



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC PETITION NO. 1 OF 2017

**IN THE MATTER OF ARTICLE 3 (1) 10, 20, 22, 23, 28, 35, 40,42,43,56(a),
69,70,159 AND 162 (8) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF POSSIBLE INFRINGEMENT AND OR ONGOING
INFRINGEMENT OF ARTICLE 28, 35, 40, 42, 43 (1) (a) AND 56 (a) OF
THE CONSTITUTION OF KENYA 2010 IN THE MATTER OF RULES 3,
4, AND 23 OF THE CONSTITUTION OF KENYA**

AND

MOHAMED HUSSEIN HAJI.....PETITIONER

VERSUS

ABDINOOR SHARIFF AHMED.....1ST RESPONDENT

MIDROCK CO. LTD.....2ND RESPONDENT

THE NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....3RD RESPONDENT

THE DIRECTOR OF MINES.....4TH RESPONDENT

THE CABINET SECRETARY IN CHARGE OF

MINING.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

JUDGEMENT

The petition herein was filed by the petitioner Mohamed Hussein Haji seeking the following relief:

1. A declaration that the petitioner is entitled to information from the respondents verify and confirm whether constitutional and statutory regulatory requirements were complied with before the 1st and 2nd respondents began their mining activities in the Ali Jibril area, within Wabari ward in Garissa County.

2. An order compelling the respondents to provide the information referred to in 1. Above to both the petitioner and this honourable court within a specified time period.
3. A declaration that if the respondents have not complied with all the Constitutional and Statutory regulatory requirements before mining activities by the 1st and 2nd respondent started in the Ali Jibril area within Wabari ward in Garissa County the said mining activities are illegal.
4. A declaration that if the respondents have not complied with all the Constitutional and statutory regulatory requirements before mining activities by the 1st and 2nd respondents started in the Ali Jibril area within Wabari ward in Garissa county they have infringed or are likely to infringe on the petitioner's rights and those of the surrounding community under Articles 28, 40, 42, 43(1) (a) and 56(a) of the Constitution of Kenya 2010.
5. An order of certiorari to issue to bring to this court for purposes of quashing any decision by the 3rd to 5th respondents to issue the 1st and 2nd respondents with any permit and/or license. If all the Constitutional and statutory regulatory requirements were not met before mining activities by the said 1st and 2nd respondent started in the Ali Jibril area, within Wabari ward in Garissa County.
6. An order of prohibition prohibiting the 3rd to 5th respondents from issuing any licence or permit to the 1st and/or 2nd respondents to conduct any mining or mining related activities within the republic of Kenya if they don't comply with the Constitutional and statutory regulatory requirements.
7. An order of Mandamus compelling the 3rd to 5th respondents to ensure that all the constitutional and Statutory regulatory requirements are met by the 1st and 2nd respondents before any further mining activities by the said 1st and 2nd respondents can continue in the Ali Jibril area within Wabari ward in Garissa County.
8. A permanent injunction restraining the 1st and 2nd respondents from engaging in mining and mining related activities in any part of the Republic of Kenya. If they do not comply with all the Constitutional and statutory regulatory requirements.
9. A supervisory order do issue to the 3rd to 5th respondents for them to report back to this honourable court on the progress of compliance with the orders issued herein.
10. An order compelling the 1st and 3rd respondents to restore their original state or at least to an environmentally apt status the areas they have degraded through mining in the Ali Jibril area within Wabari ward in Garissa County under the supervision of the 3rd to 5th respondents.
11. An order that the respondents do pay damage to the petitioner.
12. An order that costs of this suit be borne by the respondents.
13. Any other order that this honourable court may deem fit to issue for the interest of justice.

The petitioner filed the said petition simultaneously with a Notice of Motion dated 5th November, 2017 under Articles 23 and 165 of the Constitution of Kenya, Rules 34 and 23 of the Constitution of Kenya practice and procedure Rules 2013, Section 3, 13, 18 and 19 of the Environment and Land Court Act, Act No. 19 of 2011.

The application is brought under certificate of urgency seeking the following orders

1. THAT this application be certified urgent for hearing ex-parte at the first instance its service to the respondents notwithstanding.
2. THAT pending hearing and determination of this application and/or petition the 1st and 2nd respondents whether by themselves, their agents, their employees and or servants be stopped by way of a conservatory order from mining operations, engaging in mineral dealing, excavating, and/or engaging in any activity of land use that degrades the environment within the Ali Jibril area of Wabari ward in Garissa County.
3. THAT the 3rd to 5th respondents to ensure compliance with order No. 2 above with the help of Garissa Police Commander.
4. THAT costs of this application be provided for.
5. According to the petitioner the 1st and 2nd respondents have in the recent past started mining of gypsum in the Ali Jibril area within Wabari ward in Garissa County.
6. According to the petitioner and the residents of the said area, the activities undertaken by the 1st and 2nd respondents have witnessed serious environmental degradation of the said area symptomized by interalia, loss of vegetation cover, large holes, stagnant water, destruction of scenery, increased atmospheric dust, dust storms, land noise and uncontrolled disposal of suspected toxic waste.
7. The petitioner and the residents of the area are apprehensive that the mining activities being undertaken by the 1st and 2nd respondents is in

contravention of the Constitution, the Mining Act, and the Environment Management and Co-ordination Act specifically as to the requirements of public participation, licensing environmental impact assessment(s) and case of communal land.

8. Upon placing the Notice of Motion application before the duly court and after due consideration by the duly judge, the court found that the application raises serious issues that require to be addressed urgent. As such, the application was therefore certified urgent to be heard in the first instance and directed to be served for interparties hearing.

9. When the application came up for interparties hearing on 14/12/2017, the petitioner / the averments contained in the petition, the grounds shown on the face of the application and the supporting affidavit.

10. In particular the petitioner argues that the mining activities being undertaken by the 1st and 2nd respondents have not only contravened the statutory regulatory provisions but have also violated his Constitutional rights and fundamental freedoms as provided in the following Articles:

11. Article 3(1) obligates every person to respect uphold and defend the Constitution.

12. Article 10 provides for National values and principles of governance. The petitioner is therefore seeking to know whether there was public participation before the 1st and 2nd respondents began their mining activities and whether issues of human dignity inclusivity, human rights and protections of the marginalized were looked into.

13. The petitioner/applicant will also seek to know whether the 3rd to 5th respondents have been guided by the national values and principles with regard to the mining operations of the 1st and 2nd respondents.

14. The petitioner further explained the provisions of Articles 20,21,22,23,28,35,40,42,43(1), 56(a), 69, 70, 159 and 162 in the same have been allegedly violated and for infringed upon by the 1st and 2nd respondents and sought to have the orders granted by this Honourable court as prayed.

15. The 1st and 2nd respondent instructed the firm of GARANE & SOMANE ADVOCATES, who filed a replying affidavit in opposition to the said application sworn by Abdinoor Shariff Ahmed on 14/12/2017.

16. In his replying affidavit the first respondent avers that the applicant is guilty of material non-disclosure to the effect that he has business interest in the mining of gypsum in the same area. .

17. The first respondent further contends that there is no environmental degradation disclosed as the appellant has not attached any document by an environmental expert evidencing the same.

18. The first respondent also deponed that the application is premature as the applicant has not exhausted all alternative remedies.

19. The first respondent further argues that they have indeed been carrying on mining business under a contract with Afro Pride Limited who have special mining rights granted by the commission of mines and Geology. He attached a copy of the said license marked "Asa 002"

20. The Hon. Attorney General filed a memorandum of appearance and also filed a replying affidavit through one Bernard K. Kimeto who is a Senior Superintending Inspector of mines.

21. In his replying affidavit, the said Bernard K. Kimeto deponed that Ministry of Mining has not received any application for a prospective or mining licence in Garissa or elsewhere within the County from either the first or second respondents.

22. The said officer further deponed that according to the mining Act No.12 of 2016 through its regulations, the mining (license and permit) Regulations 2017 (Clause 4) provides that all applications for mineral rights shall be made through the On Line Mining Cadastre(OMC) in order for them to be considered for grant.

23. That the officer also deponed that the 4th respondent maintains a register under the provisions of Section 191 of the mining Act no. 12,2016 of all companies or entities who have applied for and received license for mining within Garissa and Tana River County. He attached copies of the register for the two counties marked "BKK1".

24. Mr. Bernard K. Kimeto further deponed that the fourth and fifth respondents deny having issued or consented to issuing any license to the first and second respondents or taking part in any public participation in the mining operations as alleged in paragraph 9 of the petition.

25. The officer also avers that any Gypsum mining operation in Garissa by the first or second respondent is illegal and a contravention of section 202 of the mining Act.

26. When the petition came up for interparties hearing counsels highlighted the affidavits both in support and opposition to the application without citing any authorities thereto.

27. I have considered with tremendous care the issue in question in this petition.

28. The subject matter of the dispute in this petition is to stop the mining operations of Gypsum minerals within Ali Jibril area in Wabari

ward in Garissa County.

29. According to the applicant, the alleged mining operations by the 1st and 2nd respondent is in contravention of the construction, the management and co-ordination Act.

30. The 1st and 2nd respondent admit that they have been carrying on mining activities under a contract with Afro pride limited who have a special mining rights granted by the Commission of mines and geology under license No. "Asa 002".

31. Those averments by the 1st and 2nd respondents have been vehemently denied by Bernard K. Kimeto who is a Senior Superintendent of mines in his replying affidavit sworn on 4th December, 2017. The officer has even attached a copy of register of all companies and entities who have applied for and received license for mining within Garissa and Tana River Counties.

32. The 3rd, 4th, 5th and 6th respondents also through their replying affidavit sworn by Bernard K. Kimeto has stated that the mining Act No. 12 of 2016 through its regulation (License and permit) Regulation 2017 (Clause 4) provides that all applications for mineral rights are required to be made on line through the One Line Mining Cadastre (OMC) in order for them to be granted.

33. Those averments on oath have not been controverted by way of a further affidavit.

34. I also note that the land in which the alleged Gypsum mining operation is being carried out in Jibril area within Wabari ward in Garissa County is land held under the community land Act No. 27 of 2016.

35. Community land is defined under Article 63 (1) (2) (3) and (4) as follows:

"63 (1) Community Land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community interests.

(2) Community land consists of:

(a) Land lawfully registered in the name of group representatives under the provisions of any law.

(b) Land lawfully transferred to a specific community by any process of law.

(c) Any other land declared to be community land by an Act of permanent and

(d) Land that is:-

(i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.

(ii) Ancestral lands and lands traditionally occupied by hunter-gatherer communities or

(iii) Lawfully held as trust land by the County Governments.....

36. Though the 1st and 2nd respondents alleged that their mining activities in Jibril area within Wabari ward are under a contract with Afro pride Africa limited who have special mining rights granted by the commissioner of mines and geology. The commissioner of mines and geology have not sworn an affidavit confirming that indeed he issued such a grant.

37. Since the land in question is held under community land, it is not conceivable how the commissioner of mined and Geology could issue a license on land that is held communally without consulting the inhabitants of the area by way of public participation.

38. Under Article 63 (3) the law provides as follows:

"63 (3) any unregistered community and shall be held in trust by county government on behalf of the communities for which it is held."

39. The land in question is an unregistered community land held in trust by the Community Government of Garissa on behalf of the communities for which it is held. There is no evidence that the same was compulsory acquired by the Natural Government before leasing it for purposes of prospecting or mining there is no indication that the County Government of Garissa was consulted before such intention to lease was granted.

40. I have noted that this petition is also promised under Article 42 of the Constitution which provides thus:-

"42 Every person has the right to a clean and healthy environment, which included the right:

(a) To have the environment protected for the benefit of present and future generations through legislative.....

(b) To have obligations relating to the environment fulfilled under Article 70.”

41. As a state officer charged with the responsibility of ensuring that sustainable development is upheld especially in ensuring that land use activities and practices have undesirable consequences such as land degradation and environmental pollution. I shall apply the precautionary principle of international environmental law which provides as follows:

“Environmental measures must anticipate, prevent, and attack the causes of environmental degradation where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

42. I have seen the affidavit of the applicant and the photographs which have been attaching which in my view demonstrates a real threat to the environment to the residents of Jibril area within Wabari ward, Garissa County.

43. In the circumstance and for the reasons I have elaborated herein above, I find that the petitioners have proved on a balance of probabilities that the respondents have infringed or are likely to infringe their constitutional rights to a clean and healthy environment so as to invite this court to issue the following orders:

44. That the 1st and 2nd respondents by themselves their agents their employees and/or servants be and are hereby stopped by way of a conservatory order from mining operations, engaging in mines support, engaging in mineral dealing, excavating and/or engaging on any activity or land use that degrades the environment or likely to degrade the environment within Jibril area of Wabari ward within Garissa County.

45. That the 3rd to 5th respondents to ensure compliance with order (44) above with the help of Garissa County Police Commander.

46. Each party to bear his own costs of this petition.

Read and delivered in the open court this 31st day of January, 2018

Hon. E.C Cherono (Mr.)

ELC Judge

In the presence of

1. Mr. Faruq – I stand 2nd respondents

2. Ijabo – Court clerk

MR. FARUQ: I wish to apply for a certified copy of the judgement and the proceedings.

COURT: The respondents to be supplied with a certified copy of the judgment and the proceedings upon payment of the requisite charges.

Hon. E.C Cherono (Mr.)

ELC Judge