



**Base Titanium Limited v Jin (Environment and Land Appeal
4 of 2021) [2024] KEELC 4087 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4087 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL 4 OF 2021**

AE DENA, J

MAY 22, 2024

BETWEEN

BASE TITANIUM LIMITED APPELLANT

AND

MOHAMED YUSUF IQBAL JIN RESPONDENT

JUDGMENT

1. The appeal herein is rooted on the ruling dated 5/5/2021 by Hon. J.M Omido SPM in Kwale CMELC Case No 1 of 2021. The ruling was premised upon a preliminary objection dated 16/2/2021 raised on the ground that the court did not have the requisite jurisdiction to deal with the instant case. That the dispute arises from mining activities, a preserve of the Cabinet Secretary before being escalated to the High Court pursuant to the provisions of Section 155 of the *Mining Act*.
2. In its ruling, the lower court made a finding that there is no provision under the *Mining Act* that designates a subordinate court and Magistrates court to sit on appeals preferred from the decision of the Cabinet Secretary. That it is the ELC court that was majorly tasked with determining appeals from the Cabinet Secretary and not in the first instance. The learned Magistrate opined that it had the jurisdiction to determine the dispute when presented in the first instance as per Section 154[c] of the *Mining Act* and also based on pecuniary jurisdiction of the court as set out under Section 7[1] of the Magistrate's Court Act No 26 of 2015. The preliminary objection was subsequently dismissed thus informing the instant appeal.
3. The Memorandum of Appeal as filed before the court raises the following grounds of appeal; -
 1. That the learned Magistrate erred in law by deciding and holding that under Section 154[c] of the *Mining Act*, 2016 the court has jurisdiction to hear and determine the suit or any other matter at first instance.



2. The learned Magistrate erred in law by failing to follow and apply the binding decision of the High Court in the case of Peter Nzeki and 14 Others Versus Base Titanium Limited & 4 Others [2021] eKLR which determined that under the *Mining Act* disputes must be referred to the Cabinet Secretary in the first instance.
3. The learned Magistrate erred in law by finding and holding that under the *Mining Act*, the Magistrates Court has jurisdiction to hear and determine disputes referred to it in the first instance and the High Court has appellate jurisdiction only in appeals referred to it by parties who are aggrieved by decisions of the Cabinet Secretary.
4. That the learned honourable Magistrate erred in law and fact by introducing section 7[1] of the Magistrates Court Act No 26 of 2015 which is irrelevant in the present case in that the matter relates to a mining dispute which is governed exclusively by the provisions of the *Mining Act*.
4. The Appellant prays that; -
 - i. The appeal be allowed and the ruling issued by Hon. J.M Omido be reversed.
 - ii. The Appellant's preliminary objection be allowed.
 - iii. The costs of the appeal and the suit in the Magistrate's Court be awarded to the Appellant.
5. By consent of the parties, the appeal is dispensed of by written submissions. The Appellant's submissions were filed before court on 18/12/2023. It is submitted that where there exists an alternative forum of solving a dispute, parties are expected to first exhaust the same before instituting their claim in court as was affirmed by the Court of Appeal in Geoffrey Muthinja 7 Another V Samuel Muguna Henry & 1756 Others [2015] eKLR and further by the Supreme Court in Benson Ambuti Atega & 2 Others V Kibos Distilers Limited & 5 Others [2020] eKLR.
6. The Appellant further submits on the failure of the lower court to be bound by the dictum in Peter Nzeki and 14 Others Versus Base Titanium Limited & 4 Others [2021] eKLR and which stated that application for determination of matters listed under Section 155 of the *Mining Act* must first be presented before the Cabinet Secretary before escalating to the court as an appeal. For that reason, the court should have upheld the preliminary objection as the lower court clearly had no jurisdiction.
7. The Appellant lastly submits that the learned Magistrates use of the word 'may' in relation to Section 154 of the *Mining Act* does not confer the said court the jurisdiction to determine the instant dispute. That section 7 of the Magistrates Court Act is irrelevant in the present circumstances as the term court of competent jurisdiction refers to the Environment and Land Court in the context of the court tasked with determining the matter.
8. The Respondent's submissions are dated 22nd January 2024 and filed on 4/03/24. Reproducing the provisions of section 155 of the *Mining Act* it is stated that the Act must be read as a whole. That the operative word in both sections 155 and 154 is 'May' which is not mandatory and that section 154 (c) gives court's jurisdiction. It is admitted that appeals from the Cabinet Secretary lies with the High Court. That appeal from the Magistrates court would also lies in the High court and therefore the High court will still exercise its jurisdiction. That the prayers are injunctive in nature and the Cabinet secretary has no jurisdiction to grant such orders.
9. The Appellant filed further submissions dated 12/04/24 in response to the above submissions. It is reiterated that that the provisions of are clear on the mode of determining matters listed in section 155 and thus the applicability of the principle of exhaustion. Further that the Respondent's failure to address this aspect is telling. That the statutory mechanism provided under section 154 cannot be



defeated by the choice of the words that the drafters chose to use. That the use of the word may attaches to the power of the decision maker who is the Cabinet Secretary. It does not connote discretion. On the submission that the Appellant has not demonstrated its mineral rights, it is contended that this is a substantive matter to be dealt with by the forum of competent jurisdiction once determined.

10. I must point out that on 31st January 2022 this court issued an unconditional stay of proceedings in Kwale CMELC No. 1 of 2021 pending the determination of the appeal herein.

Analysis and Determination

11. The court will condense the grounds of appeal into one main issue; Whether the lower court herein has the requisite jurisdiction to determine the suit filed before it as the court of first instance.
12. Jurisdiction is central in every litigation before court, without jurisdiction the court of law cannot take any step in making a finding of a matter before it. See Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1.
13. The gist of the Plaintiff's claim is that the Defendant had encroached and trespassed into the Plaintiff's land Kwale/Kidiani/219 and excavated there from causing degradation to the land making it worthless for its intended purpose. The Plaintiff seeks an order declaring him the legal owner of the land, a permanent mandatory injunction against the Defendants from remaining on the land, continuing to excavate, eviction and damages.
14. The Defendant treated the above as a dispute concerning the boundary of the Defendant's Special Mining Lease and whether the mining was being done within or outside the licensed area. That this brought the dispute under the purview of Section 155 of the *Mining Act* which confers jurisdiction on the Cabinet Secretary and thereafter appeal to the High Court under section 157 of the said Act for any party aggrieved with the outcome thereof. That the Appellate jurisdiction is limited to the High Court only.
15. The Plaintiff's response to the above was that section 155 ought to be read together with the section 154 of the Act. That the operating word in both section is 'May' which is not mandatory. That nowhere in the entire Act is the court divested of jurisdiction. That the court has jurisdiction under section 154 (c). That should the need arise appeal from the learned Magistrate's decision would still lie to the High court where its Appellate jurisdiction would still be exercised. Further that the Cabinet Secretary has no jurisdiction to issue orders of injunction.
16. The question then is whether as provided by the outlined provisions of law, the Magistrate's court has the jurisdiction to determine disputes arising from the *Mining Act*.
17. Section 154 of the *Mining Act* is on general provisions on dispute resolution arising from mining activities and provides as follows;
Any dispute arising as a result of a mineral right issued under the *Mining Act*, may be determined in any of the following manners-
 - a. By the Cabinet Secretary as 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



18. Section 155 provides as follows: -

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 pumps, flume, race, drain dam.....
- d. A claim to have any priority of water taken.....
- e. Assessment and payment of compensation where provided for under this Act.

19. This court had occasion to make a specific determination on the jurisdiction of the ELC to determine disputes arising from the *Mining Act* filed before it as a court of 1st instance in *Kavii v Base Titanium Limited & 2 others (Environment & Land Petition E002 of 2022)* [2023] KEELC 18436 (KLR) (29 June 2023) (Ruling). This is what I stated pertaining section 154;

"The above provisions are not drafted in mandatory terms. They are not obligatory but permissive. Unlike other statutes such as the Environmental Management & Coordination Act which provide alternative disputes resolution mechanisms and which must be followed, the *Mining Act* gives options to the claimants to select. In this case the petitioner chose to approach this court. It has been urged by the 1st respondent that section 153 ousts the jurisdiction of this court but in my view the option in section 154(c) may be deemed to preserve and or recognize the original jurisdiction of the High Court and Courts of equal status (sic) being courts of competent jurisdiction"

20. My position on the above has not changed. I will further add that the use of the word 'OR' at the end of 154(b) cements the above dictum. It is disjunctive. According to me section 154 gives a litigant several options on the channels to be explored to resolve a dispute arising from a mining licence. I have also had occasion to read the decision of my brother Justice Yano in the case of Peter Nzeki and 14 Others Versus Base Titanium Limited & 4 Others [2021] eKLR which is only persuasive and I'm not persuaded either by the said decision.

21. But having stated so would the same position apply to the lower court? It is contended that the learned Magistrate was bound by the above decision and which was brought to the said courts attention. Indeed the learned Magistrate appears to have taken the same position on section 154 (c) as this court when he did not have the benefit of my ruling above which was delivered much later. The court has noted the Appellant's proposition that section 154 provides the mechanism by which the Cabinet Secretary is clothed with jurisdiction at first instance. I respectfully disagree for the reason that section 156 is what sets out the mechanism for hearing the claims listed under section 155 and the attendant regulations if any.

22. This court has no reason to impugn the learned Magistrate's interpretation of the above provisions the court having taken the same position. The Magistrate court would be a competent court for purposes of section 154 (c) to entertain a matter brought before it as a court of first instance subject to its pecuniary jurisdiction which is pertinent. I however agree pecuniary jurisdiction alone does not confer jurisdiction.



23. In arriving at the above finding I'm further emboldened and persuaded by the following dictum of Ohungo J. in the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR when dealing with the jurisdiction of Magistrates court in matters of adverse of possession and which rationale would in my view apply in the present case; -

"The judicial system in Kenya also includes the magistrates' courts as established under Article 169 of the *Constitution of Kenya, 2010*. Pursuant to Article 169 (2), parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the magistrates' courts. In that regard parliament legislated the following provisions at Section 26 (3) and (4) of the *Environment and Land Court Act, 2011*:

- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- (4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
 - (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act. [Emphasis supplied]

13. Indeed, the Chief Justice has, by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act, 2011*. Such gazette notices include Gazette Notice No. 1472 dated 1st March 2016, Gazette Notice No. 1475 dated 1^{4th} March 2016, Gazette Notice No. 11930 dated 5th December, 2017 and Gazette Notice No. 2575 dated 28th February, 2019. Thus, there exist within the magistrates' courts, several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land. In particular, I am aware that there are such magistrates serving in Nakuru where Nakuru CM ELC Case No. 330 of 2018 Benjamin Kiiru Mwangi vs. Patrick Ndegwa Munyua was filed.

14. Some four years after enactment of the *Environment and Land Court Act, 2011*, parliament also enacted the *Magistrates' Courts Act, 2015* so as to among others give effect to Articles 23 (2) and 169 (1) (a) and (2) of *the Constitution* and to confer jurisdiction, functions and powers on the magistrates' courts. The Act came into operation on 2nd January, 2016 and its Section 9 (a) provides:



A magistrate's court shall -

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -
 - (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally. [Emphasis supplied]

24. Additionally I have also looked at the Plaint filed in the lower court and the prayers sought. The Plaintiff seeks an order declaring him the legal owner of the land, a permanent mandatory injunction against the Defendant. These reliefs sought can only be competently determined by the ELC court and fall within the purview of Article 162(2)(b) and Section 13 of the ELC Act. This therefore aligns with the jurisdiction of the Magistrates court in matters Land and Environment as derived from section 26 of the ELC Act as read together with section 9(a) of the Magistrates court Act. It is also in tandem with this court interpretation of section 154(c) herein.

25. The upshot is that the appeal herein is dismissed and the ruling of the Hon. Joe Mkuto (SPM as he then was) issued on 5/05/2021 is hereby upheld. Each party shall bear its own costs.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 22ND DAY OF MAY 2024.

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A.E DENA

JUDGE

In the presence of: -

Ms. Oketch for the Appellant

Mr. Obara for the Respondent

Mr. Daniel Disii – Court Assistant

