



Rarieda Artisinal Miners Savings and Credit Co-operative Society Ltd & 2 others v Amlight Resources Company Limited & 4 others; National Environmental Management Authority & 2 others (Interested Parties) (Environment and Planning Petition 1 of 2024 & Environment & Land Petition 2 of 2024 (Consolidated)) [2024] KEELC 4845 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND PLANNING PETITION 1 OF 2024 &
ENVIRONMENT & LAND PETITION 2 OF 2024 (CONSOLIDATED)**

AY KOROSS, J

JUNE 20, 2024

BETWEEN

**RARIEDA ARTISINAL MINERS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD 1ST PETITIONER
GEORGE OWADE MADHARE 2ND PETITIONER
TOM MBOYA ONYUN 3RD PETITIONER**

AND

**AMLIGHT RESOURCES COMPANY LIMITED 1ST RESPONDENT
KITIGU RESOURCE COMPANY LIMITED 2ND RESPONDENT
CHARLES ODHIAMBO NJAGA 3RD RESPONDENT
AMOS MABONGA 4TH RESPONDENT
FREDRICK OCHIENG OGUTU 5TH RESPONDENT**

AND

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY INTERESTED PARTY
THE CABINET SECRETARY, MINISTRY OF MINING AND PETROLEUM INTERESTED PARTY
THE ATTORNEY GENERAL INTERESTED PARTY**

(AS CONSOLIDATED WITH ELC EP NO.2 OF 2024 – ROSE ELIZABETH AKETCH & 2 OTHERS.V. AMLIGHT RESOURCES COMPANY LIMITED & 8 OTHERS)



RULING

Background

1. The petitioners in ELC EP Petition No 1 of 2024 (Pet 1) filed their constitutional petition against the respondents dated 2/04/2024 and contemporaneously filed a notice of motion dated 2/04/2024. This motion is one of the applications that is the subject of this ruling.
2. Shortly after that, the petitioners in ELC EP Petition No 2 of 2024 (Pet 2) in a petition dated 16/04/2024 sued some of the respondents in Pet 1 and equally filed a notice of motion on even date which more or less sought similar reliefs as the motion dated 2/04/2024.
3. On comparison of the petitions and motions, the motion in Pet. 2 was stayed as the outcome of this ruling would render it moot. In the same breath and on consensus from counsels representing various parties in the petitions, the two petitions were consolidated on 13/05/2024.
4. Shortly thereafter, the petitioners in Pet. 1 through a motion dated 19/04/2024 instituted contempt proceedings against Yao Youming, 4th respondent, Ye Zanfei, and Zhou Hong (contemnors) who are described as directors of either the 1st or 2nd respondents or of both. This motion is also the subject of this ruling.
5. Another notice of motion dated 17/04/2024 was filed by the petitioners in Pet.1 which sought a joinder of the 2nd and 3rd petitioners as co-petitioners. This motion was allowed by the court on 13/04/2024.
6. In opposition to the motion dated 2/04/2024, the 4th respondent who is a director of the 1st and 2nd respondents and with authority, filed a replying affidavit sworn on 16/04/2024. On even date, the 3rd respondent with the authority of the 5th and 6th respondents deposed a replying affidavit in opposition to the motion. The law firm on record for them also filed the grounds of opposition dated 9/05/2024 and it shall be addressed later in this ruling.
7. The contemnors opposed the motion dated 19/04/2024 by filing grounds of opposition and a notice of preliminary objection (PO) both dated 30/4/2024. Further, they filed a PO dated 17/05/2024 and grounds of opposition which challenged the two petitions.
8. The 2nd interested party supported the two petitions by filing a replying affidavit deposed by its acting director of mines Mr. Gregory Kituku sworn on 20/05/2024.
9. Thus, the subject matter of this ruling is on the PO dated 30/4/2024 and motions respectively dated 2/04/2024 and 19/4/2024.

Petitioners' case in Pet.1

Motion dated 2/04/2024

10. In their petition, the petitioners contended that the respondents conducted mining activities in land parcel No Siaya/Ramba/874 (suit property) without requisite licenses and consents thus degrading the environment which had led to a violation of the 1st petitioner's members' rights to a clean and healthy environment and socio-economic rights. They sought the following substantive reliefs: -



- a. A declaration the respondents' unlicensed mining activity on the suit property and Lamba area violated the 1st petitioner's and its members' rights to a clean and healthy environment including failure to protect the environment for the benefit of present and future generations.
 - b. A declaration the respondents' unlicensed mining activity on the suit property violates the 1st petitioner's and its members' socio-economic rights.
 - c. A permanent injunction does issue restraining the respondents by themselves, workers, employees, agents, servants, and or whoever acting on their instructions from mining, operating a gold mine, or continuing with any form of mining activity, extraction of gold, and/ or any other mineral ore, their attendant waste on/and from the suit property and Lamba area.
 - d. A mandatory order be issued to the 1st and 2nd interested parties for them to take all necessary measures to prevent and/or discontinue any act or acts or omissions by the respondents that are harmful to the environment.
11. The residual reliefs pending determination in the motion are: -
- a. A temporary conservatory order be issued restraining the respondents by themselves, their workers, employees, agents, servants, and whoever acting on their instructions from mining, operating a gold mine, or continuing with any form of mining activity, extraction of gold and/ or any other mineral ore, their attendant waste on/and from the suit property and Lamba area.
 - b. Costs of the motion be provided for.
12. The motion was supported by several grounds on its face and on the supporting affidavit of Wycliffe Odero Ochieng sworn on 28/03/2024 who described himself as the 1st Petitioner's chairman and the 1st petitioner as a licensed savings and credit cooperative society that promotes its members' welfare.
13. They also contained averments contained in the petition that was earlier highlighted in this ruling. Additionally, it was averred the 1st petitioner and its members would suffer irreparable loss and they had a prima facie case with a probability of success and an undertaking as to damages was given.
14. It was further contended in unclear circumstances, the suit property was acquired by the 1st, 2nd, and 4th respondents from the 3rd respondent which was interrelated with the demise of the 3rd respondent's family member who was one of its members and also, its membership had suffered grievous harm and death too.
15. It was contended at the 1st petitioner's complaint on the respondents' conduct, they (respondents) were charged with operating a gold processing factory in Kenya without a valid license contrary to Section 202(1) of the [Mining Act](#) and a notice to cease had been issued to the respondents by the 1st and 2nd interested parties (IPs) on diverse dates but they had failed to comply.
16. In a further affidavit in response to the 1st, 2nd, and 4th respondents' replying affidavit, the petitioners were emphatic they had availed concrete documents to support their position and the 3rd, 5th, and 6th respondents benefited from the sale of the suit property and thus benefited from the mining activities and the petition had been filed with the authority of the 1st petitioner's members and the affidavit sworn by Calvince Ouma Otieno was void as he was not the 1st petitioner's member.



Notice of motion dated 19/04/2024

17. After ex parte hearing of the motion dated 2/04/2024, this court amongst other orders issued interim conservatory orders on 8/04/2024, and in alleged infringement by the respondents, the petitioners filed the instant motion in which they sought the following reliefs: -
 - a. Leave does issue to cite the contemnors for contempt of court orders.
 - b. Upon grant of leave, the contemnors be committed to civil jail for a period not exceeding 6 months and/or be imposed a fine for being in disobedience of court orders.
 - c. The contemnors bear costs.
18. It was supported by grounds on the face of the motion, a statement, and a supporting affidavit of Wycliffe Odero Ochieng sworn on 19/04/2024. The contemnors were identified as Yao Youming, 4th respondent, Ye Zhanfei, and Zhou Hong Bang (contemnors).
19. Briefly, it was alleged orders were duly served on the respondents and their agents who were the contemnors and directors of the 1st and 2nd respondents, and because of the breach, they should be punished for being in contempt.

Petitioners' case in Pet.2

Notice of motion dated 16/04/2024

20. The petitioners described themselves as neighbours of the suit property and members of the Lumba community. Apart from suing similar parties as those in Pet.1, they also joined Yao Youming, Ye Zhanfei, and Zhou Hong Bang as respondents.
21. Pet.1 and 2 are erringly similar and even the prayers sought are similar only that in addition, they have sought an environmental restoration order against the respondents.
22. The 1st petitioner's motion dated 2/04/2024 sought comparable reliefs as this motion save in this one, the petitioners sought for the OCS Aram Police Station to enforce the orders.

Respondents' response

1st, 2nd, and 4th respondents' replying affidavit in opposition to the motion dated 2/4/2024

23. The 4th respondent who is the 1st and 2nd respondents' director swore an affidavit on 16/04/2024 which was mostly composed of denials and stated the motion was frivolous, vexatious, and an abuse of the court process and that it did not meet the threshold for the grant of conservatory reliefs.
24. According to him, the documents in support of Pet.1 did not substantiate the claim and if at all they did, they fell far short of the threshold. He contended that even though he purchased the suit property, there was no evidence of nexus between him and the 1st and 2nd respondents as all these parties were distinct in law and there was no relationship on their alleged collective involvement or evidence of police reports demonstrating evidence of mining activities in the suit property.
25. Further, he denied there was evidence of degradation or loss of life as a result of mining activities and the photographs of dead bodies that were availed to this court by petitioners in Pet.1 did not attribute the deaths to mining activities in the suit property.



26. He asserted he was a stranger to allegations of the death of the 3rd, 5th, and 6th respondents' brother ostensibly as a result of the sale of the suit property, and such death was within the confines of the criminal justice system. It was argued the motion should be disallowed.

3rd, 5th, and 6th respondents' replying affidavit in opposition to the motion dated 2/4/2024

27. With the authority of the 5th and 6th respondents, the 3rd respondent deposed an affidavit dated 16/04/2024 and the averments were largely a reiteration of the 1st, 2nd, and 4th respondents' replying affidavit that was highlighted earlier and I need not regurgitate the assertions and further, he admitted he sold the suit property to the 4th respondent. According to him, the petition and motion had been filed without requisite authority.

Contemnors' response

28. The firm of M/s. GKO Advocates filed a notice of appointment on 5/05/2024 acting for them and therefore, the grounds of opposition on their behalf by the firm of M/s Otieno Okanda Advocates dated 9/05/2024 is considered improperly on record and is at this moment expunged from the record.

Notice of preliminary objection against the motion dated 19/4/2024

29. The PO dated 30/04/2024 raised the following grounds in limine: -

- i. That under Articles 159 (1) & (2), 162(4) & 169 (1)(d) and (2) of the Constitution, the court lacks jurisdiction to determine the petition and the motion as read together with Articles 25(a), 27(1) and (2) and 50 of the Constitution and Sections 32, 33, 58, 125, 129 and 130 of the Environment Management and Co-ordination Act (EMCA) and Part VII and Sections 154, 155, 156 and 157 of the Mining Act (2016).
 - ii. Contrary to Section 5 of the Judicature Act, the jurisdiction of this court has been improperly and unlawfully invoked thus ousting the jurisdiction of the court to deal with the matter.
 - iii. The photograph attached to the affidavit of Wycliffe Odero Ochieng sworn on 19/04/2024 contravened Sections 106A and 106B of the Evidence Act.
30. The contemnors urged the court to dismiss the two motions by the petitioners, Pet.1 should be dismissed for want of jurisdiction and paragraph 4 of Wycliffe Odero Ochieng's affidavit should be struck out together with the annexure thereto.

Grounds of opposition against the motion dated 19/4/2024

31. The grounds were as follows: -

- i. The motion was incompetent, bad in law, and utter abuse of the court process.
- ii. The contemnors were never served with any court order or process that can be the subject of these proceedings.
- iii. There is no allegation of deliberate and willful disobedience of any court orders.
- iv. The motion does not meet the threshold for the grant of the orders sought.
- v. The motion is merely based on inadmissible hearsay.
- vi. The motion is based on a non-existent petition.



- vii. The motion lacks merit.
- viii. The petitioner is nonexistent or is not a party that can move the court for orders sought under the cited provisions of law.

IPs' response to the petition

- 32. The 1st IP did not file a response to either the motions or petitions but through the 3rd IP, the 2nd IP by its Acting Director M/s. Gregory Kituku of Mines in the State Department for Mining-Ministry of Mining, Blue Economy and Maritime Affairs swore an affidavit on 20/05/2024 which was in response to the petition and joined issues with the petitioner.
- 33. He averred the 1st respondent's mining site was identified and two of its supervisors were arrested and charged in a criminal court.

Petitioners' submissions

a. Petitioners in Pet.1- submissions on the Motion dated 2/04/2024

- 34. By the law firm on record for them, M/s Bruce Odeny & Company Advocates, they filed written submissions dated 26/04/2024 and in them, they identified a single issue for determination- whether the motion is merited and submitted on the principles for the grant of temporary conservatory orders and relied on several provisions of law and judicial precedents that were tendered to the court.

b. Petitioners in Pet.1- submissions on the Motion dated 19/04/2024

- 35. The submissions were equally dated 26/04/2024 and filed on the same date as the submissions on the motion dated 2/04/2024 and it identified several issues for determination: whether the motion was merited, whether there was a valid order, whether the order was served upon the respondents and whether the respondents were in contempt and relied on several provisions of law and authorities. However, it is noted the decision of Basil Criticos v Attorney General & 8 Others (2012) eKLR was not tendered to this court.

c. Petitioners in Pet.1- submissions on the P.O. dated 30/04/2024

- 36. In the submissions dated 20/05/2024, counsel identified a single issue for determination; whether the instant PO was merited and to buttress his argument, similarly relied on several provisions of law and judicial precedents.

Respondents' submissions

a. 1st- 3rd respondents' submissions on the motion dated 2/4/2024

- 37. By the law firm on record for them M/s Otieno Okanda & Company advocates, they filed written submissions dated 18/04/2024. Their counsel identified a singular issue for determination; whether the motion had met the threshold for grant of conservatory orders and relied on a single authority which unfortunately was not tendered to court.

b. 4th- 6th respondents' submissions on the motion dated 2/4/2024

- 38. The law firm of M/s Otieno Okanda & Company advocates appears for all the respondents. It appears counsel erred when describing his submissions dated 9/05/2024 as that of all the respondents as opposed to that of the 4th to 6th respondents. In this set of submissions, counsel identified a similar issue



as that of the other respondents and relied on provisions of law and authorities that were tendered to this court.

Contemnors submissions

a. Submissions erroneously referring to PO dated 19/05/2024

39. The law firm on record for them M/s. GKO Advocates, LLP, filed written submissions dated 20/05/2024. He described them as submissions on a PO dated 19/5/2024 which are ostensibly non-existent and some of the issues identified therein are on the PO dated 30/04/2024 that is the subject for determination and on another PO dated 17/05/2024 that impugns the petitions.
40. Considering Article 50 of the Constitution on fair hearing, this court will only restrict itself to portions of the submissions on grounds raised in the PO dated 30/04/2024.
41. It is noted the document filed by the contemnors dated 19/05/2024 is grounds of opposition by the contemnors against the petition and whether or not this document is properly on record will be the subject of determination in a different forum. Upon segregation, the issues they identified for resolution are whether this court has jurisdiction to entertain the petition and the motion dated 19/04/2024 and whether the jurisdiction of this court has been properly invoked. To support his arguments counsel relied on several provisions of law and judicial precedents which were tendered to the court.

b. On the motion dated 19/04/2024

42. Their counsel on record filed written submissions dated 2/04/2024 but did not identify issues for determination but outlined the law on contempt proceedings and the adduction of photographs in court proceedings. The limb of the contemnors' submissions on the petitioners' capacity was never raised in the PO dated 30/4/2024 and grounds of opposition in opposition to the motion dated 19/04/2024 and on that basis, will be disregarded.
43. Upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider each of the counsel's arguments on the particular issue and also bear in mind the provisions of law and judicial precedents that they all relied upon to buttress their respective arguments.

Issues for determination

44. Accordingly, having carefully considered the motions, affidavits, PO, grounds of opposition, and rival submissions together with provisions of law and authorities relied upon, it is the considered view of this court that the following issues which shall be dealt with consecutively commend themselves for determination: -
 - a. Whether the PO has met the legal threshold.
 - b. Whether this court has jurisdiction to entertain the petition and notice of motion dated 19/04/2024.
 - c. Whether the petitioners have met the threshold to warrant the grant of conservatory orders.
 - d. Whether the motion dated 19/04/2024 is merited.
 - e. What orders should this court issue including an order as to costs?



a. Whether the PO has met the legal threshold.

45. None of the counsels addressed me on this issue in their submissions. However, the decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696 has long settled the tests that a PO has to meet and, in this decision, the court held thus: -

“ A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

46. From this decision, it is deduced that for a PO to succeed, it must meet 3 tests which are, it raises a pure point of law, on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In addition, the PO should be capable of disposing of a suit.

47. Since the contemnors have raised the issue of this court’s jurisdiction, the Supreme Court of Kenya’s decision of *Mary Wambui Munene v Peter Gichuki Kingara and 2 others*, [2014] eKLR comes to the fore and avers the question of a court’s jurisdiction is a pure point of law when it stated thus in its obiter dictum: -

“ The question of jurisdiction is a pure question of law. This Court has on several occasions adopted the dictum of Nyarangi JA in the *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 that it has to be determined from the start, and that where the Court finds it has no jurisdiction, it should down.”

48. On application of the summarized tests and binding decision from the apex court, it is undoubted the PO meets all the tests because it raises a pure point of law on the issue of this court’s jurisdiction and since it is trite law jurisdiction is everything and without which the court cannot move one step further, it is capable of disposing of the suit. I must find the PO has met the requisite threshold.

b. Whether this court has jurisdiction to entertain the petition and notice of motion dated 19/04/2024.

49. The contemnors questioned the jurisdiction of this court and according to their counsel, the entire petition was anchored on an alleged failure by the respondents to obtain licenses enabling them to carry out mining activities. Accordingly, the National Environment Complaints Committee (NECC) and the National Environmental Tribunal (NET) should exercise jurisdiction.

50. According to their counsel, the provisions of law that oust this court’s jurisdiction are Articles 25(a), 27(1) & (2), 50, 159 (1) & (2), 162(4) & 169 (1)(d) and (2) of the *Constitution*, Sections 32, 33, 58, 125, 129 and 130 of *EMCA* and Part VII and Sections 154, 155, 156 and 157 of the *Mining Act*.

51. Their counsel relied on the Court of Appeal decision of *Kibos Distillers Limited & others v Benson Ambuti Adegga & others* (2020) eKLR which was upheld by the Supreme Court of Kenya decision of *Adegga & 2 others v Kibos Distillers Limited & 5 others* (Petition 3 of 2020) [2020] KESC 36 (KLR) (Constitutional and Human Rights) (4 August 2020) (Ruling) (Kibos case) where in the latter



- decision, the apex court stated on the application the doctrines of judicial abstention and restraint in multifaceted petitions before the ELC courts and other courts for that matter, the ELC should reserve constitutional issues on the rights to a clean and healthy environment, pending appeals from other statutory mandated bodies which had jurisdiction to determine the dispute.
52. Put another way, where there is a concise process for the redress of a particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
 53. Both the contemnors and petitioners in Pet.1 also relied on the more recent decision of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) (Nicholus’s case) where the apex court departed from Kibos case and on the application of the doctrine of exhaustion of statutory dispute resolution mechanisms before resorting to the courts, stated that where there is an alternative remedy provided by a statutory appeal procedure, then the alternate procedure should be adhered before approaching the court unless in exceptional cases.
 54. In this decision, the apex court stated: -
 104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of the Constitution as read with Section 4(1) of the Environment and Land Act. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the Constitution. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.
 105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.”
 55. Articles 159 (1) and (2) on judicial authority and 162 (4) and 169 (1)(d) & (2) on court systems of subordinate courts do not oust the jurisdiction of this court while the other provisions of the Constitution relied upon by the contemnors were omnibus.
 56. Similarly, the jurisdiction of NECC in Section 32 of EMCA is restricted to amongst others investigation, prosecution, and preparation of reports whilst NET’s jurisdiction under Section 129 of EMCA is limited in the scope of matters it can handle on appeal which is largely on licensing and environmental restoration. None of these bodies have jurisdiction to adjudicate over violation of rights to a clean and healthy environment. Lastly, Section 154 (c) of the Mining Act categorically affirms a party can approach this court on mineral rights issued under the Act.
 57. The provisions of EMCA and the Mining Act do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment as the case herein. See Nicholus’s case.



58. In any case and as provided for in Article 162 (2) (b) of the Constitution as read together with Section 13 (1) of the Environment and Land Court Act, this court has appellate and original jurisdiction over the matters that are handled under EMCA and the Mining Act.
59. Since each case is unique, a case-by-case analysis has to be considered in determining which forum is appropriate. I have considered the pleadings before me, and in my considered view and upon delicately balancing the jurisdiction of the ELC and other forums, this court is the appropriate forum for dealing with the issues in dispute and I say so for good reason.
60. Both petitions allege stop orders were issued by the IPs against the respondents however, they failed to comply. It is also alleged by the 2nd IP that criminal proceedings have commenced against the 1st respondents' supervisors for operating without mining licenses.
61. Further, it must be recalled apart from the court being guided by general principles that govern other courts, this court has unique principles that guide it. This is provided for in Section 18 (a) of the Environment and Land Court Act and they include sustainable development, public participation, cultural and social principles traditionally applied by communities in the management of the environment or natural principles of natural justice resources, international co-operation, intergenerational and intragenerational equity, polluter-pays and precautionary.
62. Therefore, I find this court has jurisdiction to entertain the motions and the petitions. The limb of the PO challenging the court's jurisdiction is hereby dismissed.

c. Whether the petitioners have met the threshold to warrant the grant of conservatory orders.

63. As a court of equal status to the High Court, Article 23 of the Constitution grants this court jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights which includes jurisdiction to grant conservatory orders.
64. However, the exercise of such jurisdiction is limited to a particular category of rights or fundamental rights which include those relating to a clean and healthy environment as found in Articles 42, 69, and 70 of the Constitution. See Section 13 (3) of the Environment and Land Court Act (ELC Act).
65. As was stated in the case of Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR, this court's mandate at this stage is restricted to probing and appraising the facts and evidence that are before it and determining if the petitioners have met the threshold to warrant a grant of a conservatory order.
66. Both the petitioners' and respondents' counsels agree the principles for the grant of conservatory orders are settled and the decision of the Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR aptly summarized these principles thus: the applicant ought to demonstrate a *prima facie* arguable case with a likelihood of success and that in the absence of the conservatory orders it is likely to suffer prejudice; whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of rights; whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory and that the court must consider conservatory orders in the face of the public interest dogma.
67. On the 1st principle of *prima facie* case with chances of success and turning to the material presented before this court, the 3rd and 4th respondents admitted the 4th respondent purchased the suit property, and a cursory perusal of materials presented before the court alleges stop orders have been issued by



- the IPs against the some of the respondents. It appears criminal charges have been preferred against the 1st respondent's officers for failure to have mining permits. Therefore, I find the petitioners succeed on this principle.
68. On the 2nd principle of whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights, I find this in the affirmative and find that the denial of conservatory orders would be based on the material before this court, stifle the petitioners' alleged rights to a clean and healthy environment.
 69. As to the 3rd principle of the petition being rendered nugatory, at this juncture, none of the alleged materials advanced the position that the respondents held licenses or permits allowing them to carry out any licensing activities in the suit property. Considering the principles of this court that were earlier highlighted in this ruling, I find in the absence of a conservatory order, the petition will be rendered nugatory.
 70. The 4th principle of irreparable harm or real danger was defined in the case of *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others* [2014] eKLR to mean danger that is imminent and evident, true and actual, and not fictitious; so much so that it deserves immediate remedial attention or redress by the court.
 71. A cursory glance at the plethora of alleged pieces of evidence on deaths and assaults that allegedly occurred as a consequence of the respondents' alleged mining activities demonstrates there are myriad causes of deaths or injury. However, the alleged death of one person stands out as she allegedly died as a result of a collapsed mining pit allegedly operated by the 1st respondent.
 72. On the fourth and 5th principles, in my humble view, human life even if in the singular, is precious and to avert the possibility of more deaths (if any), and in public interest, I find the motion dated 2/04/2024 as merited. This renders the petitioners' motion in Pet. 2 dated 16/04/2024 as spent.

d. Whether the motion dated 19/04/2024 is merited.

73. As rightfully submitted by both the petitioners' and contemnors' counsels, the law governing contempt proceedings is found in Section 5(1) of the *Judicature Act*. The decision of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR declared the *Contempt of Court Act* unconstitutional and on nullification, our regime reverted to Section 5(1) of the *Judicature Act*. This provision states: -

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”
74. The authority of this court to deal with contempt proceedings is derived from Section 29 of the *Environment and Land Court Act*.
75. The petitioners' counsel submitted the orders of the court were valid, unambiguous, and duly served on the respondents. Although they relied on the judgment in *Mutiria Karumbai Macaw v James Njagi Makembo & 3 others* [2018] eKLR to buttress their arguments, nonetheless, this decision does not support their case as it was dealing with a claim over land and not on contempt proceedings.
76. Taking a contrary position, the contemnors' counsel in setting out the procedures for contempt, submitted the motion fell far short as the requisite steps were not adhered to; leave to institute contempt proceedings was no longer a legal requirement; the affidavit in support of the motion was questionable and should be struck out; the alleged evidence in support of contempt did not comply with Section



106B of the *Evidence Act*; there was no personal service upon the contemnors; the corporate veil against the contemnors as the directors of the 1st and 2nd respondents was never lifted and, the order did not contain a notice of penal consequences. Counsel's arguments were anchored on several authorities which shall be considered in this decision.

77. It must be noted Section 5 of the *Judicature Act* is bereft of the procedure for instituting such contempt proceedings and consequently, this court has to seek recourse in the procedure applicable in the High Court of Justice in England and Wales.
78. The procedure in the High Court of Justice in England and Wales was considered in detail by the Court of Appeal in the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR when in this decision, the court stated: -

“The procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court RSC), made under the Supreme Court of *Judicature Act*, 1873 (or simply the *Judicature Act*, 1873)...Following the implementation of the famous Lord Woolf's “Access to Justice Report, 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. On 1st October, 2012 the Civil Procedure (Amendment No 2) Rules, 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety.”

79. PART 81 elaborately states the ingredients of contempt applications, the definition of terms, and proceedings thereof. This procedure was concisely summarized in the Court of Appeal decision of *Christine Wangari Gachege (supra)*. Since the contemnors' counsel has more or less challenged the entire motion, it is prudent for this court to stipulate the relevant law. Rule 81.4 of this England and Wales Civil Procedure Rules which deals with the ingredients of contempt applications provides thus:-

- “(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
- (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
 - (b) the date and terms of any order allegedly breached or disobeyed;
 - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
 - (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
 - (e) whether a penal notice had been added to the front of any order allegedly breached or disobeyed included a penal notice;
 - (f) the date and terms of any undertaking allegedly breached;



- (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
- (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- (i) that the defendant has the right to be legally represented in the contempt proceedings;
- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public. **Emphasis added.**

80. A reading of the provision of law demonstrates the requirements are mandatory except if the court directs otherwise or if a particular requirement is inapplicable. A scrutiny of the record, motion and the order served upon the contemnor demonstrates that the portions of Rule 81.4 (1) (c) (e) and (h) which this court has emphasized were never complied with.



81. In the circumstances and though I deem it unnecessary to consider the various aspersions cast upon the motion and materials in support thereof by the contemnors' counsel, I must single out the faulty affidavit in support of the motion by Mr. Wycliff Odera Ochieng which described him as the applicant which is not so. Additionally, the photograph that evidenced contempt undoubtedly contravened Section 106B of the *Evidence Act*. I therefore find this limb of the contemnors' PO is merited. I consequently find the motion dated 19/04/2024 is not merited.
82. Before I deal with the final issue, I must mention that I agree with the contemnors' counsel that leave for contempt proceedings was done away with as Rule 81.4 is silent on such leave. In effect, there is no prayer for citation for contempt. See also Christine Wangari Gachege (Supra).

e. What orders should this court issue including an order as to costs?

83. For the foregoing reasons, I find the motion dated 2/4/2024 merited and it is hereby allowed, as for the motion dated 19/04/2024, I find no merit in it and it is hereby dismissed. Further, ground (3) of the PO dated 30/4/2024 is sustained while the other grounds are dismissed. Since the petitioners in Pet. 1 have given an undertaking as to damages, an order will be issued in that respect. It is trite law costs follow the event and costs shall be in the cause.
83. Ultimately, I hereby issue the following disposal orders: -
- a. Pending hearing and determination of the petitions, a temporary conservatory order is issued restraining the respondents by themselves, their workers, employees, agents, servants, and whoever acting on their instructions from mining, operating a gold mine, or continuing with any form of mining activity, extraction of gold and/or any other mineral ore, their attendant waste on/and from land parcel No Siaya/Ramba/874 and Lamba area.
 - b. The petitioners in ELC EP Petition 1 of 2024 give an undertaking in damages for any loss that may become due and payable by them as a consequence of order (a) above.
 - c. The notice of motion dated 16/04/2024 in ELC EP Petition 2 of 2024 is deemed as spent.
 - d. The notice of motion dated 19/04/2024 is hereby dismissed.
 - e. The grounds of the preliminary objection dated 30/4/2024 challenging this court's jurisdiction are hereby dismissed.
 - f. Costs shall be in the cause.
 - g. Applications dated 20/05/2024 and 22/05/2024 shall be heard orally on 18/09/2024.

Orders accordingly.

DATED, SIGNED AND DELIVERED BY EMAIL THIS 20TH DAY OF JUNE, 2024

HON. A. Y. KOROSS

JUDGE

20/6/2024

RULING DATED, SIGNED AND DELIVERED BY EMAIL THIS 20TH DAY OF JUNE, 2024

Court assistant: Ishmael Orwa

