REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

JR CASE NO.2 OF 2019

IN THE MATTER OF: AN APPLICATION BY MUTHONI KIHARA MINING COMPANY LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORI; MANDAMUS; INJUNCTION; DECLARATION AND PROHIBITION;

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 ARTICLES 2, 19,20, 21, 22, 23, 40, 47, 48, 50 (1), 62(1) (f), 68(c)(iv), 69(1)(a)(h), 159, 160, 162(2)(b), 258, 259, 260;

AND

IN THE MATTER OF: SECTION 2, 11, 12,30, 31. 34. 36 OF THE MINING ACT 2016;

AND

IN THE MATTER OF: SECTION 3, 4, 7,8,9,10 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT 2015;

AND

IN THE MATTER OF: SECTION 13, 17 AND 19 OF THE ENVIRONMENT AND LAND COURT ACT 2011.

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC.....APPLICANT

MUTHONI KIHARA & MUTHONI KIHARA MINING

VERSUS

C.S. MINISTRY OF PETROLEUM MINING.....1ST RESPONDENT

DIRECTOR OF MINES, MINISTRY OF

PETROLEUM AND MINING.....2ND RESPONDENT

CHAIRPERSON AND MEMBERS,

MINERAL RIGHTS BOARD.....3RD RESPONDENT

MWAIRIMBA MINING COMPANY LITE.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. This matter was set for hearing of the Notice of Motion application dated 21st January, 2019 on 20th February 2019. This was pursuant to leave granted to the Ex parte Applicant on 14th January 2019. However, on 15th February, 2019, the intended Interested Party filed the Notice of Motion dated 14th February 2019, which came up before me under Certificate of Urgency on 18th February 2019. I directed that the same be served for directions on 20th February 2019 when the main Application was scheduled for hearing.

2. When the matter came up Mr. Kanjama, advocate appeared for the Ex-parte Applicant while Mr. Raiji was present for the 4th Respondent and Mr. Odhiambo was present representing the intended Interested Party. There was no appearance for the 1st, 2nd, 3rd and 5th Repsondents. The affidavit of service filed by the Applicant indicated that the 1st, 2nd and 3rd Respondnets were duly served on 7th February 2019 and acknowledged service by stamping on the hearing notice. However Mr. Kanjama informed the Court that when he served the 5th Respondent, the Honourable Attorney General in Nairobi, he was advised to serve the Attorney General's Chambers in Mombasa. This was because the suit had been transferred from the Environment and Land Court, (Milimani), Nairobi, where it has filed to this court. The applicant then served the Attorney General, the 5th Respondent by G4S Courier.

3. Mr. Kanjama indicated that he was ready to prosecute his application, stating that the grant of leave which was granted seeks orders against the 1st, 2nd, 3rd and 4th Respondents only. He added that the 5th Respondent was merely added in the application as a matter of caution and was not a necessary party. He added that the 5th Respondent could as well be removed as a party. Further, Mr. Kanjama stated that no orders were sought against the proposed Interested Party although he added that the applicant was not opposed to prayer 3 and 5 of the proposed interested party's application. The applicant however was opposed to the rest of the orders sought by the proposed Interested Party, the substantive prayers being to have the said application dated 14th February 2019 heard on priority basis and ahead of the Applicant's substantive Notice of Motion dated 21st January, 2019 and the prayer by the proposed Interested Party to be granted leave to file necessary affidavits and documents prior to the hearing of the Notice of Motion dated 21st January, 2019.

4. Mr. Raiji learned counsel for the 4th Respondent submitted that no proper service was effected on the Attorney General adding that the Attorney General is a necessary party and should be served personally. Mr. Raiji had no objection to the application by the proposed Interested Party, adding that the proposed Interested Party has always been a party in other related suits, in particular **Nairobi HCCC No.990 of 1999** which is still pending. That the Interested Party, as owner of the suit property **LR. No.12199/4, Taita Taveta**, had more interest in the suit than even the 4th Respondent who is a licencee of mining rights. He added that under the Mining Act, no mining can take place without the consent of the land owner.

5. Mr. Odhiambo, counsel for the proposed Interested Party submitted that the application by the proposed Interested Party should be heard ahead of the substantive motion for reasons that the proposed Interested Party as the registered owner of **LR. NO.12199/4** is a crucial party in the motion. Mr. Odhiambo further submitted that order 53 of the Civil Procedure Rules gives the court discretion to give directions on how proceedings should be conducted.

6. I have considered the submissions made by the counsels for the parties herein. Order 53 Rule 3(2) and (4) of the Civil Procedures Rules provides:

> **(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.**
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> **(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice that the notice may be served on that person, upon such terms (if any) as the court may direct.**

7. Therefore whereas subrule (2) of Order 53 Rule 3 aforesaid restricts persons who should be served to those who are "directly affected" subrule (4) on the other hand gives the court vide discretion to order that the application be served on any other person notwithstanding that the person ought to have been served under subrule (2) or not and the Court's decisions to do so is only subject to such terms (if any) as the court may direct. It is therefore my view that unlike under subrule (2) the court has unfettered power under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the court is of the view that a person ought to be joined to the proceedings, the court is properly entitled to direct that that person be joined irrespective of whether or not such a person has made an application to court. Under such circumstance a formal application is not mandatory or necessary.

8. In the case **of West Kenya Sugar Company Limited –v- Kenya Sugar Board & Another (2014) eKLR** the Court of Appeal expressed itself as hereunder:

> "**18. In the absence of rules regulating the procedure, a person who is not a party to the judicial review application and who**

intends to oppose the application can approach the court in any manner of approaching the court permitted by law. He can file an affidavit giving reasons why he considers himself to be a proper person and the grounds on which he intends to oppose the application. In the absence of rules, leave of the court to file such affidavit is not required. Further a requirement for leave would mean that an application for leave to be heard and determined before the hearing of the application which may result in unnecessarily protracted proceedings. The affidavit should be served on all parties in good time before the hearing of the judicial review application. In this case, such affidavit was filed and served. The learned judge, erroneously in our view, considered the filing of an affidavit without leave as an act of abuse of process of the court. At this stage and where the issue is a simple one, the court can on perusing the affidavit and replying affidavit or upon hearing brief arguments and without going into the merits, determine on prima facie basis whether or not a person intending to be heard is a proper person. If the decision is in favour of the person applying, the court should in the second stage consider the grounds of opposition on the merits at the appropriate time.

19. Phraseology "and appears to the High Court to be a proper person" in rule 6 of Order 53 necessarily raises the question of *locus standi* in the same manner as the phrase "it considers that the applicant has a sufficient interest" under the English rule. In Inland Revenue Commissioners Case (supra) the House of Lords held in essence that, except in simple cases where it was appropriate at the earliest stage to find that the applicant for judicial review has no interest at all or sufficient interest, it was wrong to treat *locus standi* as a preliminary issue and in such cases the question of sufficient interest must be taken together with the legal and factual context of the application. In Inland Revenue Commissioner's case, Lord Wilberforce put it this way at p.630 in:

There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, no sufficient interest to support the application, then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers and duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases be considered in the abstract, or as an isolated point. It must be taken together with the legal and factual context." From what we have said above, those words apply with equal force to the case of a person seeking to be heard as a proper person in opposition to application for judicial review. It follows that where the case is not so obvious the final determination of the question whether a person seeking to be heard in opposition is a proper person should be made after the judicial review application has been heard on merits and after his grounds of opposition have been heard. Furthermore, from close reading of rule 6 of Order 53 together with rule 3(2) and 3(4) it seems that the phrase "proper person" is wider in scope of class of persons than the phrase "all person directly affected." We say so because although the application ought to be served on "all persons directly affected," Rule 3(4) gives court discretion at the hearing to order service on any other person "whether or not he is a person who ought to have been served under the foregoing provisions of this rule."

9. However, where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however, that a person has made such an application does not preclude the court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the court that the person is directly affected thereby. It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are to be determined.

10. In the case of **Republic-v- Salaries and Remuneration Commission Ex parte parliamentary Service Commission & 4 Others (2018)eKLR,** the court stated:

"Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transferring judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 Rule 3(2) aforesaid the applicant ought to disclose to the court how he or she is directly affected. The court cannot be expected to act in the dark by joining such a person with a view to satisfy itself as to the effect of the orders sought on the application at a later stage of the proceedings. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the court will be reluctant to join the intended party to the proceedings. In an application of this nature, the applicant ought to adduce some material upon which the court can determine whether the applicant is directly affected by the proceedings. In judicial review especially where a party's interests can be catered for by another party participating in the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto. It is therefore upon the applicant to satisfy the court that the issues he or she intends to raise, which issues are relevant to the matter for determination before the court, cannot be adequately canvassed by any of the parties before court."

11. In this case the Interested Party, Kutima Investments Limited, is the sole registered proprietor of that parcel of land known as **Land Reference Number 12199/4 Taita Taveta** over which the Ex parte Applicant seeks to claim registered mining locations, rights and licenses. Although the Interested Party has applied to the court to join them to these proceedings, the Applicant is opposed to their joinder.

12. There is no doubt that the ownership of minerals in Kenya is the property of the Republic and is vested in the national government in trust for the people of Kenya. Section 37 (1) of the Mining Act is clear that a prospecting and mining rights shall not be granted under the Act with respect to private land without the express consent of the registered owner. It is therefore my view that the Interested Party, Kutima Investments Limited, as the registered owner of **Land Reference Number 12199/4 Taita Taveta,** is a proper party to be joined to these proceedings.

13. As regards the Attorney General who is already a party to these proceedings, although the Ex Parte Applicant served the office of the Attorney General in Nairobi, they were advised to serve the Attorney General's Office at Mombasa because of territorial jurisdiction. The hearing notice was then sent by registered mail and delivery by G4S Courier Service. There was no appearance for the Attorney General on 20th February 2019 when the matter came up in court. It is my view that the manner of service was not a proper service considering that the Attorney General's Chambers is a busy office with very many staff. It is my view that personal service was necessary. The Advocate for the Ex Parte Applicant submitted that in the event the court finds that service on the Attorney General was not proper, the Attorney General may be removed in any subsequent proceedings. In this case, the 1st Respodnent is the Cabinet Secretary of Petroleum and Mining, the 2nd Respondent is the Director of Mines, Ministry of Petroleum and Mining while the Attorney General is the 5th Respondent. The Attorney General is the principal adviser and legal representative of the national government in civil proceedings. It is therefore my view that the Attorney General is a proper party to these proceedings and his name should not be removed. Accordingly unless he opines otherwise, the Attorney General shall remain a party in these proceedings.

14. I must point out that the mere fact that parties are joined to the proceedings at this stage does not amount to a bar to the court from removing them from the proceedings if their presence clearly becomes unnecessary or untenable. Accordingly, the parties including the Interested Party will be expected to restrict themselves to the matters relating to the process rather than the Respondents' decisions on merit and the court will not permit itself to be engaged in merit oriented issues which do not strictly fall within the purview of judicial review jurisdiction. The costs of these proceedings shall be in the cause. It is so ordered.

DATED and SIGNED at MOMBASA this 15th day of March 2019.

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C.K. YANO

JUDGE

Delivered at Mombasa this 15th day of March 2019

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A. OMOLLO

JUDGE