



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT AND LAND PETITION NO. 1 OF 2018

IN THE MATTER OF ARTICLES 3 (1), 10, 20, 21, 22, 23, 28, 35, 40, 42, 43(1), 56 (a), 69, 70, 159 AND 162 (b) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF POSSIBLE INFRINGEMENT, AND/OR ONGOING INFRINGEMENT OF ARTICLES 28, 40, 42, 43 (1) (a), AND 56 (a) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULES 3, 4 AND 23 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTIONS 5, 20, 34, 35, 38, 42, 43, 44, 53, 101, 109, 110, 123, 136, 176, 177, 178, 179, 180, 181 AND OTHER RELEVANT SECTIONS OF THE MINING ACT, ACT NO. 12 OF 2016 AND THE SUBSIDIARY LEGISLATION THERETO

AND

IN THE MATTER OF SECTIONS 3, 7, 9, 11, 58, 59, 68, 108 AND OTHER RELEVANT SECTIONS OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, ACT NO. 9 OF 1999 AND THE SUBSIDIARY LEGISLATION THERETO

BETWEEN

MOHAMED HUSSEIN HAJI.....PETITIONER

VERSUS

ISSA KUNO.....1ST RESPONDENT

AFRO PRIDE.....2ND RESPONDENT

THE NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....3RD RESPONDENT

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

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGEMENT

INTRODUCTION

1. This petition has been brought by Mohamed Hussein Haji, the Petitioner herein seeking the following reliefs

- (1) A declaration that the Petitioner is entitled to information from the Respondents to 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) A declaration that the Petitioner is entitled to information from the Respondents to verify and confirm whether the 1st and 2nd Respondents have complied with the special conditions of the Special Prospecting and Exploration Grant issued to the 2nd Respondent on 24/5/2016.**
- (3) An order compelling the Respondents to provide the information referred to in 1 and 2 above to both the Petitioner and this Honourable Court within a specified time period.**
- (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 Respondent started in the Ali Jibril area, within Wabari Ward in Garissa County the said mining activities are illegal.**
- (5) A declaration that if the 1st and 2nd Respondents have not complied with the special conditions of the Special Prospecting and Exploration Grant issued to the 2nd Respondent on 24/5/2016, their mining exploration, and prospecting activities are illegal.**
- (6) A declaration that if the Respondents have not complied with all the constitutional statutory regulatory requirements before mining activities by the 1st and 2nd Respondent 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.**
- (7) A declaration that if the 1st and 2nd Respondents have not complied with the special conditions of the Special Prospecting and Exploration Grant issued to the 2nd Respondent on 24/05/2016 they have infringed, or are likely to infringe on the Petitioner's rights, and those of the surrounding community, under Article 28, 40, 42, 43 (1) (a) and 56 (a) of the Constitution of Kenya, 2010.**
- (8) An order of Certiorari do 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 licence if all the constitutional and statutory regulatory requirements were not met before mining, exploration, and prospecting activities by the 1st and 2nd Respondent started in the Ali Jibril area, within Wabari Ward in Garissa County and/or if the 1st and 2nd Respondents have not complied with the special conditions of the Special Prospecting and Exploration Grant issued to the 2nd Respondent on 24/05/2016.**
- (9) An order of Prohibition prohibiting the 3rd to 5th Respondent 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 all the constitutional and statutory regulatory requirements.**
- (10) 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, exploration or prospecting activities by the said 1st and 2nd Respondents can continue in the Ali Jabril area, within Wabari Ward in Garissa County.**
- (11) 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.**
- (12) 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.**
- (13) An order compelling the 1st and 2nd Respondents to restore to their original state or at least to an environmental apt status the areas they have degraded through mining in the Ali Jibri area, within Wabari Ward in Garissa County under the supervision of the 3rd to 5th Respondent.**
- (14) An order that the Respondents do pay damages to the Petition.**
- (15) An order that costs of this suit be borne by the Respondents.**
- (16) Any other order that this Honourable Court may deem fit to issue for the interest of justice.**

2. According to the Petitioner, he is an adult of sound mind and a resident of Garissa and Nairobi Counties.

3. The Petitioner contends that him and the residents of Jibril area, within Wabari Ward in Garissa County have in the recent passed witnessed serious environmental degradation of the said area symptomized by loss of vegetation cover, large holes, stagnant water, destruction of scenery, increased atmospheric dust, dust storms loud noise and uncontrolled disposal of suspected toxic waste.

4. The Petitioner further contends that these activities are as a result of mining gypsum activities being carried out by the 1st and 2nd Respondents in the specified areas above stated.
5. It is further stated by the Petitioner that the above mentioned activities is done by the 1st and 2nd Respondents in contravention of the Constitution, the Mining Act and the Environmental Management and Co-ordination Act specifically as to the requirements of public participation licensing environmental impact assessment(s) and the use of communal land.
6. The Petitioner further contends that though the 2nd Respondent was issued with a special licence on 24/05/2016, the same was only limited to prospect and explore for gypsum and not mining.
7. In view of the matters aforementioned, the Petitioner contends that there is a real danger that his rights under Articles 28, 40, 42, 43 (1) (a) and 56 (a) of the Constitution of Kenya, 2010 and those of other residents residing within Jibril area of Wabari Ward within Garissa County – are being infringed upon and/or are likely to be infringed upon.
8. Filed simultaneously with the petition is a Notice of Motion under certificate of urgency dated 15th January 2018. In that application the Petitioner is seeking a conservatory order stopping the 1st and 2nd Respondents from mining operations, engaging in mines support, engaging in mining dealing, excavating, and/or engaging in any activity or land use that degrades the environment within the Ali Jibril area of Wabari Ward in Garissa County.
9. That application is supported by this petition and a supporting affidavit sworn by the Petitioner on 15th January, 2018. The Petitioner has also attached an affidavit sworn by one Bernard K. Kimeto in another case before this Honourable Court being Petition No. 1 of 2017 (Garissa).
10. In that affidavit referred to herein above, the deponent Bernard K. Kimeto averred that the Mining Act No. 12 of 2016 through its regulations the Mining (Licence and Permit) Regulations 2017 (Clause 4) provides that all applications for mineral rights shall be made through the online mining cadaster (OMC) in order for them to be considered for grant.
11. The deponent of that affidavit further deponed that the Director of Mines maintains a register under the provisions of section 191 of the Mining Act No. 12 of 2016, of all companies and/or entities who have applied for and received licence for mining within Garissa and Tana River County. He annexed a copy of the said register for the two counties marked BKK1.
12. The said Bernard K. Kimeto deponed that any gypsum mining operations in Garissa County by the 1st or 2nd Respondents is illegal and a contravention of section 202 of the Mining Act.
13. In reply to the petition and the Notice of Motion, the 1st and 2nd Respondents filed a joint replying affidavit sworn by Issa Kuno, the 1st Respondent on 2/2/2018. In that replying affidavit, the 1st Respondents contend that he is a businessman dealing with mines, prospecting and selling mines. He attached a letter from the County Director of Environment, National Environment Management Authority (NEMA) Garissa County.
14. The 1st Respondent further averred that according to the terms of his licence, he is allowed to prospect for minerals in the prescribed area and that the Petitioner herein had even approached him requesting permission to carry out mining activities in the area which is the subject of this petition but he declined forcing him (Petitioner) to send elders with the same petition which he also declined. He later learnt that the Petitioner was doing mining activities within Ali Jibril area where he had exclusive rights.
15. The 1st Respondent further deponed that on 17th January 2018, he was informed by the firm of Garane & Somane Advocates that an order had been issued by this Honourable Court restraining him from mining operations within the Jibril area.
16. The 1st Respondent averred that the said order is causing him great hardship inconvenience and financial loss. He submitted that he has heavily invested in excess of Kshs. 20,000,000/= (20 million) which are now in limbo as a result of the court order.
17. Prior to filing the replying affidavit, the 1st and 2nd Respondents filed a Notice of Motion under Order 40 Rule 4 Civil Procedure Rules and section 3A Civil Procedure Act seeking to set aside, vary and/or review the conservatory order issued on 16/1/2018 when the Petitioner filed the Notice of Motion simultaneously with this petition. That Notice of Motion is supported by an affidavit by Issa Kuno, sworn and filed on 24/01/2018.
18. In his supporting affidavit, the 1st Respondent deponed that he learnt of an order of this Honourable Court deposited with the firm of Garane & Somane Advocates. On visiting the said firm of advocates and upon being shown the said court order, he was shocked since he has a licence to deal with mines, prospecting, mining selling and excavating which he has done for the last ten (10) years.
19. The 1st Respondent also deponed that he has leased and purchased equipment machineries and other tools for the purposes of operating the said business. In the grounds shown on the face of the said Notice of Motion the 1st and 2nd Respondents through their advocates on record submitted that the Petitioner obtained the conservatory orders irregularly without disclosing that he is not actually a resident of Ali Jibril area and that the same should therefore be set aside, varied and/or reviewed.
20. When the two applications came up for interparties hearing the counsels for birth the 1st and 2nd Respondents on one hand and the Petitioner on the other hand agreed to have the two applications determined by way of written submissions. It was also agreed by consent that the two applications be consolidated.

21. On 9th February 2018, the Petitioner filed his submissions in which he submitted that he has demonstrated a prima facie case against the 1st and 2nd Respondents that there is a real danger that the Petitioner's rights and those of other residents of Al Jibril area are already being infringed upon under Articles 28, 40, 42, 43 (1) (a) and 56 (a) of the Constitution of Kenya, 2010. As regards the 1st and 2nd Respondents application dated 24/1/2018, the Petitioner submitted that the 1st and 2nd Respondents have not met the legal threshold applicable in discharging varying and/or setting aside of orders. The learned counsel cited the following cases in support;

1) Al Yusra Restaurant Ltd v Kenya Conference of Catholic Bishops & Another Petition No. 312 of 2014 eKLR.

22. The subject of this petition as shown in the pleadings is a community land. Community in the preamble of the Community Land Act No. 27 of 2016 is defined as a conscious distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes:

- a) **Common ancestry.**
- b) **Similar culture or unique mode of livelihood.**
- c) **Socio-economic or other similar common interest.**
- d) **Geographical space.**
- e) **Ecological space; or**
- f) **Ethnicity.**

23. Community land means holding or using land by members of a community in undivided shares.

24. Section 8 of the Community Land Act provides for the process in which a community interest in land can be recognized through registration.

25. Where a community land has not been registered in accordance with section 8 of the Community Land Act No. 27 of 2016, the County Government shall hold in trust all land on behalf of the communities for which it is held.

26. Section 6 (6) of the Community Land Act provides as follows:

“6 (6) Any transaction in relation to unregistered community land within the County shall be in accordance with the provisions of this Act and any other applicable law.”

27. The complaint by the Petitioner in this petition is that the 1st and 2nd Respondents mining activities in Jibril area in Wabari Ward within Garissa County is not only illegal and unlawfully but also violates his constitutional right to a health and clean environment.

28. I have considered the arguments by both the Petitioner and the Respondents. I have also considered the submissions both in support and in opposition by counsels appearing for both parties. Article 42 of the Constitution of Kenya, 2010 provides as follows:

“42 Every person has the right to a clean and healthy environment which includes the right:

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 96.....”

29. Article 22 (1) (2) also provides as follows:

“22 (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest court proceedings under Clause (1) may be instituted by:-

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of; or in the interest of a group or class of persons.**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members...”**

30. The Petitioner in this case need not be a resident or a member of the community in question to institute this petition. It was within his

right to bring this petition in public interest.

31. The land in question is a community land which falls within the ambit of customary law ownership which is neither public nor private. Before any interest is acquired by any individual, the persons who ordinarily use that particular land must be consulted.

32. In this case, there is no consent sought and obtained to conduct mining operations in Jibril area from the County Government of Garissa who are the custodians of the suit land on behalf of the inhabitants of the said area.

33. It has not been shown that the benefits from the mining of gypsum from Jibril area which is a community land goes to the benefit of the residents or the County Government of Garissa on behalf of the inhabitants pursuant to the provisions of section 6 of the Community Land Act No. 27 of 2016.

34. In my view, development that threatens life is not suitable development and it must be halted. In environmental law, intergenerational equity involves the application of equity within the present and future generation such that each member has an equal right to access the earth's natural and cultural resources.

35. The copy of register of all companies and entities who have applied for and received licence for mining within Garissa and Tana River counties attached by the Petitioner has not been challenged. The said register does not include the names of the 1st and 2nd Respondents.

36. The land in question has not been acquired by the government from the community concerned by way of compulsory acquisition. The land belongs to the community and held by the County Government of Garissa in trust for the affected community. There is no indication that consent was sought and obtained from the said County Government of Garissa.

37. I have noted that the national values and principles of governance were not observed before the mining activities by the 1st and 2nd Respondents started in the Jibril area and that the said activities are therefore illegal and unlawful.

38. I have noted with concern that the 1st and 2nd Respondents have not complied with the provisions of Article 10 of the Constitution of Kenya, 2010 by failing to observe the national values and principles of governance such as patriotism, national unity, sharing and devolution of power, the rule of law, democracy, public participation, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability and suitable development.

39. In light of the matters aforementioned I find this a suitable case to apply the precautionary principle of international environmental law as contained in the 1990 Bergen Ministerial Declaration on Sustainable Development 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.”

40. In the circumstances, and for the reasons I have given above, I find that the Petitioner has proved on a balance of probabilities that the 1st and 2nd Respondents have infringed and/or are likely to infringe his rights and that of the residents of Jibril area, Wabari Ward within Garissa County so as to invite this Honourable Court to issue declaratory and/judicial review orders as follows:

(a) A declaration that the 1st and 2nd Respondents have not complied with all the constitutional and statutory regulatory requirements before mining activities commenced in Jibril area within Wabari Ward in Garissa County and that the activities being undertaken in the abovementioned area has infringed and/or are likely to infringe on the Petitioner's rights and those of the surrounding community.

(b) An Order of certiorari do issue to bring into this Honourable Court for purposes of quashing any decision by the 3rd and 5th Respondents to issue to the 1st and 2nd Respondents with any permit and/or licence.

(c) An order of mandamus do issue 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 mining exploration or prospecting activities are conducted by the 1st and 2nd Respondent

(d) Each party do bear his own costs of this petition.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 21ST DAY OF MARCH, 2018

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HON. E. C. CHERONO

E.L.C. JUDGE

In the presence of:

1. Mr. Faruq for the 1st and 2nd Respondents

2. Ijabo – Court Clerk

3. Applicant/Advocate (absent)