of the petitions have been produced. That based on the letter dated 18/7/2024 – AM-1 (c) by the Cabinet Secretary Ministry of Mining & Petroleum the applicants application for mining licence was rejected with advise that the area of interest was held under a prospecting license held by Shanta Gold Limited. That therefore the processing license (AM-1(b) whose physical address is disputed was obtained fraudulently since there is another holder.
104. That the License attached is inconsequential and incapable of causing a review of the ruling herein. That reviewing the ruling and lifting the injunction would be permitting the applicants to proceed with illegal mining activities without a valid licence as required under the relevant law and regulations. The court having stopped the applicants from continuing with illegal mining activities for failure to demonstrate existence of a mining license cannot be called upon to review the ruling and allow the applicants to benefit from an illegality.
105. It is further deponed that a restriction was lodged over the title Siaya/Ramba/874 preventing any dealings hence the applicants could not have applied the license annexed as AM-1(B). No evidence has been adduced to show they will suffer a loss of Kshs. 1.5 Million shillings per day hence no basis for the prayer of deposit of Kshs350,000,000/-.
106. That even if the applicants insist that the dealers processing license was lawfully obtained, the respondent demand that the applicants produce the documents they used to apply for the same.
107. The 1st Petitioner in PET. No. 2 of 2024 also filed a Notice of Motion application dated 6th August 2024 to strike out the application dated 16/08/2024. The court issued directions 11/02/2025 that the same be treated as a response to the application dated 16/08/2024. I note that the application is premised on contravention of order 45 rule 1 of the Civil Procedure Rules which has already been highlighted hereinbefore. Additionally, it is deponed that the applicant has not moved the Court of



- Appeal to strike out the Notice of Appeal without their instructions. The applicants should not be made to or served a Notice of Withdrawal thereof pursuant to the provisions of Rules 83 and 86 of the Court of Appeal Rules 2010. The application is supported by the affidavit of Rose Elizabeth Aketch.
108. The applicants responded further through an affidavit of Amos Mabonga sworn on 22/02/2025 deponing that the respondents encountered communication challenges with their initial lawyer who among other issues filed the Notice of Appeal without their instructions. The applicants should not be made to suffer the consequences of counsel inadvertence. That the present counsel on record was not aware of the Notice of Appeal. That the requirements of Rule 84 of the Court of Appeal Rules as to Memorandum of Appeal, payment of prescribed fees have not been complied with thus there is no appeal. That the petitioners hands are tainted as they want to eliminate competition and frustrate the respondents out of their lawful business.
109. It is further averred that the conservatory order were obtained through fraud as the petitioners have failed to demonstrate their mineral rights and are guilty of material non disclosure of the interests they represent in the suit. That upon further inquiry the relevant Ministry confirmed through a letter dated 20/01/2025 that the petitioners neither own mineral rights nor have any pending applications for the same. The letter is annexed as AM-B 1.
- 110 That while the petitioners depon that the suit property is subject of a prospecting licence held by Shanta Gold Ltd they have failed to establish any connection with the said company. Further that the petitioners have no locus standi as the petition is tainted by material non disclosure aimed at obstructing mining activities on the suit property and are abusing the court process to advance their own selfish and undisclosed private interests. He who comes to equity must come with clean hands.
- 111 It is deponed that the conservatory orders herein were granted on condition that the petitioners would compensate the company for the substantial losses incurred based on their undertaking. The petitioners must demonstrate their ability to fulfil this obligation otherwise the conservatory orders should lapse. A valuation report on the revenue from the mine is annexed as AMB-2.
112. It is averred that the respondents have conducted their mining activities in full compliance with the law and have actively engaged with the local community running various charitable initiatives including sponsoring of students education. Annexed as AMB-4 is a list of students

Submissions

113. The application was canvassed by way of written submissions which parties filed and exchanged. Parties also highlighted orally in open court.
114. The applicant /respondents filed submissions dated 22/02/2025 and identified two issues for identification 1)whether the application for review should be considered before this court and 2)whether the petitioners should deposit security for costs.
115. Rehashing the provisions of Order 45 rule 1(b) (2) of the Civil Procedure Rules, Section 80 of the *Civil Procedure Act* and Rule 84 of the Court of Appeal Rules it is submitted that the respondents previous advocate merely filed a Notice of Appeal but took no further action as no Record of Appeal or Memorandum of Appeal were filed. That a Notice of Appeal is merely an expression of intent to appeal and does not constitute and appeal. Reliance is placed on HA V LB (2022)eKLR.
116. It is submitted that the Notice of Appeal was filed without express instructions of the clients and it will be unjust, unlawful and oppressive to hold the client accountable for actions undertaken by the advocate. The case of Winfred N.Konosi t/a Konosi & Co.Advocates V Flamco Limited



- (2017)eKLR is relied upon to buttress this proposition. Further that based on article 159 justice must be administered without undue regard to technicalities.
117. On whether the petitioners should deposit security the court is referred to order 46 Rule 1 of the Civil Procedure Rules. That the power to order security is discretionary. The principles for consideration were rehashed as enumerated in the case of Keary Development V Tarmac Construction (1995)3All ER534 and Ocean View Beach hotel Ltd V Salim Sultan Mollo & 5 Others (2012)eKLR.
 118. Based on the criteria laid out it is submitted the conservatory orders are making the respondents lose over Kshs. 1.5 million a day which the petitioners have undertaken to compensate them for. That the mine has been closed for a close to 6 months with no clear end in sight as the case drags on. Therefore it is in order the petitioners deposit a security for costs of Kshs.350,000,000/-.
 119. It is submitted that the petitioners have no locus standi as they have not demonstrated what mineral rights they have over the property or any other rights thereof. They have adduced a letter which expressly states that there is a prospecting license held by Shanta Gold Limited over the property and have not explained their link with this company. That the petitioners have approached the court with unclean hands and were guilty of material non disclosure which they have used to obtain the conservatory orders.
 120. It is contended that the petitioners will not suffer any prejudice if the Respondents continue mining activities pending determination of the matter. That the balance of convenience tilts in favor of the respondents as the petitioners have no mineral rights.

Petitioners Submissions

121. The Petitioners in Petition No. 1 of 2024 through the firm of Bruce Odeny filed submission dated 7/3/2025. Guided by the provisions of section 80 of the *civil Procedure Act* and Order 45 Rule 1(1) of the Civil Procedure Rules) it is submitted that the applicants application for review is not merited. Counsel also relied on the Court of Appeal decision in Pancras T.Swai Vs. Kenya Breweries Limited (2014) which set out grounds for review as discovery of new and important evidence, mistake or error apparent on the face of the record or any other sufficient reason.
122. It is submitted it is not clear on which grounds the application was premised. That though the claim by the applicants that they bear valid mining license inclines more to discovery of new important matter or evidence, the same does not fall within the ambit of judicial review since the said documents were obtained after the ruling was delivered and therefore is new evidence disguised as review. Moreover, the documents produced are not mining licenses but Mineral Dealers (trading License). In this regard I note that the submissions rehash the depositions contained in Mr. Oderas replying affidavit as to the restriction filed against the subject property of the license including the failure to apply for the licence online.
123. It is contended that the applicant besides this application has also preferred an appeal on the ruling herein. That a person cannot exercise both the right of appeal and review at the same time as was held in Orero Vs. Seko (1984) KLR.
124. It is submitted that the applicants have not proved any grounds sufficient for grant of orders for review as the issue is one that is discretionary. The applicants were basically challenging the merits of the trial court decision which they were not happy with.
125. It is urged that the application is an abuse of the court process for offending the doctrine of *functus officio*. Once a decision is rendered it is final subject to right of appeal to a superior body. The court is referred to the case of Telkom Kenya Limited Vs. John Ochanda (2014) eKLR.



126. On deposit of security by the petitioners the depositions in the replying affidavit of Mr. Wycliffe Odera Ochieng are reiterated in this regard as to absence of the requisite mining licences and stoppage of the activities by the relevant authorities including failure to substantiate the claim of Kshs.1,500,000/- herein.
127. It is submitted that conservatory orders are issued on the inherent merit of the case bearing in mind the public interest, it would not be fair to compel the petitioners to deposit the amount sought. The court is referred to the Supreme Court decision in Civil application No.5 of 2014 Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others (2014)eKLR
128. Rehashing the provisions of Order 45 Rule 1(2) it is submitted by the Petitioners in PET No. 2 that the applicants acknowledge there is a notice of appeal on record. There is no order from the Registrar of the Court of Appeal marking the same as withdrawn pursuant to the provisions of Rule 83 and 86 of the Court of Appeal Rules 2010 before moving this court for review. Having preferred an appeal the application for review is nullity and an abuse of the court process
129. It is submitted that the application for review does not raise the grounds as listed under the provisions of order 45 of the Civil Procedure Rules. Referring to Section 107, 109 and 112 of the *Evidence Act* it is stated that the burden of proof lay solely upon the applicants to show they have obtained the relevant mining licence. The submissions largely replicate the depositions in their replying affidavit sworn by Rose Elizabeth Aketch.
130. It is contended the valuation report annexed to the applicants further affidavit states the operational expenses sunk to a tune of Kshs 20,858,600 for 14 months. There are two distinct figures including that of Kshs.350,000,000/- and thus the court cannot be swayed in their favour. The valuation is also termed as nullity as it describes a different site as opposed to the one in the respondent's motion.
131. Referring to article 70(1)(3) and (2) of *the Constitution* and Section 3 of the Environment Management & Coordination Act on right to a clean and healthy environment, exemption from need to demonstrate loss or injury and the prayers than be sought before the court, it is contended that the petitioners being neighbors are mostly likely to be affected by the respondents action in exercising their rights and obligations as enshrined in the provisions cited. That there is nowhere in the legal realm requiring an aggrieved person to have mineral rights to petition the court.

Analysis And Determination Of The Application Dated 16/08/2025

132. Before I get into the determination of the application for review herein, I noted that the replying affidavits sworn by Rose Elizabeth Aketch the 1st Petitioner in PET. No. 2 of 2024 is sworn on 5/08/2024 predating the application dated 16/08/2025 the subject of the replying affidavit. Though none of the parties raised this as an issue, I will for purposes of the record resolve this by looking at substantive justice pursuant to Article 159 (2)(d) of *the Constitution*. I also note the same was filed on 10/9/2024 after the application and paragraph 1 of the same clearly states the affidavit is sworn in response to the application dated 16/08/2024.
133. I have considered the application dated 16/08/2024, the replying affidavits in opposition and the rival submissions of the parties. I will now proceed to determine whether the applicants have met requirements for the grant of review of the orders made via the ruling dated 20/06/2024.
134. The application is brought under the provisions of Article 159 of *the Constitution* of Kenya; Sections 1A, 1B,3A of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The grounds upon which it is premised have already been enumerated elsewhere in this ruling.



135. The right to apply for review is provided for under the provisions of Section 80 of the Civil Procedure Act read together with Order 45 of the Civil Procedure Rules.

136. Section 80 provides; -

Any person who considers himself aggrieved-

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

137. Order 45, rule 1 provides for Application for review of decree or order as follows;-

“ 1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2)

138. Before I get into the gist of the application itself, concerns have emerged as to whether the application is properly before this court. The petitioners contend that by dint of the applicants having filed a Notice of Appeal, they cannot at the same time apply for review, they can only choose one forum. The applicants do not deny that indeed they have filed a Notice of Appeal except that it was not filed pursuant to specific instructions of the clients and that a Notice of Appeal is but just an intention to appeal. I have noted the decisions that have been cited by parties for and against the proposition.

139. The above discourse was clarified and put to rest by the Court of Appeal in the case of Multi Choice (Kenya) Limited Vs. Wananchi Group (Kenya)Ltd & 2 Others (2020)eKLR . The Court of Appeal considered whether under Order 45, the filing of a notice of appeal to the court of appeal is or is not a bar to the filing of an application for review. I will highlight a few excerpts from the judgement which



are to the point on the provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, thus; -

‘Both provisions require no further elucidation as they are as clear as they can be; that a party will only be entitled to seek review, if he has not preferred an appeal or if there is no right of appeal. While the statement requires no explanation, the dispute is on the question of, when an appeal is “preferred”? Or put differently, is a notice of appeal an appeal?’

140. The Court of Appeal went further to state that :-

‘It is the notice of appeal, evincing the aggrieved party’s intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4),’ respectively. For the purposes of the latter, an appeal to the Court of Appeal is “deemed to have been filed when under the Rules of that Court notice of appeal has been given”. This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.

141. The Court of Appeal also stated thus:-

‘An appeal is preceded by lodgment of a notice of appeal. If appeal is not instituted within the appointed time above, the notice of appeal will, by the provisions of Rules 83 and 84 be deemed to have been withdrawn or struck out, as the case may be.

To construe the provisions of Order 45 and to answer the question, whether a notice of appeal is an appeal, the court has to do so with reference to all the relevant provisions. This brings me to the crux of the first limb of this appeal, at which point it is apposite to state that as far my reading of the authorities in this field goes, there has never been any major inconsistencies in interpretation of Order 45, both by the High Court and this Court. Save for the case of *Kisya Investments Ltd*, (supra), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrate by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged. Conversely, the court will not hear an application for review when an appeal has been instituted under Rule 82 of this Court’s rules.

142. It has been deponed that no further action has been taken beyond the filing of the alleged Notice of Appeal to institute the appeal as required under Rule 82 of the Court of Appeal Rules. Applying the foregoing dictum and the facts before this court it is my finding that the applicant therefore is properly before this court. There is no appeal that has been instituted. In any event a Notice of Appeal for purposes of review proceedings is not an appeal.

143. Having resolved the above issue, I will proceed to the substantive application. The courts have in numerous cases expounded the provisions under section 80 of the Act and Order 45 of the Civil Procedure Rules including *Pancras T. Swai* (supra).

144. In the case of *Republic Vs Medical Practitioners Board & Others ex parte Geoffrey Muiruri King’ang’a* (2021) KEHC 298 (KLR) commenting on the provisions of order 45 and section 80 of the Civil Procedure Act Justice Odunga (as he then was) observed thus:-



34. Two lessons can be gathered from the above provisions. One, it is manifest that section 80 gives the power of review while Order 45 sets out the rules. Two, the rules restrict the grounds for review by essentially laying down the jurisdiction and scope of review by limiting review to the following grounds:
- a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b) On account of some mistake or error apparent on the face of the record, or
 - c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
145. The learned Judge went further to elaborate as follows; -
36. Paragraph (a) part of the rule deals with a situation attributable to the applicant, while paragraph (b) deals to an action attributed to the court which is manifestly incorrect or on which two conclusions are not possible. However, neither of them postulates a rehearing of the dispute. The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case is not a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy so the court should exercise the power to review its order with the greatest circumspection.
37. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.
146. Having highlighted the requirements above it is important to note that an applicant need not meet all the requirements as they are disjunctive and one ground may suffice. Applying the above requirements to the circumstances of this case I will proceed to review the grounds upon which the application is made.
147. The grounds upon which the application is premised are outlined verbatim as follows; -
1. That this court delivered a ruling
 2. That this court ordered that pending the hearing and determination of the instant petitions, a temporary conservatory order be issued restraining the Respondents (including the applicants herein) their workers, employees, agents, servants and whoever acting on their instructions from mining, operating a gold mine or continuing with any form of mining activity, extraction of gold and/or any other mineral ore, their attendant waste on/an from land parcel no. Siaya/Ramba/874 and Lamba area.
 3. That whilst the operations of the Applicants have been systematically halted as a result of the 1st Petitioner's application, there is a recurrent loss of revenue being suffered by the applicants to the tune of Ksh. 1,500,000 on a daily basis.



4. That the 1st Petitioner/Respondent have already pleaded and demonstrated their willingness to be bound and remit damages that would be incurred by the Applicants during the operation of the conservatory orders.
 5. That the parties are bound by their pleadings.
 6. That the quantification of the 1st Petitioner/Respondent's undertaking and the obligations it imposes cannot be ascertained and would only lead to unending litigation which this Court has the ability and mandate to subvert in bringing an end to litigation.
 7. That it is imperative that the undertaking be quantified as the petition is multifaceted bearing commercial connotations.
 8. That the Applicants herein have valid mining permits and relevant permits to allow them conduct their nature of business.
 9. That this court has the power to grant the orders sought herein.
148. My review of the above grounds do not expressly state whether the applicant is moving the court under any of the grounds enumerated in Order 45 and the judicial authorities cited. The court also reviewed the supporting affidavit sworn on 16/08/2024 and there was no mention of this at all.
149. But be that as it may I hear the applicant to be intimating in ground number 8 above that they now have valid mining permits and relevant permits to allow them conduct their nature of business. As suggested by the petitioners this could mean the discovery of new evidence. But I must caution it could also lie under sufficient reason. I will therefore proceed to interrogate whether this ground will suffice for purposes of order 45.
150. As already expressed the court will review its judgement or order where there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by an applicant at the time when the decree was passed. The applicants have annexed to their supporting affidavit a Mineral Dealers (trading) licence dated 28/06/2024 indicated to be valid up to 31/12/2024. The court is enjoined to interrogate further if this is a new discovery, meaning the same ought not to have been in the knowledge of the applicant. The licence is issued to Amlight Resources Co. Limited who is the 1st respondent the main applicant. Naturally this information is deemed to have been in their knowledge from the onset because for a licence to issue someone must have initiated the process by an applicant for a license. It can only be the person named in the alleged license or its authorised agent. Therefore, it cannot be said to be a new discovery as envisaged under the legal provisions herein. In any event the applicant does not state it was not in their knowledge.
151. What I see and I respectfully agree with the petitioners, is a licence that has been issued post the ruling of this court. The Licences are dated 28/6/2024 and 9/07/2024. The ruling herein is dated 20/06/2024. This is fresh evidence coming after the ruling.
152. The court has noted the robust arguments raised as to the validity of the alleged licences, whether they are prospecting licenses and the physical coverage vis a vis the specific geographical area pleaded in the Petition including allegations of fraud in its procurement. My view is that this not the right forum to look into the issues raised as it will be tantamount to getting into the merits of the petitions. The grounds are raised prematurely and must await the hearing of the consolidated petitions where the legality or otherwise of the Mining activities will be determined. Any proposition touching on



the licences including alleged failure by the petitioners to demonstrate mineral rights all touch on substantive issue that can only be determined at the full hearing of this petition.

153. The applicant having failed to satisfy the first requirement I will now consider if the grounds raised may be treated as sufficient reasons to warrant review of the orders of the court. The grounds raised by the applicant are clear. That due to the conservatory orders issued it is costing the applicants losses of approximately Kshs 1,500,000/- on a daily basis. That the court issued the conservatory orders based on the petitioners undertaking to indemnify the respondents for losses that may result should the petition be decided in their favor.
154. The applicants also desire that the undertaking must be quantified within these proceedings. In the supporting affidavit the applicants have alluded to the fact that applicants are bound by their pleadings and this court is to give consideration based on what has been pleaded. That the uncertainty of the undertaking and the lack of timelines would go on to serve a great deal of injustice to the applicants. It is stated that all these reasons advanced give this court justification to review its orders. What is termed justification in my view is what encompasses the ground of sufficient reason.
155. The court has pondered over the reasons mooted by the applicants. To me clearly the applicant is faulting the court for failing to peg timelines, for giving orders prematurely, giving an undertaking that cannot be quantified and which orders are punitive. These in my view are grounds for appeal and not review. It is trite that the court cannot seat on appeal of its own decision.
156. The applicants went further to suggest the possible quantification and annexed a valuation. These are fresh arguments supported by new evidence. The applicants had an opportunity to respond and present these arguments during the initial hearing of the petitioner's application which sought the conservatory orders. I see the applicants re-opening the application for fresh argument. It is trite that review is not a forum to open a case or application for fresh argument. In this regard I'm guided by the Court Appeal dictum in DJ Lowe & Company Limited Versus Banque Indosuez Civil Appeal Nairobi 210 of 1998[UR] where the court cautioned against allowing new evidence in review applications as the same would amount to re-opening of a case and in the present case reopening an application already decided upon.
157. The above grounds are also actions attributed to the court which based on the enunciation by Odunga J above should be on account or mistake on the part of the court. But even then I do not see how they will pass the test to warrant a review. In this regard I'm guided by the case of Nyamogo & Nyamogo Advocates –Vs- Kogo (2001) 1EA 173 where the court stated thus;-

“An error on the face of the record can only be determined on the facts of each case. For an error of law on the face of the record to form a ground for review, it must be of a kind that stares one in the face and on which there could be reasonably be no two options. If a courts original view was a possible one, it cannot be a ground for a review even though it may be one for appeal...

158. I think I have stated said enough to demonstrate why the orders sought in the application dated 16/08/2024 must fail.
159. The following orders issue to dispose of the applications; -
1. The Notice Motion dated 20/09/2024 is hereby allowed with no orders as to costs
 2. The Notice of Motion dated 30/09/2024 is hereby allowed with no orders as to costs
 3. The Notice of Motion Application 20/05/2024 is dismissed with no orders as to costs



4. The Notice of Motion dated 22/05/2024 is dismissed with no orders as to costs
5. The Notice of Motion dated 16/08/2024 is hereby dismissed and costs shall abide the outcome of the consolidated petitions.

DELIVERED AND DATED AT SIAYA THIS 16TH DAY OF JUNE 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

16/06/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Oreda for the petitioners in PET 2 of 2024

Ms Kemunto for the Respondents

Mr. Owalla 2nd Intended Interested Party

Mr. Abidha Nicholus 1st Intended Interested Party

Ms. Omondi Holding Brief for Mr. Odeny for Petitioners in PET 1 of 2024

Court Assistant: Ishmael Orwa

