REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 3 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY FOR

PETROLEUM & MINING.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

CEMTECH LIMITED.....3RD RESPONDENT

AND

DENNIS RUTO KAPCHOK (Suing on his

Behalf and on behalf of the Citizens of

Tamkal, Kiwawa, Alale, Ortum Sebit,

Pusel and Chepchoi, Iyon Iyang River,

Marich and Endough in

West Pokot County.....EX-PARTE APPLICANT

AND

THE COUNTY GOVERNMETN OF

WEST POKOT.....1ST INTERESTED PARTY

SIMBA CEMENT LIMITED.....2ND INTERESTED PARTY

RULING

1. This is a Ruling on a Preliminary Objection dated **3/5/2019** and filed in court on the same date. It has been raised by the 3rd respondent and 2nd interested party to the Amended Chamber Summons Application dated **27/3/2019** that the orders sought therein cannot be granted for the grounds that I replicate herein below verbatim:

> **(1) This Honourable Court has no jurisdiction to entertain the Amended Chamber Summons Application as it has been brought in breach of the MANDATORY provisions of Section 9 (2), (3) and (4) of the Fair Administrative Action Act, No. 4 of 2015.**
>
> **(2) This Honourable Court has no jurisdiction to entertain the Amended Chamber Summons Application as it has been brought in breach of the mandatory provisions of the Mining Act, No. 12 of 2016.**

(3) The present Application, being an Application for Leave to Apply for Judicial Review Orders, and being an Application by a private citizen, is fatally defective as it has been expressed to be brought by the Republic as the Applicant and yet an Applicant by the Republic can ONLY be brought by the Attorney General (who is the 2nd Respondent herein).

(4) The said Amended Chamber Summons Application should be struck out with costs.

2. The preliminary objection was opposed by the Ex-parte Applicant through his grounds of opposition filed on **14/5/2019**.

3. The 3rd respondent and 2nd interested party filed submissions on **13/5/2019** in support of their preliminary objection. In respect of the 1st ground they aver that **Section 9(2)** of the **Fair Administrative Action Act** provides that the High Court or Subordinate Court shall not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. It is their submissions that under **Section 9(3)** of the Act if the court is not satisfied that the remedies refers to in **Subsection 2** have been exhausted it shall direct that the applicant shall first exhaust that remedy before instituting proceedings under **Subsection 1.** In their view the provisions of **Section 9 (2)** and **9(3)** are couched in mandatory terms and this court does not have discretion to detour from those provisions. They cite the case of **James Mweri Gahunyo & 6 Others -vs- The Commissioner for Co-operative Development & 2 Other [2019] eKLR** in support of that proposition. Further they state that the question before court is whether there exists an internal mechanism for appeal or review under the **Mining Act** and whether such mechanism for appeal or review has been exhausted before the institution of these proceedings. In their view **Section 157** of the **Mining Act** provides for an appeal procedure and a party aggrieved by any decision order or decree made or given under the powers vested in the Cabinet Secretary may appeal to the High Court within 30 days. It is submitted that the mining licences granted to the 3rd respondent amount to a decision within the meaning of **Section 157** of the **Mining Act** and the proper mode of challenging that decision is by way of an appeal against the decision to the High Court and not a judicial review application to this court.

4. The objectors further aver that the *ex-parte* applicants have not shown that they appealed to the High Court against that decision and, if so, what the outcome of the decision was and therefore by reason of failure to exhaust the statutory appeal mechanism this court is barred from considering an application for judicial review orders.

5. The objectors aver that the mechanism under the **Mining Act** is adequate to resolve the applicants' grievance. In their view these judicial review proceedings are in breach of **Section 9(2), 9(3)** and **9(3)** of the **Fair Administrative Action Act** for failing to exhaust the mechanism set out under **Section 157** of the **Mining Act.**

6. The objectors' further submission is that the application is defective for listing the Republic as the applicant. In their view an application for leave to file judicial review proceedings should be filed in the name of the party seeking to challenge an administrative decision and only the substantive application for judicial review ought to be brought in the name of the Republic as the applicant. They aver that naming the Republic as the applicant goes to the substance of the application and not just the form and the application should be struck out on that ground.

7. The 1st and 2nd respondents filed submissions in support of the objectors' preliminary objection. They cited **Republic -vs- Minister in the Office of the President Provincial Administration and Internal Security & 2 Others Ex-parte Francis Mbuthia Kamau** for the proposition that where a statute creates an obligation and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner. It is their submission that **Section 157** takes away or limits the jurisdiction of this court in matters of this nature as it's only the High Court which is contemplated by that Act as a court of first instant and only on appeal within a specified period.

8. The 1st and 2nd respondents have also extended their argument the issue of the definition of exceptional circumstances. They cite the case of **R -vs- Chief Constable of the Merseyside Police Ex-parte Calveley 440 and Harley Development Inc. -vs- I.R.C [1996] WLR 727 and R -vs- Secretary of State for the Home Department Ex-parte Swati [1986] 1 ALL E.R**.

9. I have already indicated that this court does not need to delve into the issue of exceptional circumstances as no application for exemption under **Section 9(4)** has been presented before court.

10. Lastly on the issue of the inclusion of the Republic as an applicant in the title to the application the 1st and 2nd respondents agree entirely with the submission made by the objectors.

11. The submissions of the 1st interested party in support to the notice of preliminary were filed on **13/5/2019**. Briefly the gist of those submissions are that this court lacks jurisdiction for the reasons already stated above in the submissions of 1st and 2nd respondents and the objectors. He maintains that notwithstanding **Article 162(2)** of the **Constitution of Kenya 2010**, the proper construction of Section **157** of the **Mining Act No. 12 of 2016** reviews that it is the High Court's jurisdiction that should be invoked. He cites the case of **R -vs- Commissioner of Border Control Ex-parte Jayraj Impex [2019] eKLR** for his proposition that the parties have to settle their disputes as required by the statutory procedure under the **Mining Act.**

12. In the 3rd respondent's view the objection regarding title to the application is merited and the application is fatally defective.

13. The *ex-parte* applicant's response to the objection is as follows: that the intulement of the proceedings in the name of the Republic is not fatal as the same is remediable through an amendment. He cites the case of **Republic -vs- National Environment Management Authority ex-parte Coral Drive Homes Ltd 2012 eKLR.**

14. On the issue of whether the existence of alternative dispute resolution mechanisms is a bar to judicial review proceedings the applicant cites **Cortec Mining Kenya Ltd Vs Cabinet Secretary Ministry of Mining & 9 Others 2017 Eklr** and submits that notwithstanding the

provisions of the Mining Act providing for reference of a dispute to a Minister and be heard through the Mineral Rights Board, the 1st respondent declined or neglected to respond to the applicant's objection and demand that he be heard by the Mineral Rights Board. He refers to exhibits in his affidavits to support this averment. He states that his efforts to have the dispute resolved under **Section 37** of the **Mining Act** were frustrated and he can not therefore be faulted in approaching this court, and can not be held at ransom by the respondent's inaction. He submits that the appeal procedure suggested by the objectors and the 2nd interested party is not applicable in this case as the appeal under **Section 157** relates to a matter under **Sections 155** and **156** of the Act and not an objection to an application for a grant of a licence as in the instant case.

Determination.

Issues for determination

15. The issues arising for determination in the instant application are as follows:

> ***(a) Whether this court has jurisdiction to hear and determine this matter.***
>
> ***(b) Whether these proceedings are defective for want of compliance with the law.***
>
> ***(c) What orders should issue?***

16. The case of **Owners of the Motor Vessel Lillian "S" vs Caltex Kenya Ltd 1989 KLR 1** is quoted in this regard. It is correct that a court should examine the issue of jurisdiction as a preliminary point in any suit since it can not proceed to determine all the other issues arising if it has no jurisdiction.

17. It has been submitted that the mining licences granted to the 3rd respondent amount to a decision within the meaning of **Section 157** of the **Mining Act** and the proper mode of challenging that decision is by way of an appeal against the decision *to the High Court* and not a judicial review application to this court. The applicant's position is that the appeal under **Section 157** relates to a matter under **Sections 155** and **156** of the Act and not an objection to an application for a grant of a licence as in the instant case.

18. It is said by the objectors that even if this court enjoys the status of a superior court established under **Article 162** of the Constitution the net effect of the provisions of the constitution which circumscribe its jurisdiction is to restrict it to land matters and that **Sections 9(2) (3)** and **(4)** of the **Fair Administrative Actions Act** and **Section 157** of the **Mining Act** have the effect of clawing-back, suspending or ousting its jurisdiction.

19. First, was the decision on an objection to the application for a grant of a licence a matter a decision that was subject to an appeal under **Section 157** of the Act?

20. Section 157 of the Act provides as follows:

> **"157. Appeals**
>
> **Any person aggrieved by any decree, order or decision made or given under the powers vested in the Cabinet Secretary may appeal within thirty days to the High Court."**

21. The provisions of **Section 37** of the **Mining Act** which the applicant states he attempted to comply with read as follows:

> **"37. Mineral rights on private land**
>
> **(1) A prospecting and mining rights shall not be granted under this Act with respect to private land without the express consent of the registered owner, and such consent shall not be unreasonably withheld.**
>
> **(2) For the purpose of subsection (1), consent shall be deemed to be given for the purposes of this Act where the owner of private land has entered into-**
>
> > **(a) a legally binding arrangement with the applicant for the prospecting and mining rights or with the Government, which allows for the conduct of prospecting or mining operations; or**
> >
> > **(b) an agreement with the applicant for the prospecting and mining rights concerning the payment of adequate compensation.**
>
> **(3) Where consent is granted prior to any change in land ownership, such consent shall continue to be valid for as long as the prospecting and mining rights subsists.**

22. I do not find any provision in **Section 37** which the applicant relies on that directs a grievance or objection to the Minister's decision under the Act. The provisions applicable to a challenge of a Minister's decision under the Act therefore are in **Section 157** of the Act.

23. The provisions of **Section 157** set out above are general and they do not restrict the application of that section to a decision order or decree made pursuant to any specific other provisions. In my view the provisions of **Section 157** are sufficiently general in nature and cover virtually any decision made by the Minister under the Act, a decision on a grant or denial of a licence being one of them.

24. Having stated as above does the failure of the applicant to subject himself to the process under **Section 157** render these proceedings fatally defective? There are many decisions that provide that the statutory procedure provided for must be exhausted before court action **See Karume -vs- R., Harrikissoon -vs- Attorney General)**

25. In the case of **Republic v National Environmental Management Authority [2011] eKLR- Nairobi Civil Appeal No. 84 of 2010, (Omolo, Onyango Otieno, & Visram, JJ.A)** the court held as follows:

> **"We agree with Mr. Ngatia that the issue raised in the Appellant's notice of motion were in the domain of public law. But we do not accept that once a matter falls within the public law domain, judicial review is the only way to litigate upon it or it must be through the judicial review process. As we pointed out earlier, Mr. Ngatia did not contend that the matter fell outside the jurisdiction of the Tribunal specifically created to deal with disputes concerning the environment. The Tribunal itself is a public body created by statute to administer the appeal process under the Act; it cannot deal with matters concerning private law for instance. The learned Judge was merely weighing the issue of whether the High Court was in a better position to deal with the matter than the Tribunal. She dealt with the speed or pace at which the Tribunal would be able to resolve the matter and compared that with the speed or pace which would be adopted by the busier courts. She dealt with the expertise available in the Tribunal as against the High Court and such like matters and having taken all those considerations into account, she concluded that the matter ought to have been dealt with by way of an appeal rather than by way of judicial review. The Judge backed up her decision with authorities such R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD [1993] 1 ALL E.R 530. HORSHAM DISTRICT COMMISSION, ex parte WENHAM [1955] 1 WLR 680; HARLEY DEVT INC V. COMMISSION OF INLAND REVENUE [1996] 1 WLR 727; R V. WANDSWORTH COUNTY COURT [2003] 1 WLR 475 and the local case of JAMES NJENGA KARUME V. CR, 192/1992.**
>
> **The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge." (emphasis mine.)**

26. It appears then that the mere existence of provisions for alternative dispute resolution *per se* in a statute do not automatically and fully oust the jurisdiction of this court to handle a dispute once lodged before it by an applicant in the form of judicial review as in this case. This court has jurisdiction notwithstanding such provisions. In addition, the suitability and expedition inherent in that procedure or lack thereof are matters this court is entitled to consider in determining whether it should address the dispute and make a determination thereof.

27. However, it is notable that the objectors' submissions are in preference of an appeal under **Section 157** of the Act being filed in the High Court in respect of the Minister's decision. The 1st and 2nd respondents' concern is that though the applicant was admittedly entitled to elect to invoke any of the dispute resolution mechanisms under **Section 154** of the Act he chose this court, and having approached this court as a court of first instance, the applicant chose the wrong court. They cite the cases of **R -vs- Minister in the Office of the President 2013 eKLR**.

28. This being a court of equal status to the High Court, in my view the only burden this court must discharge is to satisfy itself as to whether the dispute falls within the purview of **Article 162** of the Constitution and **Section 13** of the **Environment and Land Court Act,** and having perused those provisions, I am certain that it does.

29. The question of jurisdiction having been settled as above then, how should this court approach the provisions of **Section 9(2)** and **(3)** of the **Fair Administrative Action Act** in the light of the facts of this case? Those provisions state as follows:

> **"9. Procedure for judicial review**
>
> **(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**
>
> **(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3)The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4)Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.**

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

30. With reference to **Section 9(4)** which the objectors admit provides for an exemption to the provisions of **Section 9(3)** they submit that for the exemption to apply the applicant must make an application for exemption and the application must demonstrate exceptional circumstances necessitating the grant of an exemption yet no application for exemption was made by the applicants. The objectors cite the case of **Republic -vs- Kenya National Examination Council & Another Ex-parte Board of Management Ortum Secondary School, Losharipo Managat Boaz & 319 Others eKLR and James Mweri Gahunyo (supra).**

31. In the instant application, I do not deem it necessary to delve into the issue of what constitutes *exceptional circumstances* under **Section 9(4)** of the **Fair Administrative Action Act** because the applicants have not shown that they sought an exemption under that Section.

32. It is evident that the FAA Act views judicial review as a necessity in remedying unfair action to a subject by the authorities; however, it is in my view the correct position that the provisions of **Section 9(2**) of the FAA claw back in a limited manner this court's jurisdiction in judicial review in that they provide that the same is not to be exercised in respect of an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. If the court is not satisfied that the remedies referred to in **Subsection (2)** have been exhausted, it shall direct that applicant shall first exhaust such remedy before instituting proceedings under **Sub-section (1).**

33. In these proceedings the applicant points to attempts to comply with the Act; however those attempts are said to have been conducted under a provision that does not provide for dispute resolution, **Section 37** whose relevance to dispute resolution mechanism as far as the Act is concerned is doubtful.

34. This court observes that the challenge here raised is in respect of the gazette notices on the basis of unconstitutionality as there was allegedly no public participation before the gazettement thereof. These being gazette notices it is not at once clear what remedy the 1st respondent would be able to offer the applicant were to lodge review proceedings before him, and, granted that licences have reportedly issued and consultations between the 1st respondent and third parties affected by the dispute would have to be undertaken, this court is doubtful that any presentation of this dispute before the 1st respondent would result in greater expedition than that resulting from the handling of this dispute by the court under these proceedings as filed.

35. In the case of **Republic Vs NEMA Ex Parte Coral Drive Luxury Homes Ltd 2012 eKLR** the court stated as follows:

"Discussing the issue of availability of alternative remedy as a bar to judicial review, the learned authors of H.W.R. Wade & C.F. Forsyth, Administrative Law, 9th ed. 2004 at p. 703 observe that:

"In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal,..."

36. The final and the most crucial observation of this court is that the discontent of the objectors is based on the fact that **Section 154** provides for an appeal, and that, to the High Court.

37. The **Interpretation and General Provisions Act** defines "**court"** means any court of Kenya of competent jurisdiction. The term *"court"* in contrast to the *"High Court"* is what is employed in **Section 154** of the Mining Act. There is no specific provision in the Mining Act cited directing that objections to issuance of licences must be directed to the Minister.

38. As I have already found that the dispute in these proceedings is fit for determination by this court. Having found that this dispute falls within the preview of the **Article 162 2(b**) of the Constitution and **Section 13** of the Environment and Land Court Act this court, being competent, must not divest itself of jurisdiction and turn away the applicant from the seat of justice simply for the reason that the proceedings were commenced by way of judicial review in it as a court of the first instance rather than in the High Court.

39. As to whether the application is wrongly intituled, and the case of Farmers Bus Service is cited by the 1st and 2nd respondents. They aver that the Chamber Summons for leave should be instituted in the name of the applicant and not the Republic and that the *"Republic"* should be involved only after the leave has been granted.

40. The *ex parte* applicant cites the case of **Republic Vs NEMA Ex Parte Coral Drive Luxury Homes Ltd 2012 eKLR** for the proposition that such an inclusion of the Republic in the initial proceedings that gave rise to the leave granted by this court is not fatal to the claim. It was stated as follows in the **Ex Parte Coral Drive Luxury Homes Ltd** case (supra):

"Of course, the objection as to the incorrect intulement of the Chamber Summons in the name of the Republic as Applicant may be erred by amendment without any prejudice to the parties. Further the matter is past that post because leave of the court has been granted and all that remains is for the Applicant to file the Notice of Motion in the name of the Republic which is deemed to have an interest in the lawful administration of the organs of the State. Moreover, under Order 2 rule 14 of the Civil Procedure Rules "no technical objection may be raised to any pleading on the ground of want of form."

41. In the case of **Republic V Chairman, Meru Central District Ldt & 2 Others Ex-Parte Gerald Rimberia M'Riria & Another [2012] eKLR,** it was observed as follows by the court (Justice J. A. Makau):

> **"I therefore find that though the application for leave may be defective for having been brought in the name of the Republic instead of the name of the applicant, leave having been granted and main motion having been filed, the same cannot be attacked by way of preliminary objection on point of law. There has been no application before this court to set aside the leave already granted for good reason. The application for leave as of now is spent, it cannot be revisited but both parties have to contest the subsequent application for judicial review on the basis of the grounds and reliefs set out in the respective statement filed with the application for leave."**

42. In the light of the above holdings by the court in earlier cases, I therefore find the objection based on the wrong intitulement of the chamber summons has no merit as that is not a fatal defect in the proceedings and it can be rectified by amendment.

43. The upshot of the foregoing is therefore that I find no merit in all the limbs of the preliminary objection and I hereby strike out the preliminary objection dated **3/5/2019** with costs to the applicant.

Dated, signed and delivered at Kitale on this 21st day of November, 2019.

MWANGI NJOROGE

JUDGE

21/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

COURT

The Ruling read out in open court at 2.45 p.m.

MWANGI NJOROGE

JUDGE

21/11/2019