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 CERTIORARI; 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.....EX-PARTE

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 LTD.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

EX-PARTE APPLICANTS CASE

1. The Ex-parte Applicant pursuant to the leave granted by this Court on 14th January 2019 filed the substantive Notice of Motion Application dated 21st January 2019. The Application prays for orders:

> **1. That this Application be certified urgent and heard promptly and/or ex-parte in respect of Prayer No.8.**
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> **2. That this Honourable Court be pleased to grant an Order of Certiorari to remove into this Court and quash the entire decision made by the 3rd Respondent on 6th July 2018 recommending for approval the Application by Mwarimba Mining Co. Ltd. (the 4th Respondent herein) for a Mining Permit No.MP/2017/0003 (to run from 14th August 2018 to 13th August 2023) over the applicant's Mining Locations No.1407/1-5 ad 1439/1-4 on LR. No.12199/4 Taita Taveta**
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> **3. That this Honourable Court be pleased to grant an Order of Certiorari to remove into this Court and quash the entire decision made by the 1st Respondent on 20th July 2018 approving; on recommendation of the 3rd Respondent; the Application by Mwairimba Mining Co. Ltd (the 4th Respondent herein) for a mining permit no.mp/2017/0003 (to run from 14th August 2018 to 13th August 20123) over the applicant's Mining Locations No.1407/1-5 and 1439/1-4 on LR. No 12199/4 Taita Taveta.**
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> **4. That this Honourable Court be pleased to grant an order of mandamus directed at the 2nd Respondent compelling him to switch on the Mining Cadastre Portal of the Applicant relating to the mining rights over Mining Locations Nos.1406/1-10, 1407/1-5; 1408/1-10, 1409/1-10 and 1439/1-4 and update the status to active so that the disputed locations are not reflected as free areas.**
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> **5. That this Honourable Court be pleased to grant an order of temporary injunction directed at the 4th Respondent herein precluding it from carrying out any and/or all mining activities on Mining Locations No.1407/1-5 and 1439/1-4 on LR. No.12199/4 Taita Taveta, including but not limited to prospecting for ore bodies and extracting mineral, pending the hearing and determination of the present Application.**
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> **6. That this Honourable Court be pleased to grant a declaration that the applicant is the apparent holder of the mining rights over Mining Locations No.1407/1-5 and 1439/1-4 on LR. NO.12199/4 Taita Taveta and as such is free to carry out mining activities, including but not limited to prospecting for ore bodies and extracting minerals, on the said locations.**
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> **7. That this Honourable Court be pleased to grant an order of prohibition directed at the 1st and 3rd Respondents, precluding them from entertaining any Applications for a mining permit over Mining Locations No.1407/1-4 and 1439/1-4 on LR No. 12199/4 Taita Taveta prior to full compensation of the Applicants for their exploration and prior mining expenses.**
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> **8. That pursuant to the Court order given on 14th January 2019 to the effect that inter alia: 'the issue of whether the leave granted herein should operate as stay to be determined in the main motion', the grant of leave aforesaid does operate as a stay of the grant of Mining Permit No.mp/2017/0003 over Mining Locations No.1407/1-5 and 1439-1-4 on LR No.12199/4 Taita Taveta arising from the decisions of the 1st and 3rd Respondents made on 6th and 20th July 2018 respectively.**
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> **9. That this Honourable Court be pleased to grant any further orders as it may deem fit to further the ends of justice.**
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> **10. That the costs of the Application be borne by the Respondents jointly and severally**

2. The Application is supported by the grounds set out in the statutory statement dated 19th December 2018, the verifying affidavit of Godfrey Kihara Kamau dated 19th December 2018 as well as the further affidavit sworn on 9th May, 2019 and the documents annexed thereto.

3. The crux of these proceedings is in the administrative decision of the 1st Respondent made on 20th July, 2018 acting on the recommendation of the 3rd Respondent made on 6th July, 2018 to grant a Mining Permit No.MP/2017/0003 (to run from 14th August 2018 to 13th August 2023) to the 4th Respondent over mining locations no.1407/1-5 and 1439/1-4 on LR. NO.12199/4 Taita Taveta. The Interested party is the registered owner of Land Reference No.12199/4 Taita Taveta while the Ex-parte applicant avers that it is the registered owner of Mining Locations Nos. 1406/1-10; 1407/1-5; 1408/1-10; 1409/1-10 and 1439/1-4 which are situate on the said land. The ex-parte applicant states the by virtue of the decisions of the 1st and 3rd Respondents, two of those mining locations, namely N.1407/1-5 and 1439/1-4 were granted to the 4th Respondent. Subsequently, the 4th Respondent entered into the aforesaid mining locations and on 15th august 2018 began to carry out mining activities to the financial detriment of the ex-parte applicant.

4. It is the ex-parte applicant's contention that the Interested Party after acquiring ownership of the Land Reference No.12199/4 Taita Taveta where the aforesaid mining locations are through purchase, it embarked on a scheme to coerce the ex-parte applicant to surrender her mining rights which she had legally obtained but the ex-parte applicant refused to compromise and/or surrender her rights and privileges secured by inter alia Sections 2, 4, 7(1)(d), 30 and 79 of the Mining Act Cap 306(repealed).

5. The ex-parte applicant avers that she is aware that the Interested Party **instituted Nairobi High Court Civil Case No.990 of 1999**

Kutima Investment Ltd –v- Muthoni Kihara and Commissioner of Mines alleging trespass by the Applicant herein and seeking two principal orders namely: general damages against the applicant for illegal mining on its land and restraining orders against the Applicant relating to mining operations located on its land. That the suit was dismissed by Hon. Kihara Kariuki J by a ruling delivered on 26th April, 2005 for inter alia, failing to disclose a cause of action and being time barred but was restored to proceed to full hearing by the **Court of appeal in Civil Appeal No.117 of 2005**. Further, that the Interested Party also instituted **Misc. Civil Application No. ELC No. 84 of 2011** seeking Judicial Review Orders of Certiorari to remove into the High Court and quash the decision of the Commissioner of Mines and Geology contained in the letter dated 22nd September, 2011 to grant or renew mining locations and or mining rights or licenses to the ex-parte applicant herein over the Interested Party's land reference Number 12199/4, Taita Taveta and the Certificates of Renewal issued to the Applicant as well as orders of prohibition. That in its judgment delivered on 1st November 2013 the High Court (Odunga, J) granted all but one prayer which was directed to the interested parties yet judicial review orders are directed to public bodies and not private individuals. Being aggrieved by that judgment the applicant preferred an appeal to the Court of Appeal being **Nairobi Civil Appeal NO. 10 of 2014**. The appeal against the order of certiorari quashing the decision of 22nd September, 2011 and the order of prohibition was dismissed while the appeal against the order of certiorari to quash the renewal certificates which certificates had expired was allowed and the order set aside.

6. According to the Applicant, the Court of Appeal in both the abovedecisions affirmed the mining rights and interests of the Applicant over the mining locations aforementioned are still in existence and also ensured the right of the applicant to enter and remain on Land Reference No.12199/4 Taita Taveta. It is therefore the Applicant's contention that the administrative decisions made by the 3rd Respondent on 6th July 2018 recommending for approval the Application by the 4th Respondent for Mining Permit No.MP/2017/0003 (to run from 14th August 2018 to 13th August 2023) over the Applicant's Mining Locations No.1407/1-5 and 1439/1-4 on LR No.12199/4 Taita Taveta despite objection raised by the Applicant was without lawful justification or authority thus unreasonable, unfair, irregular and contrary to Section 36(1) (b) of the Mining Act 2016 as read with Section 7(2)(c)(e)(h)(k)(n)(o) of the Fair Administrative Action Act 2015 because the mining permit was granted on mining locations over which the Applicant herein already had mining rights. The applicant avers that the 1st and 3rd Respondents acted in excess of their authority and that the decision was materially influenced by an error of law and was disproportionate to the mining interests of the applicant and also infringed upon the Applicant's right to property as guaranteed by Article 40 of the Constitution. The applicant further avers that the said decision violated the legitimate expectation of the Applicant that the 1st and 3rd Respondents would act in good faith and be just in implementing the law, adding that the said decision was unlawful, unreasonable and procedurally unfair in that the Applicant was not given substantive written reasons for the administrative decision by the1st Respondent and that no prior and adequate notice were given and that the applicant was not accorded an opportunity to be heard and make representation regarding the administrative decisions contrary to the provisions of Section 4 (3) (a) and 4(4)(a) and (b) and (b) of the Fair Administrative Action Act. The applicant states that she has so far made substantial investments into the mining locations aforesaid by undertaking such activities as searching, exploring, prospecting, acquiring mining machinery and equipment and constructing houses for the workers within the area, and that the actions of the 1st, 2nd and 3rd Respondents have resulted in loss of livelihood for the Applicant's employees and dependants since the 4th Respondent is already undertaking mining activities on the said locations as from 15th August 2018, and that if the current status quo is maintained till 2023 as per the mining permit issued to the 4th Respondent, then the Applicant stands to suffer irreparable loss and damage because minerals are technically non-renewable and as such can be depleted, with no guarantee that the mining locations will revert to them thereafter.

7. In response to the responses by the Respondents and the Interested Party, the Applicant stated that there is no express requirement for consent during the renewal process and therefore since the late Kihara Kibugi had been granted prospecting and mining consent by the former land owners in 1983 and the impugned mining locations pegged in 1985 under the repealed Mining Act, his widows who acquired the mining locations by transmission and who had complied with the terms and conditions upon which the rights were granted, were entitled to renewal. On the allegations of forgery of the consent issued to the ex-parte applicant on 31st December 1994 by one Peter M Mwachada, the Applicant stated that the same is pending determination by the **High Court in Civil Case No. 990 of 1999; Kutima Invetment Ltd –v- Muthoni Kihara and Commissioner of Mines.** The Applicant argues that the interpretation of the judgment **in Misc.Civil Application No.84 of 2011** by the defunct office of the Commissioner of Mines and Geology was erroneous because only the certificates of renewal issued for one year term from 17th August 2011 to 17th August 2012 were quashed and not the mining rights of the ex-parte applicant over the impugned mining locations. The ex-parte applicant avers that she continuously wrote several objection letters contesting the removal of the ex-parte applicants mining locations from the cadastre (electronic register) contrary to the assertion by the Respondents, but that no reply is forthcoming hitherto. It is contended that as soon as the objection was raised by ex-parte applicant, the ministry should have refrained from switching off the ex-parte applicant's mining locations and making them available for granting to any new applicant that qualified. It is stated that the ex-parte applicant's objection was overruled after the 3rd Respondent erroneously interpreted theaforementioned Court of Appeal decisions and no written reasons were given to the ex-parte applicant contrary to the provisions of Section 6(4) of the Fair Administrative Action Act.

8. The ex-parte applicant avers that the permit issued to the 4th Respondent was issued unprocedurally and maliciously because the parties involved were aware of **Civil Appeal No. 117 of 2005** which restored to full hearing **Nairobi High Court Civil Case No.990 of 1999** wherein the issue of consent to the landowner to mine on the impugned mining locations is still under consideration by the High Court. The ex-parte applicant denies that judicial review proceedings are limited strictly to government agencies and excludes disputes between individuals or companies. The ex-parte applicant avers that both the 1st and 3rd Respondents acted in excess of their authority by approving and recommending for approval respectively Mining Permit No. MP/2017/0003 to the 4th Respondent over the mining locations which were already subject to an existing permits in favour of the ex-parte applicant and that due process of law was not followed by the Respondents while granting the mining permits to the 4th Respondent.

9. Mr. Kanjama learned counsel for the ex-parte applicant submitted that this Court has jurisdiction over the matter and cited the owners of the **Motor Vessel Lilian 'S' –v- Caltex Kenya Limited (1989)KLR 1,**; Re The matter of the Interim Independent Electoral Commission (2011)eKLR; Article 162(2) (b) of the constitution as read with Section 4 of the Environment and Land Court Act and Section 13 of the Environment and Land Court Act. Counsel also relied in the case of **David Ramogi & 4 Others –v- The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others (2017)eKLR** and the case of **Republic –v- Chief Land Registrar & Another (2019)eKLR**, adding that the jurisdiction of the Court also flows from Article 47 of the Constitution as read with Sections 7, 8,9 & 11 of the Fair Administrative of Action Act, 2015. Mr. Kanjama identified three main issues for determination namely, i) whether the administrative decision passed the Wednesbury Test, ii) Whether the administrative decision was made ultra vires, iii) whether the Doctrine of lis pendens applies to these

proceedings; and, iv) whether the leave granted by this Court on 14th January 2019 should operate as stay. He relied on the case of **Associated Provincial Picture Houses Limited –v- Wednesbury Corporation (1948)I KB 223**; **Council of Civil Service Unions –v- Minister for the Civil Service (1984)ALL ER 935; Pastoli –v- Kabale District Local Government Canal & Others (2008) 2 EA 300 (quoted by the ELC at Thika in the case of Samuel Njoroge Gitukui & 4 Others –v- Attorney General & Another (2017)eKLR**. Mr. Kanjama submitted that the administrative decisions herein were illegal as the impugned Mining Locations were not free for re-allocation to the 4th Respondent, thus contravening section 36 (1)(b) of the Mining Act 2016 and Articles 47, 48 and 50 (1)of the Constitution . Relying on the case of **Republic –v- Public Procurement Administrative Review Board & 2 Others ex-parte Pelt Security Services Limited (2018)eKLR**, counsel submitted that the decision was irrational as there was no plausible justification for the failure to take into consideration the fact that the question of use and occupation of the impugned mining locations is still alive and, by virtue of the Court order in **Civil Appeal No. 117 of 2015**, subject to hearing and determination by the High Court as well as **HCCC No.990 of 1999**. Counsel urged the Court to find that the decisions of the 1st, 2nd and 3rd Respondents were outrageous in their defiance of logic and in blatant contempt of the Court order in **Civil Appeal No. 117 of 2015**. He added that the Court should find that the decision failed to take into account the relevant consideration in the applicant's objection dated 19th October 2017, namely the judgment in **Civil Appeal No.10 of 2014;** that the decision was not rationally connected to the information contained in that objection; that the decision was unreasonable, unfair, irregular and contrary to section 36(1)(b) of the Mining Act 2016; was disproportionate to the existing interest of the applicant and infringed upon the applicant's rights to property as guaranteed by article 40 of the constitution; and that the decision violated the legitimate expectation of the applicant that the 1st, 2nd and 3rd Respondents would act in good faith and be just in implementing the law. He relied on the case of **Kalpana H. Rawal –v Judicial Service Commission & 4 Others (2015) eKLR**. It is the ex-parte Applicant's submission that its legitimate expectation to be treated fairly and reasonably by the 1st, 2nd and 3rd Respondents was violated by their failure to respect the provisions of Article 50 of the Constitution on the right to a fair hearing thus going against the rules of natural justice which must be observed by decision-making authorities. Relying on the case of **Municipal Council of Mombasa – v- Republic Umoja Consultants Ltd (2012) eKLR** in which the Court of Appeal held that while considering an Application for judicial review orders, the Court would only be concerned with the process leading to the making of the decision, Mr. Kanjama submitted that the decision herein was contrary to Section 4(2) of the Fair Administrative Action Act in that the Applicant was not given substitutive written reasons for the decision by the 1st Respondent and that no prior and adequate notice of the nature and reasons for the proposed administrative action were given to the applicant and that neither the applicant was accorded an opportunity to be heard and make representations regarding the administrative decision contrary to the provisions of Section 4(3)(a) and (b) of the FAAA. Further, that the applicant was not accorded an opportunity to either attend proceedings in person or in the company of an expert or to be heard contrary to Section 4(4)(a) and (b) of the FAAA. It was also the Applicant's submission that the decisions of the 1st, 2nd and 3rd Respondents were made in blatant contempt of the order **in Civil Appeal No.117 of 2005** and thus the said Respondents acted in excess of their respective jurisdiction and therefore the decision was ultra vires. The applicant's counsel relied on the case of **Republic-v- Public Procurement Administrative Review Board & 2 Others Ex-parte Rongo University (2018) eKLR** and the case of **Omar Tahir Sheikh –v- Registrar of Titles & 3 Others (2018)eKLR.** It was also submitted for the Applicant that the doctrine of lis pendens does apply to the present proceedings, namely **HCCC No.990 of 1999**. Counsel cited the case of **Mawji –v- US International University & Another (1976) KLR 185** quoted in **Grace Chemutai Koech –v- Francis Kiplangat Chebiror & 2 Others (2018) eKLR** and the case of **Naftali Ruth Kinyua –v- Patrick Thuita Gachure & Another (2015)eKLR.** It is also the ex-parte applicant's submissions that the peculiar circumstances of this case warrant that the leave granted by this Court on 14th January 2019 should operate as stay and relied on the case of **Taib A. Taib –v- Minister for Local Government & Others Mombasa Misc. A. No. 158 of 2006.** The ex-parte applicant therefore prays that the Notice of Motion dated 21st January 2019 be allowed in terms of prayers 2-10.

THE 1ST, 2ND, 3RD AND 5TH RESPONDENTS' CASE

10. In response to the motion, the 1st, 2nd, 3rd and 5th Respondents filed a replying affidavit sworn by Raymond Mutiso on 19th February 2019. It is their case that by a letter dated 31st December, 1995, the Department of Mines, while considering a written request by the applicant, Muthoni Kihara for two mining interests; a transfer of the mining claims of the late Kibugi Kihara over **Land Reference Number 12199/4** to herself and a renewal thereof following their long expiry upon his death in 1987, declined both requests unless the Landowner consented thereto. That by letter dated 8th January 1996, Muthoni Kihara Mining Company submitted a consent issued on 31st December 1994 by a Mr. Peter M. Mwachada over a parcel of land CR. 2572. Subsequently mining locations numbers 1406/1-10, 1407/1-5, 1408/1-10 and 1409/1-10 and 1439/1-4 were renewed in the name of Muthoni Kihara Mining Company. That vide letter dated 26th April 1996, Kutima Investments Limited gave notice of cessation of mining and land degradation to Mrs. Muthoni Kihara/Kihara Mining Company for carrying on mining and prospecting over their land LR. No.12199/4 without land owner consent. That Kutima Investments Limited instituted Court proceedings under civil case No. 990 of 1999 against Muthoni Kihara and commissioner of Mines and Geology in respect to the mining operations by Muthoni Kihara/Muthoni Kihara Mining Company in the suit land which had been acquired and registered in the name of Kutima Investments Limited on 13/12/1994 pursuant to a sale agreement made on 25th May 1994. They aver that going by the date of the sale agreement of 13th December, 1994 the consent submitted by Muthoni Kihara Mining Company to the commissioner of mines and Geology on 8th January 1996 that indicated it was issued on 31st December 1994 by a Mr. Peter M. Mwachada over land parcel No. CR 2572 was invalid and a forgery as the said land had already been sold. That vide a ruling of 17th January 2000 the Court issued an injunction ordering Muthoni Kihara to vacate the suit premises and stop mining and prospecting in the suit land.

11. It is stated that in the intervening period, a limited liability company, Muthoni Kihara Mining Company Limited was incorporated on 29th June 2001 and on 22nd September 2011 the Commissioner of Mines and Geology, on the recommendations of the Attorney general, proceeded to recognize the mining locations and to renew the same (each with a specific expiry date in August 2012) in favour of Muthoni Kihara Mining Company Limited as the beneficiary (and to the exclusion of Muthoni Kihara). As a result, the Landowner instituted **High Court Misc. Civil Application No. ELC NO. 84 of 2011** seeking inter alia orders of certiorari, Mandamus and prohibition to quash the Commissioner of Mines and Geology decisions and to prevent the grant or renewal of any mining locations or licenses over its land. The orders were granted by the High Court on 1st November 2013 and the Commissioner of Mines and Geology through a letter of 9th February 2016 notified the Applicants of his action to comply by removal of the five mining locations from the Mining Cadastre (electronic register)and cancellation of the mining certificates. It is the Respondents contention that the removal of the mining locations from the mining cadastre has never been contested to date, either in Court of through the appeal process envisaged under Mining Act. That being aggrieved with the High Court decision, the applicants appealed to the Court of Appeal but their appeal was dismissed. The Respondents further contend that the applicants have set on a course to try and mislead the Court by their erroneous interpretation of the judgment of the Court of Appeal and are attempting to procure a mining licence through the back door under a procedure unknown to the law which only recognized a

licensing procedure under the Mining Act. That the effect and tenor of the judgment of the Court of Appeal is to place a permanent prohibition against the grant by the department of mines of any mining rights or interests in favour of the applicants without the consent of the landowner. That there has been no consent produced to the department and that LR NO.12199/4 is private land expressly excluded bySection 37(1) of the Mining Act from mining without the consent of the landowner. It is further stated that the applicant have never complied with a public notice dated 30th August 2017 published in the Kenya Gazette in which the department of mines notified mineral rights holders or claimants under the now repealed Mining Act to reapply under the current Mining Act for fresh registration of their interest not later than 31st October 2017, subject to compliance with the statutory requirements. That instead the applicants produced a letter from the landowner expressly denying them consent. The Respondents case is that there is no current or existing mining locations capable of being reactivated in the cadastre, the same having been removed, and that the declaratory reliefs sought in that respect are made in a vacuum and incapable of being implemented. That the 4th Respondent in support of their Application for a mining permit, submitted a consent for mineral prospecting and mining on LR. No.12199/4 in form of a letter from the landowner, Kutima Investments Limited dated 9th September, 2017. That subsequently on 31st July 2018, the ex-parte applicant lodged an objection against the grant or mining rights to the 4th Respondent upon materially similar grounds as the earlier Application they made on 19th October, 2017 but after careful consideration, the objection was overruled and the mining permit granted to the 4th Respondent. The Respondents aver that the claim for compensation is unfounded as the department of mining is not aware and has not licensed and has no record of any mining activities by the applicants.

4TH RESPONDENT'S CASE

12. The 4th Respondent opposed the motion through the replying affidavit of Oscar Mwangola sworn on 13th February 2019. The 4th Respondent avers that it has a valid permit issued to it by the department of mines to mine **On Land Reference No.12199/4 Taita Taveta** and that it did obtain the consent of the landowner prior to obtaining the permit and therefore carries on its mining activities with the express consent of the landowner. The 4th Respondent states that it satisfied itself at the point of applying for consent and obtaining the permits that the locations over which it sought the same were free of any registered claims or disputes, adding that the applicants had lodged an objection against their Application which was responded to. The 4th Respondent states that Section 7(1)(m) of the now repealed Mining Act excluded private lands from mining without the consent of the landowner, while section 29 of the repealed Act limited the lifespan of a mining location to one year and that Section 37(1) of the current Mining Act, 2016 excludes private lands from mining without the express consent of the landowner. The 4th Respondent further states that the reliefs in judicial review proceedings are limited strictly to Government Agencies and exclude disputes between individuals or companies. The 4th Respondent avers that it has not infringed on any right of the applicants warranting an injunction or claim for compensation. That the ex-parte applicants are mischievously attempting to obtain mining permit by circumventing the sanctity of tittle to land, the procedure under the Mining Act, the binding judgments of the superior Court and the Court of Appeal and the exclusive vesting of minerals in favour of the state.

13. Mr. Raiji, learned counsel for the 4th Respondent submitted inter alia that the ex-parte applicant had no prior mining or any other rights over the Interested parties land when the 4th Respondent was granted consent and subsequently issued with a mining license, noting that the motion does not apply for orders of certiorari to quash the 4th Respondent's mining licence and permit. Mr. Raiji further submitted that even if the applicant had any mining rights/locations, the Application herein is res judicata as it raises issues in **Nairobi HC. Misc. Appl. No. ELC 84 of 2011 and Civil Appeal No. 10 of 2014** in which the ex-parte applicant maintained that it had some mining rights and locations in **LR. No.12199/4** notwithstanding the fact that the Interested Party, who is the registered proprietor with effect from 13th December 1994 has never granted consent for issue of the said mining rights. He referred to paragraph 38 of the Court of Appeal judgment. It is the 4th Respondent's submission that the Registration Notices and licences exhibited by the ex-parte applicant purporting to be renewals were void and cannot now be relied on by the ex-parte applicant as evidence of rights to mine in the subject land. While making reference to prayer 6 of the motion, it is the 4th Respondent's submissions that what the ex-parte applicant is asking the Court to do is to sit on appeal on the Court of Appeal judgment and find that notwithstanding the refusal of the land owner to grant it consent to mine on its land, the ex-parte applicant is the holder of the mining rights over the said mining locations. The 4th Respondent reiterates that the ex-parte applicant's case herein is the same one as before the High Court in **Nairobi HC Misc. Appl. No. ELC 84 of 2011 and Civil Appeal No. 10 of 2014;** to wit, it holds mining rights over **LR No.12199/4** notwithstanding denial of consent by the land owner.

14. It was further submitted by the 4th Respondent's counsel that the ex-parte applicant's claim is an abuse of the Court process. That the judgment in **C.A No.10 of 2014** was delivered on 9th June 2017 and by letter dated 23rd June 2017, the ex-parte applicant applied for consent from the landowner, allegedly to enable the ex-parte applicant do the renewal of the said mining location in the said land. That the Interested Party had maintained that it has never given consent to the ex-parte applicant to mine and the only consent granted by its predecessor in title was the one to Kihara Kabugi to prospect which expired with his death and that it was the Interested Party's position that even if any mining was done by the ex-parte applicant before a stop was put to the said mining by the High Court, such Mining was illegal and clandestine. It is therefore the 4th Respondent's submissions that what the ex-part applicant was seeking for the first time since 13th December 1994 (when the interested party was registered as proprietor of the subject land) was consent to legally mine on the subject land and not consent for renewal of mining locations. The 4th Respondent's submission is that it was granted consent for mineral prospecting and mining on **LR. No.12199/4** by the interested party and the permit and licence to mine granted on 14th August 2018 after determination by the 1st, 2nd and 3rd Respondents of all objections made by the ex-parte applicant. That the 1st, 2nd and 3rd Respondents were in their dismissal of the ex-parte Applicant's objection were guided by the judgment in **Nairobi HC. Misc. Appl. No. ELC 84 of 2011 and C.A. No. 10 of 2014** to which the Commissioner of Mines and Geology was a party and supported the ex-parte applicant. That the ex-parte applicant alleged in the objection proceedings and alleges in this proceedings that the 1st, 2nd and 3rd Respondents misrepresented the judgments of the High Court and the Court of appeal, yet instead of seeking interpretation of the said judgment and their enforcement either in **Nairobi HC Misc. Appl. NO. ELC 84 of 2011 or C. A. No. 10 2014** as it is legally entitled to do, it is seeking to re-litigate the same claims before this Court which is an abuse of the Court process. The 4th Respondent relied on the case of **Kamunye & Others –v- Pioneer General Assurance Society Ltd (1971) EA 263; John Florence Maritime Services Ltd & Another –v- Cabinet Secretary for Transport and Infrastructure & Others (2015)eKLR; Solomon M'Rura Mathiu –v- Stanley M'Ikiugu M'Ikiara (2009)eKLR; and Municipal Council of Mombasa –v- Republic & Another (2002)eKLR**. It is the 4th Respondent's submission that its permit and licence was given procedurally and the only objection was made by the ex-parte applicant which was considered and rejected, and that what the ex-parte applicant seeks in the proceedings is for this Court to issue to it a licence contrary to the provisions of the Mining Act which gives such power to the 1st, 2nd and

3rd Respondents subject to the Applicant fulfilling the strict condition set out in the Act which must include the consent of the landowner under Section37 (1) of the Mining Act, 2016. The 4th Respondent submits that the Court has no jurisdiction to do so.

THE INTERESTED PARTY'S CASE

15. The Interested Party opposed the motion and filed the replying affidavit sworn on its behalf by Saul Joel Mwangolo on 3rd April 2019 and filed in Court on 5th April 2019. The Interested Party avers that it is the undisputed registered absolute owner of **LR No.12199/4 Taita Taveta**. That it acquired the property by purchase on 25th May, 1994 in vacant possession free from any registered overriding interest or encumbrances. The Interested Party states that upon purchase, it enjoyed undisturbed and uninterrupted peaceful and quiet possession and use of the property until late 1995 when it was brought to its attention a request by Mrs. Muthoni Kihara t/a Muthoni Kihara Mining Company for transfer of alleged Mining rights supposedly inherited from the late Kihara Kibugi, and upon such transfer, renewal of the same in favour of Mrs. Muthoni Kihara. That in reply, the predecessor to the 2nd Respondent, the commissioner of mines required Mrs. Muthoni Kihara to produce a letter of consent from the registered owner of the property. That no such written consent from the Interested Party was sought or obtained, and none was produced. Instead, an alleged consent from a previous owner, Mr. Peter M. Mwacheda was tendered to the 2nd Respondent. The Interested Party contends that the purported consent had no legitimacy because the property had long been sold and transferred to the Interested Party. That the sale took place on 25th May, 1994 and the transfer was registered on 13th December, 1994, while the purported written consent belatedly issued in unclear circumstances on 31st December 1994.

16. Being apprehensive that the 2nd Respondent was likely to proceed and grant mining interests over the property without its prior written consent, the Interested Party instituted Nairobi HCCC No. 990 of 1999 seeking declaratory orders and injunctions. That on 17th January 2000 the interested Party obtained an interlocutory injunction restraining Muthoni Kihara from entering or remaining upon the land and the commissioner of mines was also restrained from granting any mining interests over the property without the consent of the Interested Party. The suit was subsequently dismissed on a technicality on 26th April 2005 but the Interested Party appealed, and the suit was restored. The Interested Party avers that the civil reliefs sought in that suit are on the face it, overtaken by events.

17. The Interested party states that at all material times Muthoni Kihara has never been in occupation of any part of the land nor has she put up to any infrastructure nor engaged in any mining activities on the land. It further states that sometime in September 2011 while the orders of injunction in **HCCC No. 990 of 1999** were in force, Muthoni Kihara somehow obtained a mining licence from the commissioner of mines. In the licence, a new party known as Muthoni Kihara Mining Company Limited was introduced as a beneficiary of the license. The Interested Party avers that the mining licence was obtained without following the law or the Interested Party's knowledge and consent contrary to Section 7 (1)(m) of the repealed Mining Act. The Interested Party avers that it immediately instituted **Nairobi HC Misc. Civil Appl. No. ELC 84 of 2011** for Judicial Review orders of certiorari and prohibition. The proceedings culminated in the judgment delivered on 1st November, 2013 in which the newly granted mining rights were quashed and the commissioner of mines prohibited from granting any mining interests without the consent of the Interested Party. The ex-parte applicants appealed against the orders of the High Court and in the judgment in **Civil Appeal No. 10 of 2015** delivered on 9th June 2017, the Court of Appeal affirmed in all respects the decision of the High Court, except that the trial judge had in vain, quashed a long expired and extinct renewed licence whose lifespan in law was one-year duration. The Court of appeal stated that the order of prohibition as granted shall remain in force. It is the interested party's case that there is no justification for the current motion which it termed an abuse of the Court process. That the orders sought are all res judicata and cannot be granted in a vacuum without the involvement of the interested party, the administrative process of the 2nd Respondent. The interested party denies that it has colluded with the 4th Respondent to unlawfully expropriate the mining interests of the ex-parte applicant adding that no such interest exist on record or in law. They also deny the alleged substantial losses incurred and state that no mining infrastructure or industry as described by the Applicant exists on the property or at all. The Interested party prays for the dismissal of the motion with cost.

18. Mr. Odhiambo learned counsel for the interested party reiterated the facts in the replying affidavit and submitted that the motion amounts to a fragrant abuse of the Court process because this Court, sitting as a judicial review Court, can only invoke its special jurisdiction, statutorily concerned and restricted to a review of the decision making process of an administrative or quasi-judicial body. That the Court is not at all required to concern itself with the merits of the decisions made or to substitute its own opinion with that of the 2nd Respondent. Further, it is submitted that it is not open to the ex-parte applicant to cunningly and mischievously seek to escape from the salient principle of res judicata and urged the Court to enforce the principle of res judicata and bring to an end the long and protracted litigation. The interested party submitted that the Court should not act in vain contrary to established law. This is because, it is submitted, the ex-parte applicant holds no mining interest over the property following procedural and valid removal of their impugned claims from the mining records of the 2nd Respondent. It was further submitted that the Court has no jurisdiction to entertain the civil claims for declaratory orders and monetary compensation. Counsel for interested party relied on the case **of Allan George Njogu –v- National Bank of Kenya Limited (Eldoret ELC No.384 of 2012); Kenya Revenue Authority & 2 Others –v- Darasa Investments Limited (2018)eKLR; Judicial Service COmmisison –v- Mbalu Mutava & Another (2015)eKLR; Funzi Island Development Ltd & 2 Others –v- County Council of Kwale & 2 Others (2015)eKLR**.

DETERMINATION

19. Having analyzed the pleadings and the submissions made, the first question for determination is whether in light of the decisions in **Nairobi HC Misc. Appl. No. ELC 84 of 2011 and Civil Appeal No. 10 of 2014,** the issues raised herein are res judicata. It has been submitted by the Respondents and the Interested Party that the proceedings herein are materially similar issues of law and fact that were raised, fully canvassed and conclusively adjudicated upon in the two previous cases. In **Lotta –v- Tanaki (2003) 2EA**, it was held inter alia that the objects of the doctrine of res judicata "is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issues by a Court of competent jurisdiction in the subject matter of the suit. The scheme ….therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit, (ii) the former suit must have been between the same parties or privies claiming under them, (iii) the parties must have litigated under the same title in the former suit, (iv) the Court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit. "

20. **In Miscellaneous Civil Application No. ELC 84 of 2011** the Applicant was Kutima Investments Limited (which is the Interested Party herein). The Respondent was the commissioner of mines and Geology while the ex-parte applicants in this motion were the 1st and 2nd Interested parties. The 4th Respondent herein was not a party to the said proceedings. It has however been held by Courts that the mere fact that a new party has been added cannot ipso facto be a basis for evading the doctrine. In **Republic –v- Commissioner of Mines and Geology ex-parte Kutima Investments Limited & 2 Others (2013) eKLR, Odunga J referred to the case of Mburu Kinyua –v Gachini Tuti (1978) KLR 69 (1976-8001KLR 790** and **Churanji Lal & Co –v- Baijee (1932)14 KLR 28** where it was held inter alia that:

> "***However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the Application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura –v- MJE Morgan (1961)EA 462 the then East African Court of Appeal stated as follows:***
>
> ***….The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceeding is no answer to a defence of res judicata…. The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact……***"

21. Res judicata is provided under Section 7 of the Civil Procedure Act. It is now well settled that judicial review Applications are neither criminal nor civil in nature. In **Commissioner of Lands –v- Kunste Hotel Ltd Civil Appeal No.234 of 1995** and **Sanghani Investment Limited – v- Officer** in charge **Nairobi Remand and Allocation Prison (2007) EA 354** it was held that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply since it is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. In **Republic –v- Commissioner of Mines & Geology ex-parte Kutima Investments Ltd & 2 Others** (supra), Odunga, J stated inter alia: "Therefore strictly speaking Section 7 of the Civil Procedure Act does not apply to judicial review proceedings. In fact in **Republic –v- Judicial Service Commission ex-parte Pareno (2004) IKLR 203-209** it was held that res judicata does not apply to judicial review. See also **Re: National Hospital Insurance Fund and Central Organization of Trade Unions (Kenya)HCMA No.1747 of 2004 (2006) I EA 47."** The Court went on and stated "This, however does not mean that the Court is powerless where it is clear that by bringing proceedings, a party is clearly abusing the Court process. Whereas res judicata may not be invoked in Judicial Review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a Court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the Court and would therefore not be entertained. The court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by Section 3A of the Civil Procedure Act as such but merely reserved thereunder…

> **"Accordingly the Court in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of res judicata would be applicable…."**

22. The question that follows is whether the above stated principles apply to this case. In Misc. Civil Appl. No. ELC 84 of 2011, the Ex-parte Applicant, Kutima Investments Limited (which is the Interested Party herein) sought the following substantive orders

> 1. .
>
> 2. .
>
> **3.** .
>
> **4. That an order of certiorari be granted removing into the High Court for the purpose of being quashed the decision of the Respondent (contained in the letter dated 22nd September, 2011) to grant and/or review mining locations and/or mining rights or licences to the 2nd Interested Party over the Applicant's Land known as land reference number 12199/4, Taita Taveta.**
>
> **5. That an order of Certiorari be granted removing into the High Court for the purpose of being quashed the decision of the Respondent (contained in the letter dated 22nd September, 2011) to grant or renew mining locations and/or mining rights of licences to the 2nd interested party over the Applicant's land known as Land Reference Number 12199/4, Taita Taveta and the certificate of Renewal issued in respect of claims numbered 1-4 and 1-10 be similarly quashed.**
>
> **6. That an order of prohibition be granted prohibiting the Respondent, his officers, employees, servants or agents and any other person acting under him from issuing or purporting to issue any prospecting or mining rights or licences to the Interested parties or to any other person over the Applicant's land known as land reference number 12199/4, Taita Taveta without the consent of the Applicant.**
>
> **7. That an order of prohibition be granted prohibiting the interested parties, their officers, employees, agents, servants or any other person claiming through them from entering or remaining upon the applicant's land known as land reference Number 12199/4, Taita Taveta**

8. **That costs of this suit be provided for**.

23. As already stated, the Respondent and the interested parties in **Misc. Civil Appl. No. ELC 84 of 2011** are the 1st Respondent and the ex-parte applicant in this proceedings. They both opposed the Application. In their replying affidavits the ex-parte applicant deposed inter alia that they were the registered owner of mining locations 1406, 1407, 1408, 1409 and 1439 located on LR No.12199/4, Taita Taveta. Upon hearing the parties, the Court (Odunga, J) allowed the Application and delivered a judgment dated 1st November, 2013 in which orders of certiorari and prohibition were issued. That Court held inter alia, that the Respondent had no power to renew the impugned licence without the consent of the landowner.

24. It is not in dispute that the ex-parte applicant herein was aggrieved by the judgment and order of Odunga, J and filed **Civil Appeal No. 10 of 2014** before the Court of Appeal at Nairobi. The Appeal against the order of Certiorari quashing the decision of 22nd September, 2011 and the order of prohibition was dismissed with costs to Kutima Investments Limited. However, the appeal against the order of certiorari to quash the renewal certificates which certificates had expired was allowed and the order set aside. In its judgment, the Court of Appeal concluded by stating that "***for avoidance of any doubt, the order of prohibition as granted shall remain in force….***"

25. The present Application is in respect to the administrative decision of the 1st Respondent made on 20th July 2018, acting on the recommendation of the 3rd Respondent made on 6th July 2018 to grant mining permit to the 4th Respondent over mining locations No.1407/1-5 and 1439/1-4 on LR No.12199/4 Taita Taveta. In my considered view, the issues raised herein are res judicata. It is clear that in both **Nairobi HC Misc. Appl NO.ELC 84 of 2011** and **Civil Appeal NO. 10 of 2014** the ex-parte applicant maintained that it had some mining rights and locations in LR No.12199/4 Taita Taveta. Both the High Court and the Court of Appeal dealt with the requirement for consent of the land owner over mining rights and locations as well as issuance or renewal of licenses. The ex-parte applicant contends that the impugned decision was materially influenced by an error of law namely the misinterpretation of the Court of Appeal judgment in **Civil Appeal No. 10 of 2014**. I am afraid what the ex-parte applicant is asking this Court to do is to sit on appeal on the Court of Appeals judgment and find inter alia, that notwithstanding the refusal of the land owner to grant it consent to mine on its land, the ex-parte applicant is the holder of the mining rights over the said mining locations. I am afraid I cannot pretend to sit on appeal on the Court of appeal's judgment, even the High Court one. In my view, the ex-parte applicant should have sought interpretations of the said judgments and their enforcement either in **Nairobi Misc. Appl. No. ELC 84 of 2011** or **Civil Appeal No. 10 of 2014** instead of seeking to re-litigate the same claims before this Court. The ex-parte applicant's action no doubt is an abuse of the Court process. The ex-parte applicant is trying to bring before this Court, in another way and in the form of a new cause of action, a dispute which has already been put before other Courts of competent jurisdictions and which has been adjudicated upon.

26. In the the result I find that the orders which commends to be made which I hereby make is the order striking out the notice of motion application dated 21st January 2019 with costs to the Respondents and the interested party.

DATED, SIGNED and DELIVERED at MOMBASA this 22nd day of October 2019.

_____

C.K. YANO

JUDGE

IN THE PRESENCE

Ms. Kibogy holding brief for Kanjama for ex-parte Applicant

Mwandeje for 1st, 2nd, 3rd and 5th Respondents

Raiji for 4th Respondent

Odhiambo for interested party