

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC JUDICIAL REVIEW APPLICATION NO. E009 OF 2024**  
**IN THE MATTER OF AN APPLICATION FOR ORDERS OF**  
**JUDICIAL REVIEW OF CERTIORARI AND**  
**PROHIBITION**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLES 1, 2, 10, 23,**  
**24, 27, 29, 40, 47, AND 50 OF THE CONSTITUTION OF**  
**KENYA**

**AND**

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

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT,**  
**NO. 4 OF 2015**

**BETWEEN**

**REPUBLIC.....**  
**APPLICANT**

**AND**

**REGIONAL MINING OFFICER KISUMU.....1<sup>ST</sup>**  
**RESPONDENT**

**THE PRINCIPAL SECRETARY OF THE MINISTRY**  
**OF**  
**MINING.....2<sup>ND</sup>RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup>**  
**RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF KISUMU..1<sup>ST</sup> INTERESTED**  
**PARTY**

**COUNTY GOVERNMENT OF SIAYA....2<sup>ND</sup> INTERESTED PARTY**

**COUNTY GOVERNMENT**

**OF HOMABAY.....3<sup>RD</sup> INTERESTED PARTY**

**COUNTY GOVERNMENT OF MIGORI..4<sup>TH</sup> INTERESTED PARTY**

**RARIEDA ARTISANAL MINERS SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD.....5<sup>TH</sup> INTERESTED PARTY**

**EX-PARTE:**

**ISAAK OWANG**

**JUDGMENT**

**The Ex-Parte Applicant's Case**

The Ex-Parte Applicant, IsaaK Owang (hereinafter referred to only as "the Applicant"), brought this judicial review application by way of Notice of Motion dated 14<sup>th</sup> October 2024 following the leave that was granted on 1<sup>st</sup> October 2024. In the application, the Applicant sought the following orders;

1. An order of Certiorari to remove into this court for the purposes of being quashed, the decision of the 1<sup>st</sup> Respondent contained in its letter dated 19<sup>th</sup> September 2024, reference MG/NZR/MG/6/3 VOL II/(65) that stopped

the Applicant from undertaking any form of mining activities at San Martin Gold Mining.

2. An order of Prohibition to restrain the 1<sup>st</sup> Respondent, its servants, agents, employees or any person acting under the authority of the 1<sup>st</sup> Respondent from taking any further step or action in furtherance of the said decision of the 1<sup>st</sup> Respondent against the Applicant contained in the 1<sup>st</sup> Respondent's letter dated 19<sup>th</sup> September 2024 reference MG/NZR/MG/6/3 VOL II/(65).
3. That the costs of the application be provided for.

The application was brought on the grounds set out in the statutory statement and supporting affidavit of the Applicant, both dated 14<sup>th</sup> October 2024. The Applicant averred that he was the registered proprietor of all that parcel of land known as Title No. Siaya/Ramba/716 (hereinafter referred to as "the suit property"). The Applicant averred that he was a small-scale artisanal miner. The Applicant averred that he was carrying out his mining activities on the suit property under the umbrella of the 5<sup>th</sup> Interested Party. The Applicant averred that he had been carrying out mining activities on the suit property for the last 8

years. The Applicant averred that he was earning a living from the said mining activity. The Applicant averred that he was surprised to receive a letter dated 19<sup>th</sup> September 2024, reference MG/NZR/MG/6/3 VOL II/(65) from the 1<sup>st</sup> Respondent in which the 1<sup>st</sup> Respondent unilaterally and without notice arbitrarily ordered the Applicant to cease mining activities. The Applicant averred that the 1<sup>st</sup> Respondent's decision came as a surprise because, upon applying for a mining permit, the 1<sup>st</sup> Respondent had allowed him to carry out mining activities within San Martin Gold Mine as a small-scale miner pending the issuance of the permit. The Applicant averred that it was upon being allowed to carry out mining as aforesaid that he joined the 5<sup>th</sup> Interested Party. The Applicant averred that the 1<sup>st</sup> Respondent picked him from among several miners to be barred from mining activities. The Applicant averred that the 1<sup>st</sup> Respondent's decision to stop him from carrying out mining activities was made in bad faith and in violation of his fundamental rights and freedoms guaranteed under the Constitution. The Applicant averred that the 1<sup>st</sup> Respondent had violated his rights under Articles 10, 27, 29, and 40 of the Constitution. The Applicant averred that the 1<sup>st</sup> Respondent also

violated his right to a fair administrative action. The Applicant averred that the 1<sup>st</sup> Respondent did not give him a hearing before the decision that was to affect him adversely was made.

The Applicant averred that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties had been promoting the activities of the small-scale miners, including the Applicant. The Applicant averred that the 2<sup>nd</sup> Interested Party had been engaging the Applicant on the modalities of good mining methods and had never raised any objection to the Applicant's activities. The Applicant averred that as an artisanal miner, his operations were guided by Section 94(2) of the Mining Act. The Applicant averred that the Section establishes the artisanal mining committees at the County Level with the mandate to advise the director of mines on granting, renewal, and revocation of mining permits for artisanal miners. The Applicant averred that the committees had not been constituted by the Government due to budgetary constraints. The Applicant averred that operating without a permit was not his fault but that of the Government, which had failed to issue permits. The Applicant averred that the legal framework was put into place while he was already carrying out

mining activities on the suit property. The Applicant averred that the Government of Kenya issued a communication on 2<sup>nd</sup> October 2023 in which it permitted small-scale miners to form co-operative societies and undertake their activities without interference. The Applicant averred that there were some pre-licensing activities to be undertaken by the Government before areas could be declared as artisanal mining zones and miners licensed. The Applicant averred that the Government had not undertaken the exercise, and as such, the licensing process was not being undertaken.

The Applicant averred that the 1<sup>st</sup> Respondent's decision was discriminatory against the local artisanal miners who operate within the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties. The Applicant averred that the 1<sup>st</sup> Respondent had never issued stop orders against the artisanal miners operating in other counties. The Applicant averred that the 1<sup>st</sup> Respondent's decision was an economic threat to the Applicant and members of the 5<sup>th</sup> Interested Party, whose rights to freedom from discrimination, right to equal treatment, and social and cultural rights to earn a living and right to own property had been violated. The

Applicant averred that the 1<sup>st</sup> Respondent acted unreasonably, irrationally, and arbitrarily.

**The Respondents' and the Interested Parties' response to the application**

The Respondents did not file a response to the application despite several extensions of time that were given to them to enable them to do so. Only the 2<sup>nd</sup> Interested Party filed a response to the application. The other Interested Parties did not participate in the hearing of the application. The 2<sup>nd</sup> Interested Party filed a replying affidavit sworn by its County Secretary, Joseph Ogutu, on 1<sup>st</sup> April 2025. The 2<sup>nd</sup> Interested Party averred that it was not disputed that the Applicant lacked an artisanal mining license to undertake gold mining on the suit property as required under the Mining Act, Chapter 306 Laws of Kenya. The 2<sup>nd</sup> Interested Party averred that any mining activity undertaken without a mining license or permit is illegal. The 2<sup>nd</sup> Interested Party averred that it was in the public interest that any individual or group undertaking mining activity acquire a license or a permit before embarking on such activity. The 2<sup>nd</sup> Interested Party averred that mining was one of the activities

that required an Environmental Impact Assessment (EIA). The 2<sup>nd</sup> Interested Party averred that the Applicant had not demonstrated that he had obtained an Environmental Impact Assessment License for his mining activities. The 2<sup>nd</sup> Interested Party averred that before a stop order was issued for the Applicant to stop mining activities on the suit property, there were countywide consultations in which views were received from the stakeholders. The 2<sup>nd</sup> Interested Party averred that although the Applicant owned the suit property, he still required a license to undertake mining activities thereon. The 2<sup>nd</sup> Interested Party averred that the stop order given against the Applicant had its support, as there had been several accidents in mining areas occasioned mostly by collapsing mining shafts, which resulted in deaths and injuries. The 2<sup>nd</sup> Interested Party averred it had a duty to protect the lives of the public within its jurisdiction. The 2<sup>nd</sup> Interested Party averred that the Applicant was engaged in illegal mining and, as such, the 1<sup>st</sup> Respondent acted within its powers to stop the activity.

The 2<sup>nd</sup> Interested Party averred that it was the responsibility of the Applicant to apply for a mining permit and to operate within

the limits of the same. The 2<sup>nd</sup> Interested Party averred that the Applicant was operating without a license or permit, and as such, he was not entitled to be given a notice to show cause before he was served with a stop order. The 2<sup>nd</sup> Interested Party averred that illegal mining activities pose great danger to the environment, and because of that, the Applicant should not be permitted to continue with the illegal mining on the suit property. The 2<sup>nd</sup> Interested Party annexed to its affidavit several newspaper reports of accidents in gold mines within Siaya County, which resulted in deaths and injuries.

### **The submissions**

The application was argued by way of written submissions. The Applicant filed submissions dated 20<sup>th</sup> May 2025 in which the Applicant reiterated the contents of his affidavit in support of the application. The Attorney General (A.G.) filed submissions on behalf of the Respondents dated 24<sup>th</sup> September 2025. The A.G. submitted that the application was untenable, procedurally flawed, and contrary to the public interest. The A.G. submitted that the Respondents acted within their statutory and constitutional mandate when they issued the impugned

notice/stop order against the Applicant. The A.G. submitted that the impugned notice was issued to the Applicant after several earlier compliance notices were not heeded by the Applicant. The A.G. submitted that legitimate expectation could not override express provisions of the law, and public bodies cannot be compelled to act unlawfully.

The A.G. submitted further that the Applicant's application was brought in breach of the doctrine of exhaustion. The A.G. submitted that the Applicant should have taken his complaint to the Mineral Rights Board/Tribunal established under Section 153 of the Mining Act, Chapter 306 Laws of Kenya, for determination in the first instance. The A.G. submitted that the Respondents acted lawfully, rationally, and within their statutory and constitutional mandate. The A.G. submitted that the Applicant had not satisfied the threshold for judicial review.

### **Analysis and Determination**

I have considered the Applicant's application together with the supporting affidavit. I have also considered the replying affidavit by the 2<sup>nd</sup> Interested Party. Finally, I have considered the submissions by the Applicant and the Attorney General, and

the authorities cited in support thereof. As mentioned earlier in the judgment, the Applicant is seeking an order of certiorari to bring before this court and quash the decision of the 1<sup>st</sup> Respondent contained in its letter/notice dated 19<sup>th</sup> September 2024, and an order of prohibition to restrain the 1<sup>st</sup> Respondent from taking any action based on that letter/notice dated 19<sup>th</sup> September 2024. The only issue arising for determination in the application before me is whether the Applicant has made out a case for the grant of the orders of judicial review in the nature of certiorari and prohibition against the 1<sup>st</sup> Respondent. Judicial review is now a constitutional, statutory, and common law remedy. Section 4 of the Fair Administrative Action Act, 2015 (hereinafter referred to as “the Act”) provides as follows:

**“4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) a statement of reasons pursuant to section 6;**
- (e) notice of the right to legal representation, where applicable;**
- (f) notice of the right to cross-examine or where applicable; or**
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

- (a) attend proceedings, in person or in the company of an expert of his choice;**
- (b) be heard;**
- (c) cross-examine persons who give adverse evidence against him; and**
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

Section 7 of the Act provides as follows:

**“(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-**

- (a) a court in accordance with section 8; or**
- (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.**

**(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-**

**(a) the person who made the decision-**

**(i) was not authorized to do so by the empowering provision;**

**(ii) acted in excess of jurisdiction or power conferred under any**

**written law;**

**(iii) acted pursuant to delegated power in contravention of any law**

**prohibiting such delegation;**

**(iv) was biased or may reasonably be suspected of bias; or**

**(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**

**(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

**(c) the action or decision was procedurally unfair;**

**(d) the action or decision was materially influenced by an error of law;**

**(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;**

**(f) the administrator failed to take into account relevant considerations;**

- (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;**
- (h) the administrative action or decision was made in bad faith;**
- (i) the administrative action or decision is not rationally connected to-**
- i. the purpose for which it was taken;**
  - ii. the purpose of the empowering provision;**
  - iii. the information before the administrator;**  
**or**
  - iv. the reasons given for it by the administrator;**
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;**
- (k) the administrative action or decision is unreasonable;**
- (l) the administrative action or decision is not proportionate to the interests or rights affected;**
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;**
- (n) the administrative action or decision is unfair;**  
**or**
- (o) the administrative action or decision is taken or made in abuse of power.”**

Section 12 of the Act provides that:

**“This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.”**

In OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v. Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR, the Court of Appeal stated as follows:

**“The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect; That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the**

**jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters”.**

In Municipal Council of Mombasa v. Republic & another [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

**“... And as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decision; acting as an appeal court over**

**the decision would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision - and that, as we have said, is not the province of judicial review...”**

In the book, H. W. Wade and C. F. Forsyth, Administrative Law, 10<sup>th</sup> Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

**“The quashing order and prohibiting order are complementing remedies, based upon common law principles...A quashing order issues to quash a decision which is ultravires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future.”**

In Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

**“.... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land... Only an order of Certiorari can quash a decision already**

**made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”**

In the book; Public Law in East Africa published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

**“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”**

It is on the foregoing principles that the Applicants’ application falls for consideration. Upon perusing the Mining Act, Chapter 306 Laws of Kenya, I am persuaded that the 1<sup>st</sup> Respondent acted without jurisdiction. The 1<sup>st</sup> Respondent purported to exercise powers that it did not have. In the impugned letter/notice dated 19<sup>th</sup> September 2024, the 1<sup>st</sup> Respondent purported to be exercising a statutory power. The letter/notice was captioned “STOP ORDER /CLOSURE OF ILLEGAL MINING OPERATION”. The question that I need to answer is whether the

1<sup>st</sup> Respondent had the power to issue a stop order against illegal mining or the power to close an illegal mine. In HC. Misc Application No. 524 of 2017, R v. The Chief Licensing Officer and Another, Ex Parte Tom Mboya Onyango, that was quoted in Re: Kisumu Muslims Association HC. Misc Application No. 280 of 2003, the court stated that:

**“Where an officer is exercising statutory power, he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters...”**

The answer to the question which I have posed above is found in Section 200 of the Mining Act, Chapter 306 Laws of Kenya, which provides as follows:

**“Court orders to cease operations**

**The Cabinet Secretary or a public officer may apply to the Environment and Land Court for orders compelling a person to immediately stop activities and operations for, or connected with, the search for, prospecting, or mining of a mineral or mineral deposit in Kenya where he reasonably believes that such operations are being carried out in contravention of the provisions of this Act.”**

It is clear from this Section that it is this court that has the power to issue an order stopping an illegal mining activity or closing an illegal mine. The 1<sup>st</sup> Respondent is a public officer. If he believed that the Applicant was engaged in illegal gold mining, he was required under Section 200 of the Mining Act to make an application to this court for an order stopping the illegal mining activity or closing the illegal mine. Such an application would have been served upon the Applicant, who would have had an opportunity to be heard on the application before any order could be made on the same. The 1<sup>st</sup> Respondent had no power to stop illegal mining or to close an illegal mine without a court order.

Due to the foregoing, it is my finding that the 1<sup>st</sup> Respondent usurped the powers of the court when it purported to issue an order stopping the Applicant's mining activities on the suit property. As I mentioned earlier, judicial review is a discretionary remedy and as such it can be refused even where it has been demonstrated, as in this case, that the public officer acted unlawfully. It is common ground that the Applicant was engaged in gold mining on the suit property when the 1<sup>st</sup>

Respondent purported to stop him through the impugned letter/notice. It is also common ground that the Applicant had applied for a mining permit/license but had not obtained it, which means that the Applicant was undertaking a mining activity without a valid permit/license. It is a criminal offense under Section 202 of the Mining Act, Chapter 306, Laws of Kenya, for a person to carry out a mining activity without a license or permit. This means that the Applicant was involved in illegal mining, and the orders sought, if granted, would allow the Applicant to continue with the illegal activity. In Kenya Pipeline Company Ltd. v. Glencore Energy(UK)Ltd.[2015] eKLR, the Court of Appeal cited with approval the statement that was made in Holman v. Johnsons(1775-1802)All ER 98 concerning a cause of action based on an illegal act as follows:

**“The principle of public policy is this:**

**Ex dolo malo non oritur actio. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If from the plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes, not for the**

**sake of the defendant, but because they will not lend their aid to such a plaintiff.”**

Due to the consequences of illegal mining that were highlighted in the replying affidavit of the 2<sup>nd</sup> Interested Party, I will exercise my discretion against granting the orders sought by the Applicant in the public interest. The Applicant is at liberty to pursue the mining license/permit that he had applied for to enable him to operate his gold mine lawfully.

### **Conclusion**

For the foregoing reasons, the Notice of Motion application dated 14<sup>th</sup> October 2024 is dismissed. Each party shall bear its costs of the application.

**Delivered and signed at Kisumu this 17<sup>th</sup> day of December 2025**

**S. OKONG'O  
JUDGE**

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Applicant

N/A for the Respondents

Ms. Odipo for the 2<sup>nd</sup> Interested Party

Ms. J. Omondi-Court Assistant

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