

THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC L. PET. CASE NO. E002 OF 2025

IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 11, 20, 21, 22, 24(1), 27(1), 28, 32, 40, 42, 43, 44, 47, 48, 50(1), 60, 63, 64, 69, 70, 159, 162(2)(b), 186, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF (PROPOSED) GOLD MINING IN RAMULA VILLAGE IN SIAYA COUNTY

PETITION NO. E003 OF 2025

BETWEEN

WILLIAM ONYANGO ORICHO & 38 OTHERS.....PETITIONER

& OTHERS Suing on their own behalf on behalf of the Ramula-Manungo Community and in the Public Interest

AND

MINISTRY OF MINING, BLUE

ECONOMY AND MARITIME AFFAIRS.....1ST RESPONDENT

NATIONAL ENVIRONMENT

**MANAGEMENT AUTHORITY.....2ND
RESPONDENT**

**SHANTA GOLD KENYA LIMITED.3RD
RESPONDENT**

**COUNTY GOVERNMENT OF SIAYA.4TH
RESPONDENT**

RULING

INTRODUCTION

1. The Petitioners have filed the instant petition seeking the following reliefs; -
 - I. A declaration that the actions of the Respondents have violated articles 10, 11, 27(1), 28, 32, 40, 42, 43, 47, 48, 50(1), 60 and 232 of the Constitution of Kenya, 2010.
 - II. An Order directing the 3rd Respondent to immediately halt any prospecting and mining activities in Ramula Sub-Location until such a time as
 - a) genuine, informed, express and unequivocal consent is secured from private land-owners, lawful occupiers and the community, b) a fair agreement is concluded on the terms of engagement with the community, proprietorship/tenure of the subject land, and adequate compensation to the land-owners, lawful occupiers and the community, c) a framework agreement is concluded on benefit-sharing in the mining venture, and d) a framework is concluded on

environmental protection and protection of cultural and religious sites and practices.

- III. An Order directing the 1st and 2nd Respondent to immediately halt any plans to conduct any public hearings with respect to the proposed gold mining and processing project in Ramula in Siaya County.
- IV. An Order of Prohibition prohibiting the 1st, 2nd and 4th Respondents from issuing any approvals and/or consents to the 3rd Respondent for gold mining in Ramula Village until such a time as a) genuine, informed, express and unequivocal consent is secured from private land-owners, lawful occupiers and the community, b) a fair agreement is concluded on the terms of engagement with the community, proprietorship/tenure of the subject land, and adequate compensation to the landowners, lawful occupiers and the community, c) a framework agreement is concluded on benefit-sharing in the mining venture, and d) a framework is concluded on environmental protection and protection of cultural and religious sites and practices.
- V. An Order revoking any approvals or consents already issued by the 1st, 2nd and 4th Respondents to the 3rd Respondent for gold prospecting and mining in Ramula Village.
- VI. An Order directing the Respondents to report to the Honourable Court on compliance with this judgment within six months of the judgment.

VII. Costs and interest thereof of this Petition.

2. Together with their Petition, filed a Notice of Motion application dated 17/07/2025 seeking the following orders;

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1) SPENT

2) THAT pending the hearing and determination of the Application and Petition, the Honourable Court be and is hereby pleased to issue an order stopping the issuance of any licences and approvals to SHANTA GOLD MINING KENYA LIMITED or to any other person for the prospecting or mining of gold in Ramula Village, Ramula Sub- Location in Siaya County.

3) THAT if any licences and/or approvals have already been issued to SHANTA GOLD MINING KENYA LIMITED or to any other person for the prospecting or mining of gold in Ramula Village, Ramula Sub-Location in Siaya County, the Honourable Court be and is hereby pleased to issue an order suspending the said licences and/or approvals pending the hearing and determination of the Application and Petition.

4) THAT pending the hearing and determination of the Application and Petition, the Honourable Court be and is hereby pleased to issue an order stopping SHANTA GOLD MINING KENYA LIMITED or any other person from prospecting or mining gold in Ramula Village, Ramula Sub-Location in Siaya County.

- 5) THAT pending the hearing and determination of the Application and Petition, the Honourable Court be and is hereby pleased to issue an order stopping SHANTA GOLD MINING KENYA LIMITED or any other person from illegally soliciting and recording any consents from residents of Ramula Village, Ramula Sub-Location in Siaya County in respect of gold prospecting or mining activities.
 - 6) THAT pending the hearing and determination of the Application and Petition, the Honourable Court be and is hereby pleased to issue an order stopping the Respondents from evicting residents of Ramula Village, Ramula Sub-Location in Siaya County or in any way interfering with their quiet enjoyment of their land and homes in Ramula Village, Ramula Sub-Location in Siaya County.
 - 7) THAT the Honourable Court be and is hereby pleased to issue any other Order/direction that it may deem just and expedient to issue.
 - 8) THAT costs of this Application be in the cause.
3. The application is based on the Affidavit of WILLIAM ONYANGO ORICHO the 1st Applicant/Petitioner sworn on 17/07/2025 in support of both the Petition and the application with authority of the petitioners.
 4. It is averred that with the knowledge of the 1st , 2nd and 4th Respondents, the 3rd Respondent has been undertaking exploration and prospecting activities in

Ramula Village in Siaya County with the intention of mining gold all without following the necessary legal requirements including obtaining necessary express and unequivocal consents and regulatory approvals. That the 3rd Respondent now intends to evict members of the community from their ancestral land where they derive livelihood and practice cultural and religious rights in order to commence open-pit gold mining.

5. The alleged illegalities are deponed to include failure by the 1st -3rd respondents to disclose exact locations and land parcel numbers within which mining activities are to be undertaken. Underhand tactics by the 3rd respondent with the help of police and County officers including threats, intimidation, forgery, illegal access to personal data, bribery aimed at cheating the community and its members out of their land and natural resources.
6. It is deponed that despite formally addressing the above concerns with the respondents the same have gone unanswered, ignored and with no room given to the petitioners to air their grievances. That the 1st, 2nd and 4th Respondents were instead swiftly proceeding with steps towards licensing and/or approving prospecting and mining activities by the 3rd Respondent.
7. That the Petitioners and the Community are apprehensive that the activities of the 3rd Respondent are likely to result in irreparable damage to their physical and human environment including degradation of land and soil quality

and pollution of the air and water sources, thereby exposing them to irreparable harm to their health and irreparable desecration of their culture and religion and subjecting the community to a life of indignity.

8. The petitioners aver it is therefore in the best interest of justice that the orders sought in the Application are granted.

RESPONSES TO THE APPLICATION

9. The 2nd and 3rd Respondents opposed the application and filed a Replying affidavit each in respect to the petition and the application. The 4th Respondent filed grounds of opposition. A Preliminary objection dated 1/10/2025 was also raised on the petition by the 3rd respondent and which was supported by the 2nd respondent. The 1st defendant did not participate in the application and preliminary following persuasion of the court due to a delay in filing their documents based on service.

2nd Respondents Response

10. The 2nd Respondent (NEMA) opposed the application and the petition through the affidavit sworn by Dr. Mamo B. Mamo dated 1/10/2025. Referring to the provisions of section 58 of EMCA it is confirmed that NEMA issued EIA licence to the 3rd respondent for prospecting activities authorizing exploration within the project area and within the project area which remained under regulatory

oversight for compliance with the conditions attached thereto.

11. It is deponed that NEMA subsequently received notice of intention by the said 3rd respondent to undertake gold mining in the Ramula-Mwiboni area Siaya County. They also received Terms of Reference for EIA on 12/3/2024 under the provisions of Regulation 11 of the Environment (Impact Assessment & Audit Regulations). These were approved subject to submission of EAI Study Report and which was submitted to the Authority on 17/10/2024 and circulated to the lead agencies/committees for their review and comments. This was followed by submission by NEMA of a public notice to the Government Printer for gazettelement with a requirement for the 3rd respondent to publish similar notice in print and broad cast media which they did.
12. It is deponed that the 1st respondent raised no objection while NEMA as part of its review on the report raised several issues vide a letter dated 22/08/2025 to be addressed by the 3rd respondent which the respondent did comprehensively. The State department of Social Protection also submitted their comments. A public hearing was then convened by the Authority on 2/4/2025 with prior advertisement in My Gov and invitations to stakeholders.
13. On the public hearing above it is deponed that the same was attended by community members and stakeholders,

their concerns addressed and documented for consideration by the 2nd respondent.

14. Outlining the various factors to be considered in the determination on whether or not to issue and EAI licence it is deponed that in accordance to legal provisions in EMCA and subsidiary legislations NEMA issued to the 3rd respondent on 2/5/2025 an EIA Licence. According to the deponent the issuance of the EIA license was based on a rigorous, transparent and participatory process ensuring the potential environment impacts of the proposed project were properly assessed.
15. It is averred that the petitions claims on denial to access to information is false owing to the advertisements undertaken, that the study report was accessible online through the NEMA Portal and physically at their offices in line with article 35 of the Constitution. Further that NEMA has not condoned impunity and remains actively involved in compliance monitoring and retains enforcement powers including suspension or revocation of license where necessary.
16. Referring to conditions 2.4, 2.3 and 2.5 it is stated that the license conditions operationalise constitutional guarantees under articles 40.42.44 and 69 of the Constitution on property rights, cultural rights and right to clean and healthy environment. It is further deponed that the Petitioners being aggrieved with the issuance of the Licence ought to have appealed to the NET and not to by

pass statutory process and prematurely invoke the jurisdiction of the court and without demonstrating exceptional circumstances warranting the courts direct intervention. Further that the petitioners have failed to establish any breach or omission attributable to the 2nd respondent.

17. The court is invited to dismiss both the application and the petition with cost to the 2nd respondent.

Response of the 3rd Respondent

18. The 3rd Respondent also responded to the application and petition in the same affidavit sworn by its Director Kaplesh P.Patel. The affidavit highlights and clarifies the activities of the 3rd respondent with emphasis that the company has not commenced gold mining in Ramula.
19. The deponent further explained the process of prospecting and confirm that the 3rd respondent was now conducting exploration as the 1st stage having been duly licenced by the 1st respondent, 2nd respondent and obtained voluntary consent of the land owners where the exploration is being conducted and attendant compensation made.
20. It is deponed that the 3rd respondent is currently at design stage where the design of the mine which are hinged on the above two licences. It is while the 3rd respondent has now applied for a Mining License the same remains at a preliminary stage and was still under consideration by the relevant authorities.

21. Comparing the position on the ground at Ramula and that of its Singida Mines in Tanzania which is said to be fully operational it is averred that a gold mine is substantial and complex commercial operation involving large scale infrastructure machinery and labor which operations cannot therefore be concealed. The deponent believes that the petitioners have conflated exploration with mining thereby fuelling unfounded fears of forced eviction, environmental degradation and cultural desecration.
22. Further that should exploration and design ultimately confirm feasibility of mining, and relocation become necessary, it is deponed that a comprehensive Resettlement Policy Framework to govern such a process and which encompasses transparent engagement with local community and voluntary consent of all affected land owners is in place. However, at this point the issue of relocation is speculative and premature.
23. With regards to the prospecting licences and renewal thereof the deponent outlines the various renewals granted, transfer of licence and approvals obtained including community involvement thereof. It is reiterated that in accordance with obligations under EIA Licence the respondent on 10/07/2024, submitted Annual Environmental & Social Audit Report containing the institutional arrangements, monitoring framework and grievance mechanisms to be implemented by the relevant committees as well as under EMCA. It is averred that

these have not been exhausted by the Petitioners prior to filing the instant petition.

24. On the Mining Licence it is deponed that the 3rd respondent has formally applied for the same. That the 1st Respondent published a notice of the application in the Kenya Gazette on 1/8/2025 and advertisement in Daily Nation and the Star on 6/8/2025. That to date the application is still under active consideration with opportunity for public participation before determination is made and no mining licence has been issued.
25. Additionally, it is deponed that an ESIA license has been issued by NEMA as part of the Mining application process above following ESIA study and which report identified potential and Environmental and social Impacts of the project and set out detailed mitigation measures thereof including safeguarding of cultural heritage sites. It is reiterated that the petitioners are attempting to pre-empt and curtail a lawful established statutory process is misconceived and premature.
26. It is deponed that the 3rd respondent is in the process of developing a detailed Resettlement Action Plan drawing from the Resettlement policy framework should it be required if mining operations proceed. The deponent sets out the various principles to be deployed should resettlement happen including fair compensation at paragraph 21 of the Replying affidavit. The deponent however adds that the RAP is not a statutory requirement

at the exploration stage nor is it a precondition for the grant of a Mining Licence. That at this stage the Resettlement policy together with the ESIA suffice since in practice the RAP is only finalised, disclosed and implemented once all regulatory approvals have been granted and final investment decision made to proceed with Mining.

27. The 3rd respondent assures that it remains committed to ensuring should mining proceed and resettlement become necessary, it will be transparent, lawfully and in full partnership with the Community.
28. Outlining the various engagements including public participation, access to information and corporate social responsibility it is deponed that public barazas were held, targeted focus group discussions held and community engagements which were detailed and feedback gathered which included the claims herein and which were factored in the Resettlement Policy and will shape the design of the project. That deliberate steps have been taken to ensure information regarding operations is accessible to all members of the community by making notices in both English and Kiswahili. It is further noted many of the petitioners participated in the barazas.
29. It is averred that information on the coordinates of the exploration and proposed mining areas is already public information as contained in the EIA are maps and diagrams showing the same. The petitioners therefore

have access to the very information they claim to have been denied. It is deponed that the petitioners have never made any formal or informal request for the disclosure of project information from the 3rd respondent before approaching this court and had such information been sought the 3rd respondent would have obliged.

30. It is stated that allegations of fraud must be strictly proved and mere allegations of coercion, intimidation without evidence cannot suffice. Having participated in the barazas and executed voluntary consents in favor of exploration activities the petitioners are estopped from alleging ignorance, coercion and secrecy.
31. On the petitioners claims on harassment and intimidation by local police and county officers these are denied and it is deponed that all documents annexed to the petition in support of the claims reveal that the limited involvement of the police arose from disputes among community members themselves. That the only instance where the 3rd respondent engaged with the local police arose from an incident where a small group of individual opposed to the project attacked the respondents vehicle where a laptop and documents containing personal data were stolen. The incident was promptly reported to the local police station and Office of Data Protection Commissioner.
32. Additionally on the right to clean and healthy environment it is averred that the petitioners have not demonstrated any actual, ongoing or imminent violation of their right to

a clean and healthy environment and constitutional reliefs cannot be granted on bare apprehension without proof of actual or threatened infringement supported by credible evidence.

33. It is also deponed on jurisdiction that this court is enjoined from considering the matters in dispute due to the doctrine of exhaustion. That the petitioners did not file objections to the gazette notice inviting public representations on the Mining Licence application. They did not lodge complaints or appeals with NEMA in respect of the EIA licence.

The 4th Respondents Response

34. The grounds of opposition are dated 24/09/2025. It is stated that the application is premature, incompetent, speculative and an abuse of the Court process. That the same does not disclose anything illegal done or intended to be done by the 4th Respondent to a warrant grant of the orders sought against it. That the 4th Respondent being a public entity, is committed to undertake its processes, if any, strictly within the law. That the application does not sufficiently disclose any cause of action against the 4th Respondent. It does not meet the established threshold for grant of the orders sought. That it is in the interest of justice that the prayers sought against the 4th Respondent and the application be dismissed with costs.

PRELIMINARY OBJECTION

35. The preliminary objection is dated 14th September 2025 and was filed by the firm of Mohamed Muigai LLP on record for the 3rd Respondent raising a jurisdictional issue on the following grounds; -

- 1) This Honourable Court lacks jurisdiction to entertain the Petition by virtue of the doctrine of exhaustion, the Petitioners having failed to first pursue or exhaust the statutory remedies expressly provided under the Mining Act, 2016 and the Environmental Management and Coordination Act, 1999 (EMCA).
- 2) Sections 152 to 157 of the Mining Act establish a clear framework for the resolution of disputes arising from or connected to prospecting licences, mining licences, permits, royalties, and other rights or obligations under the Act, including recourse to the Cabinet Secretary and the Mineral Rights Board, before recourse may be had to the courts.
- 3) Further, this Honourable Court lacks jurisdiction to hear the Application and grant the orders sought in light of Sections 125, 126, 127, 128 & 129 of the Environmental Management and Co-ordination Act which establish the National Environment Tribunal (NET) and confer it original jurisdiction over disputes concerning licensing, compliance, regulatory and alleged violations of environmental law.

Hearing and Disposal

36. The court issued direction on the disposal of the preliminary objection and the application concurrently for efficiency. Parties exchanged submissions and highlighted the same orally.
37. A determination of the Notice of Motion application is dependent upon the outcome of the ruling on the preliminary objection as in its very nature a preliminary objection is capable of resolving the entire petition at this stage without hearing on merit. Moreover, jurisdiction is everything and without it this court cannot do anything but to down its tools, otherwise its decision will be a nullity. I must at the earliest opportunity therefore proceed to resolve the preliminary objection.

SUBMISSIONS ON THE PRELIMINARY OBJECTION

Submissions of the 3rd Respondent

38. It was submitted that where Parliament has provided a clear statutory procedure for the redress of a particular grievance, that procedure must be strictly followed before a party can invoke the jurisdiction of the High Court (and by extension the Superior Courts) under Articles 22 or 165 of the Constitution. Reliance is placed on the case of **Speaker of National Assembly v Karume [1992] KLR 21,**
39. It is submitted that the Petitioners challenge the issuance and renewal of prospecting licences; the environmental approvals granted by NEMA; and the ongoing

consideration of a mining-licence application which are matters falling within the jurisdiction of the Ministry of Mining, the Cabinet Secretary, NEMA, and the National Environment Tribunal, each of which is seized of the very processes that the Petitioners now seek to halt. The statutory mechanisms available to the petitioners under the Mining Act and EMCA have not been invoked and therefore none of the issues raised are ripe for judicial determination.

40. In response to the Petitioners contention that they were entitled to elect between the statutory remedies under EMCA and the original jurisdiction of this Court under Article 22 of the Constitution and Section 13 of the Environment and Land Court Act based on the holding in **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR)**, it is submitted that this position is misplaced and if accepted, would render the doctrine of exhaustion redundant in all matters touching on environmental rights. Further that the Supreme Court did not create an automatic bypass of statutory mechanisms but a "case-by-case assessment.
41. Further that in the Nicholus case, the petitioners had initially pursued his grievance through the very statutory bodies empowered to address the issues; including KPLC and NEMA in the first instance. It was only after those institutions failed or proved unable to enforce their own

directives that he approached the Court for constitutional redress. That the present case is a stark contrast.

42. That in **Aluochier v Senate & 2 others [2025] KESC 59 (KLR)**, which now stands as the most recent and authoritative guidance on the matter, the Supreme Court rejected a petition founded on the right of access to information because the Petitioner did not exhaust all administrative remedies before approaching the High Court.
43. It is contended that all the reliefs sought in the application are statutory matters falling squarely within the purview of the regulatory agencies established to oversee them. The court is referred to the case of Savraj **Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR** to buttress the argument that the Petitioners are not without remedy as the Mining Act and EMCA already provide robust, participatory, and specialized mechanisms for addressing the concerns raised.
44. It is further argued that before exhaustion this Court's intervention would not only be premature but would also undermine the legislative framework intended to regulate the very matters in issue. That as it is the matters are not ripe for constitutional scrutiny which also prejudices the petitioner's opportunity to ventilate before the technically competent route for redress.

45. The Court is urged to strike out the application and the Petition to allow the Petitioners to first approach the proper statutory bodies.

Applicants Submissions on the Preliminary Objection

46. The submissions are dated 21/10/2025. It is submitted that under section 154 of the Mining Act by dint of the word 'May' an applicant has the liberty to elect and choose this court as a court of competent jurisdiction.

47. That since the applicant's grievance is a threat to violation of their fundamental constitutional right and seek to enforce the Bill of Rights, the only competent organ was the court and not any other forums. That the ELC court was clothed with jurisdiction to determine the dispute by dint of article 162 of the Constitution and section 13 of the ELC Act.

48. Emphasis is placed on the Supreme Court of Kenya decision in *Nicholus* (supra) (see paragraphs 14 & 15 which is termed to have settled the issue of constitutional violation vis a vis other forums of dispute resolution. It is submitted that the NET has and had no jurisdiction to determine alleged violations of the constitution. Right to access court for redress of alleged constitutional violations should not be impeded or stifled in a manner that will frustrate the enforcement of fundamental rights and freedoms. That the availability of an alternative remedy if any should not necessarily bar an individual from seeking

constitutional reliefs. The Honourable Court is not restrained or restricted from providing Constitutional reliefs.

49. According to Counsel the petition is said to raise a plethora of fundamental Constitutional violations by the Respondents. That the Petitioners are not inviting this Court to determine issues of prospecting licenses, mining licenses, permits, royalties, and other rights or obligations espoused under the Mining Act 2016 and the Environmental Management and Coordination Act, 1999 but was being called upon to determine violations of the Constitution which NET has no jurisdiction whatsoever to deal with.
50. The court is urged to dismiss the Preliminary objection for want of merit.

Second Respondents Response to the Preliminary Objection

51. The 2nd respondents' submissions are dated at 24/10/2025 and supported the preliminary objection.
52. Counsel submitted that the Petitioners have bypassed the specialized forum established under EMCA and prematurely invoked this Court's jurisdiction without demonstrating any exceptional circumstances to justify departure from the doctrine. That the allegations they raise, touching on the issuance and procedure of the EIA

licensing process fall squarely within the NET's jurisdiction under Section 129(1). The first port of call is NEMA.

53. The court was referred to the Supreme Court decision in **United Millers Limited v Kenya Bureau of Standards & 5 Others [2021] Eklr**, citing *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others [2019] Eklr* which emphasized; "...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.'

4th Respondent Submissions on the Preliminary Objection

54. The 4th respondent submissions are dated 22/10/2025. Counsel for the 4th respondent reiterated support for any process that complies with the law.
55. It was submitted that section 154 of the Mining Act did not give one singular procedure to be followed but three options for a party to elect. It is submitted that the law gives a raft of options that a party can explore in ventilating disputes arising out of issuance of a mineral right. That approaching this Court is one of such procedures allowed by the law.
56. As regards alleged violations of Sections 125, 126, 127, 128 and 129 of the Environmental Management and

Coordination Act, referring to section 129 (1) which outlines the jurisdiction of the National Environment Tribunal it is submitted that the same speaks to licences issued under EMCA. That the petition herein is on matters which fall purely under the Mining Act. EMCA does not address rights under Mineral rights.

57. The court was invited to dismiss the preliminary objection.

Analysis and Determination on the Preliminary Objection

58. I have considered the grounds upon which the preliminary objection is raised and the responses thereto and the submissions made by counsel on record for the parties in this petition both written and oral. The main issue for determination is whether the preliminary objection has merit.

59. I will first satisfy myself whether the preliminary objection is properly raised guided by the case of **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors [1969] E.A. 696** where Law JA at page 700 stated;

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are

bound by the contract giving rise to the suit to refer the dispute to arbitration.”

60. Justice Newbold in the said case argues that;-

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

61. Further Black’s law Dictionary 11th Edition defines a preliminary objection as

‘..as an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary. An objection to the court’s jurisdiction is an example of a preliminary objection’.

62. The gist of the preliminary objection is that this court lacks jurisdiction to entertain this matter as the petition herein offends the provisions of Sections 152 to 157 of the Mining Act and Sections 125, 126, 127, 128 & 129 of the Environmental Management and Co-ordination Act (EMCA). Indeed should the court uphold the grounds raised in the preliminary objection, then the suit will be disposed of preliminarily without the court resorting to ascertaining the facts. I’m satisfied that the preliminary

objection has been properly raised on pure points of law. Moreover, the respondents have not disputed the preliminary objection meets the settled principles.

63. The Mining Act is an Act of Parliament to give effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. The Act applies to the Minerals in the First schedule of the Act, which includes Gold the subject Mineral being prospected for and or for which a Mining licence is being sought in the present proceedings.
64. The court finds it necessary to highlight the relevant provisions of the Mining Act that are alleged to have been bypassed; -
65. **Section 153** is on Principles of compensation. Subsection (6)- (7) outline the route to be followed where a demand or claim for compensation is disputed, including amicable resolution through negotiations in good faith and where a dispute cannot be resolved through negotiations within a reasonable period of time, either party to the dispute may refer the matter to the Cabinet Secretary for a determination. A provision is also made for a holder of a mineral right not to commence mining of minerals until such compensation is made.
66. **Section 154** is on disputes arising on Mineral rights as follows;-

Any dispute arising as a result of a mineral right issued under this Act, may be determined in any of the following manners—

(a) by the Cabinet Secretary in the manner prescribed in this Act;

(b) through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement; or

(c) through a court of competent jurisdiction.

67. **Section 155** is on Determination of disputes by Cabinet Secretary and reads; -

Subject to the provisions of this Act, the Cabinet Secretary may inquire into and determine the following matters—

(a) a dispute of the boundaries of an area held under a prospecting or mining right;

(b) any wrongful act committed or omitted in the course of prospecting and mining operations, by any persons against any other person;

(c) a claim by any person to be entitled to erect, cut, construct or use any pump, line of pipes, flume, race, drain, dam or reservoir for mining purposes;

(d)a claim to have any priority of water taken, diverted, used or delivered for mining purposes, as against any other person claiming the same; or

(e)assessment and payment of compensation where provided for under this Act.

68. Section 156 outlines the procedure for determination of disputes by the Cabinet Secretary.
69. Section 157 provides for appeals against a decision of the Cabinet secretary and which lies to the High Court within 30 days of the decision.
70. The above therefore are the statutory mechanisms available to the petitioners under the Mining Act. It is contended that they were not invoked and or exhausted in the first instance by the Petitioners before approaching this court.
71. I will go straight to the provisions of section 154 of the Mining Act which I have already extracted verbatim. The 3rd respondents case is that the petitioners ought to have submitted to the jurisdiction of the Cabinet Secretary as provided under the Mining Act. What I also hear the 3rd respondent to be saying is that based on the provisions of section 157 of the said Act, this court as a court of equal status with the High Court can only seat as an appellate court on the complaints or orders sought.

72. A look at the provisions of section 154 herein gives three options to a litigant on the forum to lodge their grievance emerging from a Mineral right. This is informed by the use of the words 'May' and the phrase 'in any'. One is to approach the Cabinet Secretary, two is mediation and three a court of competent jurisdiction. The provisions are not couched in an obligatory or mandatory manner as may be discerned from the use of the word 'May'. Had the parliament intended for the lodging of the complaints first to the Cabinet Secretary nothing would have been easier than to provide as such by using the words 'shall'.
73. Further the use of the word 'or' is also instructive. I say so because the same is disjunctive to connote there is no strict sequence or priority.
74. The petitioners had the liberty and or option to choose any of the above forums and they exercised it by choosing to approach the court. I cannot fault them in this regard.
75. But having made the above conclusion it would be pertinent to consider if the option taken is available in the present circumstances. In other words is this court of competent jurisdiction?
76. The Environment and Land Court is conferred with jurisdiction by dint of Articles 162 of the Constitution of Kenya 2010 and section 13 of the Environment & Land Court Act. Article 162(2) b. of the Constitution makes proviso for the establishment of courts with equal status as the High Court, one of them being the ELC as follows:

2.Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- (a)employment and labour relations; and(b)the environment and the use and occupation of, and title to, land.3.Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

77. In order to give effect to Article 162(3), Parliament enacted the ELC Act, Cap 8D. Section 13 of the said Act outlines the jurisdiction of the ELC as follows:1.The Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.2.In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-a.relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;b.relating to compulsory acquisition of land;c.relating to land administration and management;d.relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and e.any other dispute relating to environment and land. 3.Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental

freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

78. Arising from the foregoing this court is seized with jurisdiction to hear disputes arising from Mining which is also the subject of this petition. Read together with section 154 of the Mining Act I must say the Act did not oust the original jurisdiction of this court from dealing with disputes relating to Mining or Mineral right.
79. It is further urged that the petition violates Sections 125, 126, 127, 128 and 129 of the Environmental Management and Coordination Act (EMCA). The EMCA is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.
80. **Section 125** of EMCA establishes the National Environment Tribunal (NET). This is where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA ought to be lodged with and/or addressed. Sections 126 is on proceedings of the NET while 127 is on awards of the NET, 128 on quorum and 129 is on appeals to the NET.
81. I will extract the provisions of section 129 verbatim ;-
- Appeals to the Tribunal
- (1) Any person who is aggrieved by— (a) a refusal to grant a licence or to the transfer of his licence under

this Act or regulations made thereunder; (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder ;the revocation, suspension or variation of his licence under this Act or regulations made thereunder; (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder; (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

- (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose. (3) Upon any appeal, the Tribunal may— (a) confirm, set aside or vary the order or decision in question; (b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or (c) make such other order, including an order for costs, as it may deem just. (4) Upon any appeal to the Tribunal under this section, the status quo of any matter or

activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

82. It is important to note that the events outlined in section 129 above do not include the issuance of a Licence under the Mining Act. The mechanisms for dispute resolution would be those provided under the Mining Act and not EMCA. I have already noted that a litigant is given options under the former Act and in the present petition, the petitioners chose the option of approaching a court of competent jurisdiction.

83. Additionally section 3 of EMCA does not oust the jurisdiction of the Environment and Land Court. Section 3 states as follows;-

‘Entitlement to a clean and healthy environment

(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes. (3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders,

issue such writs or give such directions as it may deem appropriate to—

84. Citing the above provisions the Supreme Court of Kenya in the case of **Nicholus (supra)** stated thus;-

109. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the Energy Act. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify. Emphasis is mine

85. I will now look at the powers of the Environment and Land court to hear applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. Counsel for the petitioners submits that since the applicant's grievance is a threat to violation of their fundamental constitutional rights and seek to enforce the Bill of Rights,

the only competent organ was the court and not any other forums.

86. Counsel for the 3rd respondent submits that the reliefs sought in the petition have been couched to circumvent statutory provisions that lay out the procedure to be followed and which provide a forum for the petitioners to ventilate their grievances. NEMA supports this position.
87. I will also speak to the petitioners contention that the Supreme Court of Kenya in **Nicholus (supra)** resolved the issue of exhaustion. In my view the Apex Court was categorical that every case is decided on its own merits provided that an applicant demonstrates there exists exceptional circumstances.
88. Firstly, the petition seeks a declaration that the actions of the Respondents have violated articles 10, 11, 27(1), 28, 32, 40, 42, 43, 47, 48, 50(1), 60 and 232 of the Constitution of Kenya, 2010. A look at the powers granted to the Cabinet Secretary Mining and the NET, the two forums would not enter the realm of determining constitutional violations. This would fall outside the EMCA and the Mining Act. Moreover, the petitioners would not in my view obtain efficacious relief had they taken the route envisaged under the Mining Act and EMCA in view of the claim on constitutional violations.
89. The upshot of the above is that this court declines to uphold the preliminary objection as it is not merited. The

petition must therefore be interrogated and determined on its merits one way or the other.

ANALYSIS AND DETERMINATION ON THE APPLICATION DATED 17/07/2025

90. I have read the affidavits sworn in support of the application and those sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. It is my considered view the main issue for determination is whether the petitioners are entitled to the orders sought in the Notice of Motion application dated 17/07/2025.
91. The application is brought under articles 20, 22, 50(1), 159(2) and 258 of the Constitution of Kenya, 2010; rules 3(4), 3(8), 4, 13, 19, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; sections 13(5) and 19(2) of the Environment and Land Court Act, Cap. 8D; Order 40 of the Civil Procedure Rules, 2010; and all other enabling provisions of the law]
92. In its submissions the applicant petitioners have drawn the courts attention to principles for grant of conservatory orders in the case of **Wilson Kaberia Nkunja Vs. The Magistrates and Judges Vetting Board & Others (2016) eKLR** namely an applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the orders there is real danger that he will suffer prejudice as result of the violation; the

petition alleging the violations or threat of violation will be rendered nugatory and the public interest must be considered.

93. In their submissions on the issue of arguable prima facie case the applicants rehash all the allegations raised against the 3rd respondents which are said to be condoned by the other respondents. That the issues raised in the petition cannot be wished away as they are serious constitutional issues worthy of consideration and the court must find that the Petition raises an arguable prima facie case.
94. But for me all the above issues have been contested and to make them a basis for finding that a prima facie case has been raised would be to miss the point. It cannot be automatic. The issues must be fully weighed on the scales of justice on the hearing of the main petition to avoid dealing with the merits of the petition.
95. Prayer 2 of the application invites the Court to stop the issuance of any licences and approvals to the 3rd respondent for the prospecting or mining of gold in Ramula Village, Ramula Sub- Location in Siaya County. In respect to prospecting it would appear to me based on the replying affidavits filed by the 2nd and 3rd respondents that with regard to prospecting, licences and approvals have since been granted and it is not clear which licences and approvals with regard to prospecting should be stopped.

96. The 3rd respondent outlines at paragraph 11 of their replying affidavit the issuance of prospecting licence and its renewal. An EIA licence in relation to prospecting is also confirmed to have been issued by NEMA. The court cannot therefore stop that which has already happened and in any event court orders should not be issued in vain.
97. The applicants under prayer 2 have sought in the alternative an order suspending the said licences and/or approvals pending the hearing and determination of the Petition. This is not necessary at interlocutory stage and in my view must await the determination of the petition on merits. I say so because it is clear from the depositions a lot has already happened with regard to prospecting activities since the issuance of the initial prospecting licence and subsequent renewals.
98. Mr Otieno for the Petitioners submitted that the people of Ramula are not saying gold should not be mined except for the protection of their rights. The court must therefore fully investigate the allegations of illegalities and constitutional violations to inform a decision on suspension or any appropriate orders in regard thereto. It will be difficult for the court to make a finding on this order without delving into the merits of the main petition.
99. The above course must also apply to the orders sought in prayer number 5 of the Notice of Motion.
100. I must now address the petitioners concerns about the impending eviction and whether there is immediate

danger of eviction of the petitioners. This in my view would warrant the courts consideration. The guiding phrase is the word 'immediate' since it is the urgency that would warrant the grant of the orders at interlocutory stage. The petitioners have expressed their apprehension that the 3rd respondent will evict them from their land to allow for the Mining.

101 The 3rd respondent has deponed that there is no mining currently being undertaken in the project area. I have not seen evidence from the petitioners of anyone who has been evicted and or any notices issued by the 3rd respondent on intended eviction or land acquisition. Theirs is an apprehension which again will be interrogated further at the hearing. As such I have not seen any immediate threat to warrant the issuance of orders in relation to eviction in the interim as sought.

102. It has been urged that the Petition will be rendered nugatory if the orders are not granted. Based on my analysis above I do not see the petition being rendered nugatory as long as the same is heard on priority basis since the subject of the concerns is not an event but a process.

103. I think I have said enough to demonstrate why the orders sought in the application cannot issue at this stage and must await the full hearing of the Petition. I will reiterate the best the court can do is to ensure the quick disposal of the petition on merits.

104. The upshot of the foregoing is that the preliminary objection is dismissed.

105. The Notice of Motion dated 17/07/2025 is also dismissed.

106. Due to the public interest nature of the petition there shall be no orders as to costs.

Orders accordingly.

Dated, signed and delivered at Siaya this 29th day of January 2026.

HON. JUSTICE A. E. DENA

JUDGE

30/01/2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Willis Otieno for Applicants/Petitioners

No appearance for the 1st Respondent

Ms. Kahuria for the 2nd Respondent

Mr. Mungai for the 3rd Respondent

Mr. Okanda for the 4th Respondent

Court assistant: Ishmael Orwa

ORIGINAL