



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC PETITION CASE NO. 2 OF 2018

HON. TOM MBOYA ODEGE.....PLAINTIFF

VERSUS

CABINET SECRETARY,

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

DIRECTOR OF MINES.....2ND RESPONDENT

LIJIN MINING COMPANY LIMITED.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. On 31st May 2018, the petitioner, Honourable Tom Mboya Odege, who is represented by Okongo Wandago and Company Advocates filed a petition dated 25th May 2018 pursuant to Constitution Provisions, among them, Articles 22(1) and (2) (c), 50 (1) and 258 (1) and (2) of the Constitution of Kenya, 2010. He has sought the following reliefs:-

i. A declaration that the right to life and protection under Article 26, the right to dignity under Article 28 and the economic and social rights under Article 43 of the residents of Nyatike Constituency, who eke out a living through gold mining in Macalder Area has been contravened, and is being contravened by 1st and 2nd respondents who has allowed foreign nationals to undertake and operate illegal mining activities in the area to the exclusion of the residents of Nyatike, who are being deprived of their means of livelihood.

ii. A declaration that the refusal to allow and eviction of Nyatike Constituents from undertaking gold mining in Macalder area and allowing non Nyatike residents and foreigners to illegally undertake the same from the same land is contravention of their right to protection of law, and their right not to be discriminated against under Articles 27 and 56 of the Constitution as the same has resulted in Nyatike Constituents being denied an opportunity to eke out a living.

iii. A declaration that the mining activities being undertaken by the 3rd respondent in Macalder Area without licences violates the constitution and law, is ultra vires the mining Act, 2016 and the Forests Act and are thus illegal null and void.

iv. An order restraining the 3rd respondents from continuing with illegal and unlawful gold mining activities in Macalder area Nyatike Constituency.

v. An order that the 3rd respondents to remove forthwith from the site in Macalder area Nyatike Constituency, any plants, machineries, equipments, implements tools etc which they had erected in Macalder area Nyatike Constituency.

vi. An order that the 3rd respondent to pay compensation and royalties to the people of Kenya, for and on behalf of the inhabitants of Nyatike Constituency for the illegal gold mining activities and such compensation be determined by the court and if ordered and paid, be applied in public projects and facilities in the Constituency.

vii. An order directing the 3rd respondent to restore the environment at said mining site to the position it was in before the said illegal mining activities took place under supervision of National Environmental Management Authority.

viii. The 3rd respondent do pay the costs of this petition.

ix. And the petitioner will further and forever continue praying to this court for and on behalf of Nyatike Constituents for appropriate relief as this court may deem fit and just to grant.

2. The petition is anchored on a 49 paragraphed supporting affidavit sworn on the even date by the petitioner. In the affidavit the petitioner alleges, inter alia, that he has brought the petition for and on behalf of the public and in the public interest in his capacity as the member of Parliament for Nyatike Constituency and as state officer who has a duty to uphold protect and defend the Constitution of Kenya, 2010 and the Rule of law. That the 3rd respondent whose directors are Chinese Nationals are engaged in illegal Mining and prospecting activities of gold and Copper in Macalder from a trust land within Nyatike Constituency in Migori County. That there was no Public participants before commencement of the said mining activities. That the 3rd respondent did not obtain the requisite consents or approvals from Migori County Government, the National Land Commission, the National Government and the Kenya Forest Service to carry out the mining.

3. The petitioner further states that there is Environmental degradation including unsustainable levels of pollution and effects on human health as a result of the illegal mining activities in the area. He relied on the **Mining Act 2016. The Environment Management and Coordination Act (EMCA) No. 8 of 1999, Articles 42, 62 (1) and 70 (2) of the Constitution of Kenya 2010, (the Constitution), the Forests Act, 2005**

4. Simultaneously filed with the petition was an application by way of Notice of Motion of the even date brought under **Rules 23 (1) and 24 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. An interim conservatory order of injunction and Prohibition and an order for the Officer Commanding Macalder Police Station to ensure compliance with any order which the court may issue in these application, were granted by court on 20th June, 2018.

5. The 1st 2nd and 4th respondents were duly served on 6th June 2018 while the 3rd respondent was duly served on 12th June 2018 as revealed in an affidavit of service sworn on 18th June 2018 by Peter Ochara Anam, a duly licensed court process server.

6. Further to the service of the petition, the 3rd respondent through Aoko Ondieki and Company Advocates, opposed the petition by six (6) grounds of opposition dated 20th June 2018. The grounds are that :-

i. The petition and the application pending before this court is vexatious, mischievous, and bad in law as the same has not been brought in good faith and should be struck out as it is an abuse of the courts process and time as the petitioner is using the judicial forum to seek political relevance.

ii. The petitioner is a busy-body who seeks to create unwarranted attention and animosity between the community and if at all any foreign investors in the region for the alleged benefit of the community.

iii. The application before court is not founded in any relevant laws and the orders sought should not be granted by this honorable court.

iv. The 3rd respondent herein has never involved itself in any mining activities in the Macalder area in Nyatike.

v. The application and petition before court seeks to exclude vital national and county organs that are necessary in the any decision making process that involves mining of minerals thus circumventing the 3rd respondent's right to fair trial and due process.

vi. The application and petition before court misconceived and a fabrication for reasons that the 3rd respondent have at no time begun and or undertake any mining activity at Macalder area.

7. The 2nd respondent supported the petition by a 21 paragraphed affidavit sworn on 22nd June 2018 by Mr. Raymond M. Mutiso, the acting director of the 1st and 2nd respondents. The said director averred, inter alia, that the respondent never issued a license or permit to the 3rd respondent to undertake any mining activity or any related activity in the area that officials of the 1st and 2nd respondents found the 3rd respondent carrying out mining activities in the area without any licence or permit. That they immediately stopped the 3rd respondent who ignored the stop order and continued with illegal mining operations.

8. The 2nd respondent further averred that the mining activities by the 3rd respondent are in contravention of **sections 11, 200 and 202 of the Mining Act, 2016**. The 2nd respondent relied on four (4) notices marked 1 to 4.

9. In his submissions dated 14th November 2018, the petitioner urged this court to allow the petition in terms of the orders sought to ensure protection of the public interest. The petitioner submitted that the 3rd respondent is engaged in illegal mining operations calling for the court's intervention.

10. To fortify the submissions the petitioner's counsel cited **Articles 10,26,27,28,42,43,62 (1) (f),70 and 156 of the Constitution**, as well as the **Mining Act,2016** and the **Environmental Management and Coordination Act (EMCA) No. 8 of 1999** together with attendant regulations.

11. Counsel further relied on the case of **Mohamed Hussein Haji –v- Abdi Noor Shariff Ahmed and 5 others (2018) eKLR** where Justice Enock C. Cherono allowed a petition in similar circumstances.

12. Learned counsel for the 1st, 2nd and 4th respondents supported the petition as discerned in court proceedings of 20th June 2018 and 18th September 2018.

13. I have carefully considered the entire petition, the reply thereto, submissions, and proceeding in this matter. I do bear in mind the decision in **Great Lakes Transport Co. (U) Ltd –v- Kenya Revenue Authority (2009) KLR 720** on issues for determination in a suit generally. Therefore the issues for determination are whether the respondents' activities as alleged are a violation of the Local Communities right to clean and healthy environment under the relevant statutes and the Constitution of Kenya, 2010 and whether the petitioner is entitled to the reliefs sought in the petition.

14. It is the contention of the petitioner that the 3rd respondent is conducting gold Mining activities illegally and unconstitutionally as the 3rd respondent did not apply for and obtain mining rights in the form of either a permit or a licence issued in accordance with the law by the 1st and 2nd respondents. That the said 3rd respondent did not receive parliamentary ratification before commencement and continued Mining activities contrary to **Article 42 as read with Article 70 of the Constitution**.

15. The petitioner also contends that there was no environmental impact study including public participation was undertaken and no report availed thereof before carrying out the mining activities. That the only forest cover in the area has been destroyed to pave way for the illegal mining.

16. The 3rd respondent simply denied the allegations in the petition by grounds of opposition as noted hereinabove.

17. On their part, the 1st, 2nd and 4th respondents supported the instant petition.

18. This court takes into account **Article 60 of the Constitution** on the principles of land policy which include sustainable and productive management of land resources. **Article 62 (1) of the same Constitution** defines Public land to encompass all minerals and mineral oils as defined by law. I am also aware of the Mining Act 2016 cited in the petition and in petitioners' submissions.

19. **Section 18 of the Environment and Land Court Act 2015 (2012)** stipulates that this court shall be guided by principles which include:-

a) The principles of Land Policy as already stated herein

b) The principle of sustainable development which include the principle of public participation in the development of policies, plans and processes for the management of the Environment and Land as well as the principles of inter- generational and intragenerational equity.

20. The Forest Act, 2005 and Section 48 of the Environmental Management and Coordination Act, 2012 (1999) (EMCA) make provision for protection of forests in Kenya. Part VI (Sections 58 to 68) of EMCA relates to environmental impact assessment reports and issuance of license for activities including mining activities which is the subject in this petition.

21. It is worthy to note that sustainable development and participation of the people and equity are some of the national values and principles of governance recognized under Article 10 of the Constitution. Thus I am bound by the said values and principles in the interpretation and application of the law in the instant petition.

22. The petitioner contends that the respondents have disregarded the environment due to the illegal mining undertaken by the 3rd respondent. The Constitution at the preamble reads:-

“Respectful of the environment which is our heritage and determined to sustain it for the benefit of future generation”
(Emphasis added)

23. This petition, it has been shown that the respondents have not been respectful of the environment due to the illegal mining of gold and copper in Macalder area, Nyatike Constituency within Migori County. Every person has right to clean and healthy environment as enshrined under **Article 42 as read with Articles 69 and 70 of the Constitution**. This court has an obligation to respect, protect and defend the Constitution under **Article 3 (1) of the Constitution of Kenya, 2010**.

24. I find this petition essentially unopposed as the 1st, 2nd and 4th respondents support the same. The 3rd defendant merely denies the petition.

25. In the premises, I approve the position taken in **Mohammed Hussein Haji case (Supra)** where similar illegal mining was ordered stopped. This petition has been proved by the petitioner against the respondents on balance of probability.

26. Notably order (f) sought in the petition is within the discretion of this court as envisaged under **Article 70 (2) (c) and (3) of the Constitution of Kenya, 2010**. In view of the character of the petition, including order (g) for restoration of the environment, I would decline to grant the said order (f)

27. The upshot is that, I allow the petition in terms of orders (a) to (e) and (g) as sought therein.

Orders accordingly.

DELIVERED, SIGNED and DATED in open court at MIGORI this 15th day of January 2019.

G. M. A. ONGONDO

JUDGE

In the presence of:

Ms. Msafiri learned counsel for petitioner

Tom Maurice – Court Assistant