



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 105 OF 2015

BETWEEN

CORTEC MINING KENYA LIMITED APPELLANT

AND

THE CABINET SECRETARY,

MINISTRY OF MINING 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....3RD RESPONDENT

BASU MINING COMPANY LIMITED4TH RESPONDENT

KENYA FOREST SERVICE 5TH RESPONDENT

NATIONAL MUSEUMS OF KENYA6TH RESPONDENT

MSHENGA VUYAA RUGA 7TH RESPONDENT

BENSON KIOKO MULANGILI8TH RESPONDENT

MATHEUS MUTINDA MUTUA9TH RESPONDENT

COUNTY GOVERNMENT OF KWALE 10TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Mutungi, J) dated 20th March, 2015 in H. C. ELC No. 195 of 2014 (Formerly Misc. Appl. No. 298 of 2013 (JR)

JUDGMENT OF THE COURT

1. The appeal before us appears complex on account of the multiplicity of parties and the voluminous record extending to about 2000 pages of reading material. But it focuses on one main issue: whether the judicial review orders of *Certiorari* and *Prohibition* (JR) should have issued as sought by the appellant before the Environment and Land Court (ELC), **Mutungi, J.**

2. The appellant (hereinafter, "**Cortec**"), a Canadian based company, was locally incorporated on 4th July, 2007 and its core business is prospecting, exploration and mining. It was represented before us by learned counsel **Mr. Nelson Havi** instructed by M/s Havi & Company Advocates. The 1st respondent is the Cabinet Secretary in the Ministry of Mining ('**CS**') who was represented by learned counsel **Mr. Fred Ngatia** instructed by the Attorney General; while the 2nd respondent, Attorney General ('**AG**'), was represented by State Counsel **Mr. Emmanuel Bitta**. The other 8 respondents were enjoined in the proceedings by the ELC as interested parties and appeared before us as follows:

a) 3rd respondent - National Environmental Management Authority (**NEMA**) - represented by Mr. E. Gitonga;

b) 4th respondent - Basu Mining Company Ltd (**Basu**) - represented by Mr. Ochieng Odipo, instructed by M/s Taib A. Taib Advocates;

c) 5th respondent - Kenya Forest Service (**KFS**) - represented by Mr. E.W. Kiege;

d) 6th respondent - National Museums of Kenya (**NMK**) - represented by Mr. Stephen Lingunya and Ms Elizabeth Fundi, instructed by M/s Rachier & Amollo, Advocates;

e) 10th respondent - County Government of Kwale (**Kwale County**) - represented by Mr. Maina Njanga. The 7th, 8th and 9th respondents were individual citizens of Kwale County but retreated from active participation when the County Government was enjoined in the matter to represent the residents of the whole county.

3. Cortec's plea before the ELC was raised in a motion filed on 9th September, 2013 after grant of leave to seek the two orders of *certiorari* and *prohibition*. It asserted in affidavits on record that on 4th April, 2008 it was issued with a special license No. 256 under the **Mining Act, Cap 306**. That Act has since been repealed and replaced by the **Mining Act, No. 12 of 2016** commencing 27th May, 2016 but the new Act is not retrospective. The license issued was for carrying out prospecting and exploration works over an area of 1,180 square kilometers in Kwale County for a period of 2 years. It was renewed in November 2011 for a further period of three years with effect from 1st December, 2011. Cortec then avers that it applied for and was granted a **Special (Mining) License No. 351** on 7th March, 2013 under **section 17** of the Mining Act to commence '*exploration, development and mining of Niobium and Rare Earths Elements (REEs)*' on an area of 142.149 hectares in **Mrima Hill Forest Reserve** for a period of 21 years, subject only to the provisions of the Act and other conditions stated in the license. It asserted that it obtained all necessary approvals required by law before the license was issued and was ready to commence mining. By 5th August, 2013, it had spent over Ksh. 500 million and identified large deposits of Niobium and Rare Earth Base metals worth over USD 600 billion. Then suddenly, on 5th August, 2013, the CS and the AG appeared on national television and announced the revocation of the special (mining) license and the appointment of a task force to undertake a review of the license. The same information was carried by the local media the following day.

4. Cortec protested the decision as unconstitutional (**Articles 40 and 47**); *ultra vires* the provisions of the law (**sections 17 to 56** of the Mining Act); contrary to the rules of natural justice as Cortec was not heard;

arbitrary as there was no reason for the action; irrational as the appointment of a task force was meant to validate a wrongful act; procedurally unfair, unreasonable, actuated by ulterior motives and totally inconsiderate of its legitimate expectations of making profits from the business. It alleged the CS took the action after its refusal to give him a bribe.

5. The responses to the motion came thick and fast from the CS and AG and shortly afterwards, from the other respondents. The CS and AG clarified that the revocation was not limited to Cortec but was directed at all mining licenses issued between January and August 2013, in all affecting about 43 licensees without discrimination. They asserted that the process of revocation was in accordance with the law and justified by existing facts. The CS deposed that the allegation of bribery was false and he was ready to face any criminal investigation. The AG, who gave the legal advice for the action taken by the CS, contended that the provisions of the Mining Act as existed on the effective date of the Constitution should be read, construed in line with, and aligned to the Constitution. The AG also contended that Cortec ought to have appealed the decision of the CS under **section 93** of the Mining Act, Cap 306, rather than taking out JR proceedings that were not available to it. At any rate, the AG further argued, JR applies to public law claims and the instant matter involves public interest which superseded all other interests.

6. As regards Cortec, the CS and AG asserted that the original license No. 8528 was fraudulently obtained and issued in May 2007 to one **Harie Kinosthe Ndungu** purporting to be an agent of Cortec which was not in existence at the time. That license was not assignable to anyone else under the law and Cortec could not derive any benefit from it. Subsequently license No. 256 was issued to Cortec for 2 years to '*prospect and explore*' an area of 1180 square Kilometers that expressly excluded Mrima Hill Nature Reserve (**Mrima Hill**). It was also subject to various conditions, including the provisions of the **Mining Act**, the **Environmental (Management & Co-ordination) Act (EMCA)**, the **Forest Act**, the **Wildlife (Conservation & Management) Act (WCMA)**, and the **Trust Land Act**. It was extended severally on application, the last renewal being in November 2011.

7. On 10th January, 2012, Cortec applied for a Special mining license over Mrima Hill without complying with various statutes but the application was rejected on 27th January, 2012. No appeal was filed against the refusal. Strangely, however, on 7th March, 2013, in the middle of the 2013 General elections, (the transition period) the Commissioner of Mines & Geology (**Commissioner**) clandestinely purported to issue a Special (Mining) License to Cortec for 21 years without any application having been made, without any deliberations by the relevant Licensing Committee of the Ministry, and in violation of various statutes prohibiting mining in nature reserves and forests.

8. According to the CS, the license was lawfully revoked under **section 27** of the Mining Act in the public interest after complaints were lodged with the Ministry that the special license was being used for ulterior motives to mislead the public about Cortec's share value. It was also issued contrary to the law and a party cannot seek equitable redress which is founded on violation of the law.

9. NEMA, which is mandated by EMCA, *inter alia*, to process Environmental Impact Assessment (**EIA**) reports to mitigate and control environmental degradation and ensure a clean healthy environment for all, denied issuing any EIA report covering the social, health, cultural and environmental impacts on the Mrima Hill project before the issuance of the special license or at all. It supported the revocation of the illegal license.

10. KFS also denied issuing any clearance for mining activities on Mrima Hill before the issuance of the offending license. In all its letters on renewals of previous licenses, it pointed out, it limited its approvals to prospecting and exploration of old sites, not mining, and expressly subjected the approvals to other laws and regulations affecting the project, including the local Community Forest Association. It averred that Mrima Hill is a rich indigenous forest area which has been legally protected since 1961, and is gazetted as a Natural Heritage and a National Monument. It supported the revocation of the license.

11. NMK also supported the revocation. It is established under the **National Museums and Heritage Act** and entrusted, *inter alia*, with the mandate to identify, protect, conserve and transmit the cultural and natural heritage of Kenya for cultural, social and economic development for present and future

generations. In its view, there was no provision for a "special mining licence" under **section 17** of the Mining Act and so the one issued was a nullity in law. **Section 7 (1) (kk)** of the Act also protect National Monuments like Mrima Hill forest from mining activities. NMK denied having issued any approval to Cortec. It only made recommendations which were to be complied with before any consent could be issued, but there was no follow up by Cortec.

12. Kwale County dubbed the license as illegal and unconstitutional because there was no consultation with the county government or any public participation by the people of Kwale who must know what economic benefit they will derive from the mining activities and express their fears on any radioactivity and other health hazards that may ensue from the mining activities. They protested the degazetting of the forest which is home to cultural holy sites or "Kayas".

13. For its part, Basu, which is in the same industry as Cortec and had been issued with some licenses in Kwale County, protested the clandestine manner in which the license was issued to Cortec and confirmed that it had filed its own suit against Cortec seeking nullification of the license. As there is an order of the trial court that the parties agitate and settle their dispute in that suit, we say no more about the averments made by Basu in this appeal.

14. The trial court examined all the affidavits and supportive documents filed by the respective parties and considered the submissions of counsel before framing seven issues and determining them as follows (in summary):-

(i) Whether Judicial review proceedings are available to the Applicant Considering that Cortec in its JR had invoked the provisions of **sections 17** which provided for the issuance of the special mining licence and **section 27** which provided for revocation of the license, its remedy lay in **section 93** of the Act which laid out an appellate system. There was thus an alternative remedy and, therefore, on authority, where an alternative remedy exists, the applicant seeking an order of judicial review must disclose the existence of the alternative remedy and should demonstrate the exceptional circumstances, if any, under which judicial review is sought instead of the remedy provided by statute. Cortec had not done so and had thus chosen the wrong forum to ventilate its grievance.

(ii) Whether the Commissioner of Mines could issue a Mining Licence before the Applicant had obtained a NEMA Licence

Despite the argument by Cortec that the obtaining of a **NEMA** license was not a condition precedent before it could be issued with a mining license and that it was only one of the conditions that the license was issued, **The Environmental (Impact Assessment and Audit) Regulations 2003** are explicit in regard to the obtaining of NEMA licenses for projects that are likely to have any Environmental Impact. Furthermore under EMCA '**Mining**' is one of those projects that require to undergo an EIA before implementation and by its own admission Cortec did not submit a NEMA license to the Commissioner before being issued with the Special Mining License. To the extent that the Commissioner was not furnished with a **NEMA** license as required under the EMCA and the Regulations made thereunder, he could not issue a valid mining license and the one he issued to Cortec on 7th March, 2013 was null and void and of no legal effect.

(iii) Whether the Commissioner of Mines could issue a Mining Licence before the Applicant had obtained authorization from Kenya Forest Services and National Museums of Kenya

Mrima Hill was excluded from prospecting and mining under **section 7** of the Mining Act and it was necessary to obtain the consent of the KFS as provided under **section 42** of the Forest Act, Cap 385. **The National Museums and Heritage Act** also requires consent from NMK to undertake any prospecting or mining activities in areas falling under them as per **section 7 (1) (kk)** of the Mining Act. Cortec did not demonstrate that it obtained any consents and consequently the special mining license would be invalid. The Commissioner could not properly issue a valid mining license which would entail carrying out mining activities in areas which were otherwise protected by reason of being Gazetted Forest and/or falling under the jurisdiction of the National Museums of Kenya.

(iv) Whether a Mining Licence issued before issuance of a NEMA Licence and consents and/or authorizations from Kenya Forest Services and the National Museums of Kenya is valid in law

Such licence would be invalid. The holder of the licence would not have complied with the law relating to the requirement of obtaining consent or approval from the state agencies or organs mandated to give such approval for carrying out prospecting or mining activities in areas falling within their jurisdiction.

(v) Whether in the circumstances of this case the 1st Respondent was entitled to revoke the special mining licence issued to the Applicant on 7th March, 2013

The CS under *section 27* of the *Mining Act* is empowered to revoke a holder's license where there is breach of the conditions of the license or the law. *Section 27* presumes the license in the hands of the holder would have been validly issued by the Commissioner whereupon such holder of a license would be called upon to show cause why the license should not to be revoked. The CS is the custodian of public trust and interest such that where the Commissioner is shown to have acted contrary to the law in the issuance of any license, the CS, as the final authority, would be entitled to revoke such a license to facilitate an inquiry respecting the circumstances under which the license was issued. The CS ought not to be beholden to the strictures of the process of 'notice to show cause' conducted by the Commissioner if it appears to the CS that the license was not lawfully issued in the first place. If the Commissioner had failed to act lawfully it would be fool hardy to require the same Commissioner to conduct the notice to show cause. The CS has a duty to preserve and act in public interest and, in the circumstances of this case, the CS was entitled to act in the manner that he did. On authority, it was not in every instance that a right exists to be heard before a decision is taken. Before taking the decision, the CS considered the circumstances leading to its issuance and even took time to obtain appropriate advice from the AG. His action was neither malicious, capricious nor unreasonable as it applied to 42 other licenses issued under similar circumstances.

(vi) Whether the Commissioner of Mines in issuing the Special Mining Licence to the Applicant acted in breach of the Mining Act and/or the Constitution

Under *Article 62 (1) (f)* of the *Constitution* "all minerals and mineral oils as defined by law" are classified as public land and by *Article 62 (3)* they are vested in and are held by the national government in trust for the people of Kenya. The Commissioner is thus placed in a position of trust to execute the functions and exercise powers as a trustee for the people of Kenya. In the present matter, by failing to ensure the law was complied with, the commissioner acted in abuse of his office and the CS, as his supervisor, was entitled to review and audit his work and take such action as was necessary. The national values and principles of governance under *Article 10 (1)* of the Constitution apply to and bind all state organs, state officers, public officers and all persons. The Commissioner as such a public officer charged with making or implementing public policy decisions and in issuing the Mining Licence to Cortec without ensuring the law was complied with, was abdicating his duty and obligations entrusted on him to carry out on behalf of the public. The Commissioner acted in breach of the Mining Act and the Constitution and in breach of the trust bestowed upon him.

(vii) Whether the doctrine of public trust and public interest is applicable in the instant suit

Having regard to *section 4* of the *Mining Act*, *Article 10 (1)* and *62* of the *Constitution*, the doctrine of public trust and public interest cannot be expunged from these proceedings. The CS is the ultimate custodian of the public trust and interest in the various matters that fall under his docket and it matters not that there are other officers charged to do various tasks. It is him as CS who takes responsibility and the buck rests at his desk. Under the Mining Act this hierarchy of responsibility is well recognized and articulated and that explains why under *section 27* of the Mining Act the CS has the final word on the revocation of licenses. The Minister's decision once exercised under *section 27* can only be challenged by way of an appeal and not by way of Judicial review.

15. In the end, the trial court held that a party who flouts the law to gain an advantage cannot expect that the court will aid him to sustain the advantageous position that he acquired through the violation of the

law; that the acquisition by Cortec of the Special mining license was not in compliance with the law and it was void *ab initio* and liable to be revoked; and that the CS had a duty and obligation in the interest of the public to have the license revoked. The court dismissed the motion but ordered each party to bear its own costs.

16. Cortec was aggrieved by those findings and is now before us urging 10 grounds listed in the memorandum of appeal which we may summarize.

The learned Judge erred in law in:

(a) holding that the 1st Respondent's revocation of the Appellant's Mining License on 5th August, 2013 was a lawful and valid decision made under Section 27 of the Mining Act, Cap. 306 of the Laws of Kenya.

(b) holding that the Appellant's request for judicial review relief was barred by the existence of an alternative remedy of appeal under Section 93 of the Mining Act, Cap. 306 of the Laws of Kenya.

(c) failing to consider the effect of non-compliance by the 1st Respondent with the process necessary for the making of a decision for the revocation of a mining license under Section 27 of the Mining Act, Cap. 306 of the Laws of Kenya.

(d) failing to consider and determine the grounds upon which the relief of judicial review was sought and thereby arrived at a wrong decision.

(e) considering and determining the merits of the 1st Respondent's decision instead of the process leading to the making of the decision.

(f) holding that a National Environmental Management Authority License was required before the issuance of the Mining License to the Appellant on 7th March, 2013 and that the revoked Mining License was invalid for want of compliance.

(g) holding that a license and/or consent from Kenya Forest Service was required before the issuance of the Mining License to the Appellant on 7th March, 2013 and that the revoked Mining License was invalid for want of compliance.

(h) holding that a license and/or consent from the National Museums of Kenya was required before the issuance of the Mining License to the Appellant on 7th March, 2013 and that the revoked Mining License was invalid for want of compliance.

(i) relied upon extraneous and irrelevant matters in arriving at the conclusion that the 1st Respondent was entitled to revoke the Mining License issued to the Appellant on 7th March, 2013.

(j) relied upon extraneous and irrelevant considerations in holding that the Commissioner of Mines acted in breach of the Mining Act, Cap. 306 of the Laws of Kenya and the Constitution of Kenya, 2010 in issuing the Mining License to the Appellant on 7th March, 2013.

17. Mr. Havi, in written submissions and oral highlights argued on the 1st ground that **section 27** of the **Mining Act** provides the procedure for revoking a license and it is preceded by a notice to show cause issued by the Commissioner. Only when there is no compliance with the notice to show cause does the CS come in to summarily revoke the license. It is such revocation which would attract an appeal to the Minister and thereafter to the High Court under **section 93 (2) (a)**, if the licensee was not satisfied. In this case however, urged counsel, no notice to show cause was served and consequently there was no lawful

or any valid decision made in respect of the license. That is why Cortec sought an order of *certiorari* to quash the illegal revocation which was devoid of due process of reasonable notice and fair hearing, and gave no reasons for the action. For those principles, counsel cited copious extracts from the decision of the **Employment & Labour Relations Court** in *Richard Bwogo Birir vs Narok County Government & 2 Others [2014] eKLR* without disclosing that it went on appeal as *Narok County Government & Another vs Richard Bwogo Birir & Another [2015] eKLR*.

18. As regards the alternative remedy of appeal under **section 93 (2) (a)**, counsel submitted that there could only be an appeal if there was a valid and lawful decision under **section 27** in the first place but there was none. The learned Judge also misdirected himself when he concluded that the alternative remedy precluded the filing of an application for judicial review. By so finding, the Judge relied on English decisions to that effect while he ignored, and disregarded, despite being bound by it, the Court of Appeal decision of *David Mugo t/a Manyatta Auctioneers vs Republic Civil Appeal No. 265 of 1997* which held that the existence of an alternative remedy was no bar to the granting of an order for *certiorari*. According to counsel, the only available remedy in this matter was judicial review which the Constitution in **Articles 23 (1)** and **165 (6)** empowers the High Court to grant in its supervisory jurisdiction. **The Fair Administrative Action Act No. 4 of 2015** which empowers the Court to address abuses of administrative power irrespective of the existence of any alternative remedy was, in counsel's view, applicable retrospectively. He cited the case of

Suchan Investments Ltd vs Ministry of National Heritage & Culture & 3 Others [2016] eKLR in support of the application of the statute.

19. Mr. Havi further attacked the trial court for disregarding the grounds upon which the JR application was made, that is to say, non-compliance with **section 27** and instead exonerating the CS and his actions which it termed as preservation of public interest. There cannot be public interest in breach of the law, he submitted. He observed that the court said nothing about the decision of the CS being *ultra vires*, arbitrary, irrational, without reasons, on wrong motives and in breach of the legitimate expectations of Cortec as asserted in the application. In the process, the court went outside the scope of judicial review and examined the merits of the decision to revoke the license. That is why, in counsel's submission, the interested parties were unnecessarily enjoined in the suit and misled the court in framing issues which dwelt on the merits of the decision instead of the process of making that decision which was under challenge. All these, in his view, were irrelevant and extraneous considerations. Counsel cited several authorities for those submissions including *Shaban Mohamud Hassan & 703 Others vs AG & 3 Others [2013] eKLR*; *Kisumuwalla Oil Industries Ltd vs Pan Asiatic Commodities PTE Ltd & Another [1990] eKLR*; *Barclays Bank of Kenya Ltd vs Joseph Mwaura Njau [2006] eKLR*.

20. On the other issues framed and decided on by the trial court, counsel submitted that there was evidence of applications and payments made by Cortec to NEMA, KFS and NMK who gave their approvals subject to conditions for compliance. The licenses issuable from those institutions were necessary after the issuance of the mining license and not vice versa. One need not have the consents from those institutions before obtaining a mining license, contended counsel, and called for allowing of the appeal.

21. Mr. Ngatia for the CS did not attend court or file any written submissions but Mr. Bitta for the AG who advised the CS made extensive oral submissions in response. He supported the finding by the trial court that the mining license was illegally acquired and was properly cancelled by the CS. The license was illegal because, as confirmed by the institutions which must approve the issuance of the license - NEMA, KFS, NMK - they did not issue any licenses as required under their respective governing statutes before the mining license was issued. Cortec indeed admitted as much, he observed. These, in his view, were relevant considerations which the trial court was bound to make since JR is a discretionary remedy.

22. It was also necessary for the court to consider as it did, whether there was an alternative remedy which was more efficacious than JR and found **section 93** was such remedy. No reason was given by Cortec for skipping that remedy and the court cannot be blamed for declining the remedy of JR. In counsel's submission, Cortec was approbating and reprobating by stating that the CS did not make a

decision and that is why an appeal was not possible, but at the same time seeking a court order to quash the decision made by the CS. What decision would they be quashing if there was none? The CS could only make a decision under **section 27** and did in fact do so in the circumstances explained, thus setting off the avenue of appeal under **section 93**. Mr. Bitta distinguished the authorities cited by the appellant which addressed the Bill of Rights under the Constitution, with authorities on JR dealing with statutory provisions. He decried the reliance on the **Fair Administrative Action** which was enacted in 2015 long after the cause of action arose in this matter and submitted that it was not applicable retrospectively. He pleaded that we do not interfere with the discretion of the trial court as it was exercised judiciously.

23. Mr. Lingunya for NMK filed written submissions which he highlighted. He submitted that it was necessary, before even considering the issue put forward by Cortec as to whether the CS wrongly revoked its license, to find out whether there was a license issued in the first place. In his view, it was indisputably plain from **section 7 (1) (kk)** of the **Mining Act** that Mrima Hill was legally out of bounds for mining and the Commissioner could not purport to issue a mining license on it. It was plainly illegal and therefore a nullity.

24. Finally, Mr. Maina Njanga for Kwale County supported Mr. Bitta on the discretionary nature of JR and the necessity of the trial court to look at all the issues placed on the table by the parties. Kwale County was allowed to join the proceedings to show beyond doubt that **Article 10** of the Constitution relating to sharing, devolution and public participation was flouted in the issuance of the license, and thus assist the court in the exercise of its discretionary power.

25. We have considered the appeal in a manner consistent with **Rule 29 (1) (a)** of the **Court of Appeal Rules** to re-appraise the evidence and to draw our own inferences of fact, on a first appeal. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is bad in law. We have also considered the submissions of learned counsel and the guiding principles of the law cited before us.

26. As stated at the opening paragraph of this judgment, the central issue is whether the JR orders of *certiorari* and *prohibition* should have issued in this matter. Whether or not they should issue is an exercise in the discretion of the court seized of the matter and such discretion may only be disturbed if the appellate court is satisfied that the decision is clearly wrong because of misdirection or making the wrong conclusion on matters which should have been considered. Sir Charles Newbold P. in ***Mbogo & Anor v Shah [1968] EA 93*** stated the principle as follows:

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

27. There is no divergence of view on the law relating to the nature and scope of JR orders. It is trite that judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made. In the case of ***Commissioner of Lands vs Kunste Hotel Ltd [1997] eKLR***, this Court stated:-

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected (see *Republic -vs- Secretary of State for Education and Science exparte Aron County Council (1991) ALLER 282 at P. 285*). The point was more succinctly made in the English case of *Chief Constable Evans (1982) IWLR 1155, by Lord Hailsham of St. Marylebone, thus:*

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is

authorized by law to decide for itself a conclusion which is correct in the eyes of the court”.

See also *Republic vs Judicial Service Commission ex parte Pareno Nairobi HC Misc. Civil Application No. 1025 of 2003.*

28. As for the scope of the remedy, it is also trite that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...

*Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” See *Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300.**

We are, nevertheless, aware that the limits of judicial review continue to expand so as to meet the changing conditions and demands affecting administrative decisions. See the case of *Kuria & 3 Others vs Attorney General [2002] 2 KLR 69.*

29. The most fundamental decision made by the trial court in this matter was that judicial review orders were not available owing to the availability of an alternative remedy, and the court was ready to rest its decision on that finding. The other issues were considered *ex abundanti cautella*. The finding was criticized, firstly, because it was not correct in law as it relied on English authorities, and secondly, because there was no valid decision made upon which an appeal could lie under **section 93** of the Mining Act. The English authorities referred to were cited in the decision of **Wendoh, J.**, which the trial court followed, in the case of *Republic vs National Environment Management Authority Exparte Sound Equipment Ltd, (Misc Civil Application No. 7 of 2009)* where Wendoh, J held thus:

“The Applicant never made any effort to demonstrate that judicial review was better a mode of redress than an appeal to the Tribunal..... Failure by the Applicant to disclose the existence of an alternative remedy and failure to demonstrate at permission stage, why judicial review was more convenient or effective disentitles the Applicant to the exercise of this court’s discretion to grant the orders sought herein”.

30. When the matter went on appeal to this Court as *Republic vs National Environmental Management Authority [2011] eKLR* the Court (differently constituted), observed that Wendoh, J. correctly appreciated the principle that the availability of an alternative remedy was not, by itself, a bar to a judicial review order when she stated thus:

“The law is that the existence of an alternative remedy is not a bar to commencement of Judicial Review Proceeding by an aggrieved party. This is because of the nature of Judicial Review remedies which do not deal with merits of the impugned decision but review the decision making process.”

31. There was, however, a concomitant consideration, that is: whether an applicant for a judicial review order is bound to disclose in the application that an alternative remedy does exist and then explain why an

order for judicial review is being sought and the alternative remedy is not being pursued. Wendoh, J. answered that question in the affirmative and was upheld on appeal. This Court re-examined the English decisions relied on and concluded thus:

"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".

We respectfully agree with that exposition of the law.

32. Cortec in this matter pleaded, amongst other provisions of the law, **section 17** of the Mining Act on the issuance of a mining license, and **section 27** on revocation of such license. Despite its argument that there was no decision made by the CS under **section 27**, we find that a license issued under **section 17** was revocable under **section 27** and Cortec was right to plead those sections. **Section 27** in relevant part provides as follows:

"In the case of any breach by the holder of a prospecting right or an exclusive prospecting license or by any attorney of or manager employed by such holder or any of the terms and conditions of his license or of any of the provisions of this Act or of any of the regulations, it shall be lawful for the Commissioner to call upon the holder of the right or license to show cause, within a time specified by the Commissioner, why his right or license should not be revoked, and, should he fail to comply with such order within the time specified or should the cause shown not be adequate in the opinion of the Minister, the Minister may summarily revoke the right or license, and thereupon all privileges and rights conferred thereby or enjoyed thereunder shall as from the date of such revocation cease." [Emphasis added].

33. The section provides a two-tier procedure for revoking a license due to breach of any of the provisions stated therein: the Commissioner would issue a notice to show cause first and then the CS steps in if the licensee fails to comply. But the facts brought out in this case were that the license was clandestinely issued by the Commissioner at a time when the country was transitioning to a new government, in a manner that flouted the provisions of the Act. The Commissioner was complicit in the matter, was under suspension, and could not therefore issue any notice to show cause. Was the CS then powerless to take action under **section 27**? The trial court did not think so and we have no reason to fault him. It was not an isolated case involving the appellant and in the scheme of the Act the CS was the overall custodian of the provisions of the Act.

34. Parliament had provided a statutory procedure in **section 93** of the Act for challenging the revocation of a license issued under **section 27** of the Act. It provides in relevant part as follows:

"93. Appeals

(1)

(2) *any person aggrieved by any decision or determination of the Minister-*

(a) revoking a prospecting right or exclusive prospecting licence under section 27, or

(b)

may appeal against such decision or determination to the High Court.

(3)

35. That was an alternative remedy which the appellant ought to have disclosed and explained why it was not efficacious, thus resorting to judicial review. The appeal process, unlike judicial review, would afford the parties an opportunity to explore the merits of the decision. We think in the circumstances, the trial court did not misdirect itself in the exercise of its discretion as it accorded with the law. That finding would be sufficient to dispose of this appeal.

36. But the trial court was vilified for delving into the validity of the license issued in a manner that was irrelevant and totally outside the purview of the application before it. In the end, it is said, it determined the merits of the license rather than the process of its revocation. With respect, we think that criticism is rather harsh. The application before the trial court was initially between Cortec and the two public offices of the CS and the AG. But Cortec had pleaded that it had a valid license on account of consents and approvals obtained from the institutions that must be involved before the issuance of the license. Those institutions then became necessary parties and were enjoined in the proceedings and provided information which the trial court was bound to consider in abundant caution. The information was relevant and it assisted in the judicious exercise of the discretion the court was called upon to exercise. In our view, it was not a determination of the merits of the decision of the CS.

37. We have come to the conclusion that in exercising its discretion, the trial court did not misdirect itself in the matter and as a result arrive at a wrong decision, or that the decision as a whole was clearly wrong. In the result we find no merit in the appeal and order that it be and is hereby dismissed. As the matter raised more of public interest rather than private issues for consideration, we order that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 9th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR