Mangeli & 4 others (Suing on Their Own Behalf and on Behalf of all the Owners of Parcels of Land and/or Squatters Situate In Mchingirini, Mivumoni and Mafisini Villages and Who Were Affected by the Defendants Mining Activities) v Base Titanium Limited (Land Case E003 of 2023) [2024] KEELC 3813 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3813 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

LAND CASE E003 OF 2023

AE DENA, J

APRIL 12, 2024

BETWEEN

DAVID MANGELI ..... 1ST PLAINTIFF

BENARD MUSYOKA KIVINDU [SUING AS BENEFICIARY OF THE PARCEL OWNED BY SAMUEL OPON AUMA] ..... 2ND PLAINTIFF

ISAAC MUSYOKA ..... 3RD PLAINTIFF

STANLEY KITAVI ..... 4TH PLAINTIFF

MONICA MUTUA MULINGE [SUING AS THE ADMINISTRATOR OF THE ESTATE OF FREDRICK MUTUA MULINGE] ..... 5TH PLAINTIFF

SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE OWNERS OF PARCELS OF LAND AND/OR SQUATTERS SITUATE IN MCHINGIRINI, MIVUMONI AND MAFISINI VILLAGES AND WHO WERE AFFECTED BY THE DEFENDANTS MINING ACTIVITIES

AND

BASE TITANIUM LIMITED ..... DEFENDANT

RULING

Background

1. The Plaintiffs vide a Plaint filed on 19/7/23 averred that at all material times relating to this suit they were the legal and or beneficial owners of various parcels in Mchingirini which were affected by the Defendants mining activities. That subsequently the Plaintiffs were compensated but, on the basis, that there were no minerals in their land and for resettlement. They accepted compensation and

resettlement at Kshs. 100,000/- with the understanding that the issue of actual compensation and resettlement plans would be discussed latter and when formal agreements would be executed. That the Plaintiffs subsequently in 2019 through the media learnt that the Defendants had now confirmed availability of mineral ore on the Plaintiffs land contrary to the earlier representation where the issue was concealed from the Plaintiffs. That compensation offered to neighboring parcels with lower quality mineral ore was higher than the one offered to the Plaintiff and where interim payment was at 250,000 compared to the Kshs.100,000/ = paid to the Plaintiffs.

2. That in August 2021 the Defendants offered some of the residents in Mchingirini Kshs. 460,000/ = per acre the amount paid to the neighbors above. That vide letter dated 13/9/21 the Plaintiffs formally demanded from the Defendants adequate and fair compensation whereupon the matter was referred to the Msambweni liaison Committee where several hearings were undertaken and finalized on 9/12/21 .The Plaintiffs impeach the said proceedings for lack of impartiality and aver they have lost confidence in obtaining a fair ruling. That the proceedings of the Liaison Committee were illegal, partisan, unlawful, wrongful and void abnitio and thus not binding upon the Plaintiffs. Further that the Defendant failed to apply for an EIA and Environmental Management Plan nor carry out resettlement Action Plan for Mchingirini, Mivumoni and Mafisini Villages at the initial relocation, compensation and resettlement in 2015 but only did so in the year 2021 further cementing the illegalities of actions undertaken in the year 2015.

3. In their prayers the Plaintiffs seek a declaration that their relocation and payments made in 2015 before the mandatory EIA, EMP and RAP were fraudulent, illegal, unconstitutional. That the Kshs.100,000/ = per acre was grossly inadequate and should be 460,000/= per acre totaling Kshs 37,306,000.00/=.

4. The basis of this ruling is a Notice of Preliminary Objection dated 26/7/2023 and which raises the following grounds;

    i. This Honourable court lacks the jurisdiction to hear and determine this suit.

    ii. The suit offends the provisions of article 159[2] of *the Constitution* of Kenya 2010 read with sections 153,154,155 and 157 of the *Mining Act* 2016 Laws of Kenya.

    iii. The suit as lodged before this honourable court is an abuse of the court process.

    iv. In light of the above this court lacks jurisdiction to dispose of the suit instituted vide a plaint dated 19th July 2023.

    v. In addition to the above, the suit is statute barred under the provisions of *Limitation of Actions Act* cap 22 laws of Kenya.

    vi. The Defendant prays that the entire suit be dismissed with costs

    vii. Further grounds to be canvassed at the hearing hereof.

5. The Preliminary objection was canvassed by way of written submissions which parties filed and exchanged.

6. The Defendants submit that the Plaintiffs have failed to exhaust alternative remedies under sections 153,154,155 and 157 of the *Mining Act* and Article 159(2) of *the Constitution* as to alternative forms of dispute resolution. That the Plaintiffs ought to have filed their claim for upward review of the compensation to the Cabinet Secretary. Citing section 157 of the *Mining Act*, it is urged that this court has only appellate and not original jurisdiction when it comes to matters of compensation under the said Act. The court is invited to down its tools and halt all the proceedings herein as established in the

case of Owners of Motor Vessel Lilian V Caltex Oil (Kenya)Ltd (1989) eKLR. The defendant did not submit on the issue of Limitation but reserved its right to raise the same in its substantive pleadings.

7. Referring to paragraphs 19 – 22 of the Plaint, the Plaintiff submits that it is misleading for the Defendants to state that the Plaintiffs did not exhaust the alternative remedies when it is clearly pleaded by the Plaintiff that the matter was before the Msambweni Liaison Committee. It is further submitted that even if the alternative remedies had not been exhausted the Court of Appeal has held that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies See Chief Justice and President of Supreme Court of Kenya & Another V. Bryan Mandila Khaemba (2021) eKLR. It is submitted that there is evidence of gross manipulation and deliberate efforts to deny the Plaintiffs their Constitutional and legal rights at the instance of the Defendants and this court remains the only remaining avenue for the said issues to be resolved and addressed.

8. The Plaintiffs further submit that this court has original jurisdiction by dint of Article 162 (1) (2) (b) read together with section 13 of the ELC Act 2011 and section 154 (c) of the *Mining Act*, in respect of disputes relating to Mining, minerals and other natural resources including compensation. That under section 154 the Cabinet Secretary was only but one of the alternatives. That the use of the word 'MAY' under section 154 was permissive and not mandatory. That the legislature wanted to limit the jurisdiction of this court under the *Mining Act* it would have made express provisions in the said Act. That sections 153, 154 and 157 are not ouster clauses to the jurisdiction of the ELC.

9. That the actions complained of arose in 2015 when the applicable law was the *Mining Act* Cap 206 of 1987 wherein the various disputes relating to Mining were wholly vested upon the jurisdiction of this court and the Commissioner of Mining. It is stated that section 67 thereof did not exclude the jurisdiction of ordinary courts. The objection is termed a mere technicality meant at delaying justice and the court is invited to invoke the provisions of article 159 (2) (a) (b) (d) and (e).

10. The Defendant filed supplementary submissions dated 17/11/23 in response to the above which I have considered.

Analysis and Determination

11. Having considered the foregoing I find the main issue for determination are;-

    a. Whether the Plaintiffs were required to exhaust the alternative dispute resolution mechanisms under the *Mining Act* before filing the present suit at the Environment and Land Court.

12 The Plaintiffs in the suit filed before this court seek the following verbatim reliefs;-

    a. A declaration that their relocation and payments made in the year 2015 before the mandatory Environment Impact Assessment, Environment Management Plan and Resettlement Action Plan were done, were fraudulent, illegal, unconstitutional, unlawful, wrongful, void ab initio and a nullity.

    b. A declaration that the payments made to the Plaintiffs of Kshs.100,000.00 per acre was grossly inadequate, discriminatory, fraudulent, illegal, unconstitutional, unlawful, wrongful and a further declaration that the Plaintiffs are entitled to adequate and full compensation for their respective parcels at the rate of Kshs. 460,000.00 per acre.

    c. Prompt payment of the sum of Kshs. 37,306,000.00 as pleaded above, less the amounts paid earlier and based on the aforesaid sum of Kshs. 100,000.00 per acre.

    d. Costs and incidental to this suit.

13 What is the gist of the above prayers? My perusal of the plaint herein and the above prayers clearly point towards a claim for an upwards review of the compensation allegedly made to the Plaintiffs in the year 2015. To this end I respectfully agree with the Defendant. The compensation claims and the relocation of the Plaintiffs arose from the Mining activities of the Defendant.

14 It is trite that the jurisdiction of a court is conferred by *the Constitution* or by statute or by both. It is contended by the Defendant that sections 153,154,155 and 157 of the *Mining Act* 2016 provide for a framework for the resolution of disputes arising from mining undertakings. I find it necessary to extract the said provisions verbatim from the Act.

15 Section 153.

(1) Where the exercise of the rights conferred by a mineral right –

a. Disturbs or deprives the owner or any lawful occupier or user of the land or part of the land;

b. Causes loss of or damage to buildings and other immovable property;

c. Causes damage to the Water table or deprives the owner of water supply;

d. In the case of land under cultivation or grazing of domesticated animals, causes any loss of earnings or sustenance suffered by the owner or lawful occupier of the land;

e. A demand or claim for compensation may be made to the holder of the mineral right to pay prompt, adequate and fair compensation to the lawful owner, occupier or user of the land in accordance with the provisions of this Act.

(2) .....

(3) .....

(4) .....

(5) Where a demand or claim for compensation is disputed, the parties to the dispute shall seek to resolve the dispute amicably by agreement reached through negotiations in good faith.

(6) Where a dispute cannot be resolved through negotiations within a reasonable period of time, either party to the dispute may refer the matter to the Cabinet Secretary for a determination in accordance with section 129 of this Act.

(7) .....

(8) The Cabinet Secretary in consultation with the community and the National Land Commission shall in such manner as may be prescribed, ensure that the inhabitants or communities who prefer to be compensated by way of resettlement as a result of being displaced by a proposed mineral operation are settled on suitable alternate land, with due regard to their economic wellbeing, social and cultural values and the resettlement is carried out in accordance with the relevant physical planning law.

(9) The cost of resettlement under sub-section (8) shall be borne by the holder of the mineral right.

154 Any dispute arising as a result of a mineral right issued under this act may be determined in any of the following manners –

a. By the Cabinet Secretary in the manner prescribed in this Act;

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

c. Through a court of competent jurisdiction.

16 Section 155 states,

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

a. A dispute of the boundaries of an area held under a prospecting or mining right;

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

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

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

e. Assessment and payment of compensation where provided for under this Act.

17 Section 156 is on the procedure for referring and determination of disputes by the Cabinet Secretary.

18 Section 157 provides that; -

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.

19 The Defendant takes the position that the above mechanisms which are available under the *Mining Act* have not been exhausted and that the Plaintiffs grievances ought to have been directed to the Cabinet Secretary and not this court. This dispute in my understanding arose in the year 2021 way after the Plaintiffs were resettled and compensated albeit according to them on interim basis awaiting final compensation. They discovered the defendant had made an offer of Kshs. 460,000/- per acre to some of the Mchingirini villagers who had decided not to relocate which was higher than the 100,000/- paid to those who had relocated under the initial arrangements. Two demand notices dated 13/9/21 and 26/11/21 were issued to the Defendant through the firm of H.M Lugogo & Company Advocates. Thereafter the matter was referred to the Msambweni Liaison Committee where it was heard and Ruling reserved for 13/01/22 which was allegedly adjourned indefinitely on 24/2/22. It is pleaded that the Liaison Committee verdict was manipulated and gave unfavorable decision in favor of the Defendant and was contrary to the evidence tendered. That vide a letter dated 1/3/22 the same law firm referred the said dispute to the Cabinet Secretary Ministry of Petroleum & Mining but no action was taken thus this suit. Mr. Tindika for the Plaintiffs urges that the alternative dispute resolution mechanisms were exhausted.

20 I think this will be the right place to have a look at the doctrine of exhaustion and what it entails. This has been a subject of a myriad discussions up to the Supreme Court of Kenya as shown by the authorities cited by counsel for the Defendant. Below is an extract from the Supreme Court of Kenya in the case of Abidha Nicholus -Versus- Hon. The Attorney General & Others SC//// Petition No. E007 of 2023__

(81) On our part, in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (NGOs Co-ordination Board) we outlined the doctrine of

exhaustion of administrative remedies and adopted our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR where we held that:

...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasijudicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

(82) In the above decision, we furthermore emphasized that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by *the Constitution* and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.

(83) This position was also adopted by the Court of Appeal in R v National Environmental Management Authority, CA No 84 of 2010; [2011] eKLR that we persuasively relied on in NGOs Co-ordination Board (supra). The Court of Appeal in doing so, observed that;

"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...". [Emphasis ours]

(84) The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law. (Emphasis mine)

21 I have already laid out the relevant sections of the Act. The demand notices herein in my view appear to have been issued pursuant to the Provisions section 153(1) (e), the reference to the Liaison Committee was pursuant to section 154 (b) to wit mediation for amicable resolution of the dispute. That following the decision of the later the matter was referred to the Cabinet Secretary which is also provided for under the provisions cited. The procedure for dealing with complaints and or disputes before the Cabinet Secretary has been laid out under section 156 of the Act. According to the Plaintiffs the Cabinet Secretary was moved but has never responded and prompting the present proceedings.

22 Based on the foregoing it is my view in the circumstances of this case the Plaintiffs have tried to exhaust the procedures under the *Mining Act*. This court also notes the dictum in Abidha Nicholus -Versus- Hon. The Attorney General (supra) does not state that jurisdiction is ousted but the ideal situation is to give the alternative forums the first priority. This in my view has been given by the Plaintiffs who submitted to the jurisdiction of both the Liaison Committee as an alternative dispute resolution mechanism as well as the communication to the Cabinet Secretary seeking his intervention and who has kept mum.

23 The question that arises therefore is what recourse do they have, seat back and wait perpetually for a response from the Cabinet Secretary Ministry of Mining? The answer in my view is in the negative. I say so because firstly the Supreme Court above also envisages that under exceptional circumstances the court can resort to any other process known to law. Where else could the Plaintiff get redress? The only recourse the Plaintiffs had was to approach the court and access justice which they have done. This

court is emboldened by Article 48 of *the Constitution* of Kenya which commands access to justice for all persons and which I will uphold. It is also trite that justice delayed is also justice denied.

24 The court has also noted the Defendant's contention that the Plaintiffs have failed to follow the procedure by submitting the complaint by way of a letter and not a Memorandum. In my view the letter clearly enumerates what the dispute entails and the office of Cabinet Secretary herein cannot hide under technicalities to abscond from responding and or acting on a complaint.

25 The court will not address the issue of the suit being statute barred under the provisions of *Limitation of Actions Act* cap 22 laws of Kenya for I note that parties did not pursue the same.

26 For the foregoing reasons this court finds the preliminary objection lacks merit and is hereby dismissed with cost to the Plaintiffs.

27 Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 12TH DAY OF APRIL 2024.

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A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Tindika for the Plaintiff

Ms. Onesmus for the Defendant

Mr. Daniel Disii – Court Assistant