



**Nicolus v Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) (Environment & Land Petition 2 of 2021) [2024] KEELC 4723 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4723 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND PETITION 2 OF 2021  
AY KOROSS, J  
JUNE 13, 2024**

**BETWEEN**

**ABIDHA NICOLUS ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH ANDEERE NYAANGA ..... 2<sup>ND</sup> RESPONDENT**

**OJWANG’ ISAACK OGWEYO ..... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF PETROLEUM AND MINING ..... 4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY ENVIRONMENT AND FORESTRY .... 5<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 6<sup>TH</sup> RESPONDENT**

**COUNTY COMMISSIONER, SIAYA COUNTY ..... 7<sup>TH</sup> RESPONDENT**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL ENVIRONMENTAL COMPLAINTS COMMITTEE (NECC) ..... INTERESTED PARTY**

**COMMISSION ON ADMINISTRATIVE JUSTICE ..... INTERESTED PARTY**

**KATIBA INSTITUTE ..... INTERESTED PARTY**

**KITUO CHA HAKI ..... INTERESTED PARTY**

**ACACIA EXPLORATION KENYA LIMITED ..... INTERESTED PARTY**



## MEMBER OF COUNTY ASSEMBLY EAST ASEMBO WARD .... INTERESTED PARTY

### RULING

1. The subject matter that is the subject of this ruling is the chamber summons dated 1/09/2020 in which several parties challenged the jurisdiction of this court through various applications among others: the 2<sup>nd</sup> respondent's notice of preliminary objection (PO) dated 9/09/2020; 3<sup>rd</sup> respondent's grounds of opposition dated 9/09/2020 and the 8<sup>th</sup> respondent's PO dated 7/10/2020. I have been unable to trace this last application from the court record.
2. Upon hearing all parties, this court in a ruling rendered on 2/02/2021 found the petitioner had not exhausted procedures of various forums including those provided under the Environment Management and Co-ordination Act (EMCA) and Energy Act before approaching the court and upheld the 2<sup>nd</sup> and 8<sup>th</sup> respondents' POs and struck out the petition for want of jurisdiction. The import of this is that the substantive application was not heard on merits.
3. Aggrieved, the petitioner appealed to the Court of Appeal, and in a judgment delivered on 7/02/2023, it upheld the decision of this court.
4. Undeterred, the petitioner appealed to the Supreme Court of Kenya, and in a judgment rendered on 28/12/2023, the petitioner's appeal was upheld, the impugned ruling of this court was set aside in its entirety and the matter remitted back to this court for determination on merits. It is noted the Supreme Court found the petitioner's claim is a private litigation against private and public entities.
5. Upon remission, this court dealt with two applications dated 29/12/2023 and 12/02/2024. Consequently, and for purposes of clarity, this court will not reopen or deal with any part of the pleadings or submissions that touched on this court's jurisdiction as this is spent.

### Petitioner's case

6. The petitioner commenced these proceedings by way of a petition on 1/09/2020. In his petition, the petitioner sought amid others, the following reliefs;
  - a. A declaration the 1<sup>st</sup> to 7<sup>th</sup> respondents had violated his rights and that of Ramba Community contrary to Articles 10, 27(1), 28, 35 (1), 42, 43 (1), 47, 69(1), 73 and 75 of the Constitution.
  - b. A declaration the petitioner's right to property has been violated by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 8<sup>th</sup> respondents.
  - c. A declaration mining activities including leaching and gold processing carried out in Ramba area by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have been irregular, illegal, and unconstitutional.
  - d. An order of mandamus compelling the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents to supply the petitioner or any member of Ramba area with all mining records on Ramba area since 1988.
  - e. An order of certiorari to bring to this court and quash the decision of the 4<sup>th</sup> to 6<sup>th</sup> respondents to issue permits and or mineral licenses for mineral rights in Ramba area issued in blatant breach of the Mining Act, EMCA, and other relevant Treaties and Conventions.
  - f. A conservatory order restraining/ prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves, agents, hirelings, hoodlums, servants, and workers or persons working on their behalf from



continuing with threats to the life of the petitioner, disposal of wastes/ effluents on plots no. 788, 719, and river Odundu, trespass on plot no. 788 or any actions/activities likely to interfere with the petitioner's rights to property and a clean and healthy environment as protected by Articles 40 and 42 of *the Constitution*.

- g. An order for compensation and or damages.
7. Together with the petition, the petitioner also filed a chamber summons application that is the subject of determination. Some of the reliefs are spent and the substantive prayers for resolution pending determination of the petition are: -
- a. A conservatory order does issue restraining the respondents from threatening and or harming, injuring, hurting, harassing, insulting, assaulting, stalking, intimidating, and or meting any form of violence against the petitioner and or acting in any way intended to limit his rights and or rights.
- b. A conservatory order be issued prohibiting or restraining the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from continuing with mining operations in Ramba area including the processing of gold and or ore, grinding, washing/elusion, and or leaching ore/sand, and or dumping/draining the wastes, effluent and or sludge into river Odundu and or the nearby properties including Ramba 788, 719, 550 among others and/ or trespassing upon Ramba 788 by entering and staying therein, using it as a footpath, molding concretes thereon for processing gold/ore, building structures and or installing their machines for purposes of leaching, washing, elution and or grinding gold ore thereon.
- c. A conservatory order be issued prohibiting or restraining the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents by themselves, their agents, servants, workers, employees, agents or any person acting on their behalf from covering up, encouraging, supporting, and protecting the unconstitutional, illegal and unregulated mining operations and environmental pollution, degradation, violations currently being conducted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, their agents, servants, workers, hoodlums, hirelings and any other person acting on their behalf and or any mining activities in Ramba area not compliant with the provisions of *the Constitution*, *Mining Act*, and EMCA.
- d. A conservatory order compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents to furnish and make available to the petitioner and the court the approved environmental impact assessment (EIA) report and license, gold mining, prospecting, leaching, elution license and permits, effluent discharge license, copies of deposited environmental bonds and securities and annual financial reports of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent as per Section 53 of the *Mining Act* since 2019.
8. The summons was supported by several grounds on its the face and on the affidavit that was in support of the summons and petition. It was deposed by the petitioner Mr. Abidha Nicholus on 1/09/2020 and they presented the petitioner's complaints in the following summarized grounds; he had brought the petition on his behalf and that of Ramba community and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had threatened him through proxies which had necessitated him to complain to the Law Society of Kenya (LSK) and Directorate of Criminal Investigations (DCI).
9. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had been operating illegally without requisite licenses, despite a stop order by the 6<sup>th</sup> respondent, some of its agents in collusion with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 7<sup>th</sup> respondents had disregarded the orders, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's mining activities on plot Ramba 716 had caused effluent to discharge to nearby plots including land parcel nos. Siaya/Ramba 788 and Siaya/Ramba 719, Plot nos. 720 and 550, and also river Odundu which is used by the residents of Ramba.



10. Moreover, his queries and that of the community to the 1<sup>st</sup> and 7<sup>th</sup> respondents and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties had not yielded any response, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had trespassed onto Siaya/Ramba 788 and carried out illegal activities with the 8<sup>th</sup> respondent installing poles thereupon, and the 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> respondents had contravened Article 35 (1) of *the Constitution* by denying him access to information.
11. The petitioner asserted he had a prima facie case and if the reliefs are denied, the substratum of the petition will be rendered nugatory and expose persons to health risks, and the law should be held sacrosanct.
12. The petitioner also filed a further affidavit which he deposed on 6/11/2020 and stated the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' mining activities were not restricted to Plot no. 711 but the entire Ramba area and these activities entailed underground mining tunnels which subsisted in several other parcels of land.
13. The petitioner averred that the alleged EIA license issued to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents contained conditions that had been breached and the activities posed health risks to the ecosystem and waters of river Odundu and caused erosion to Siaya/Ramba 788.

### **Respondents' responses**

14. In response to the summons and petition, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents and 1<sup>st</sup> interested party (IP) which are all government bodies filed a replying affidavit deposed by Dr. John Kipkorir Chumo who is the 1<sup>st</sup> IP's secretary.
15. In it, he contended that on receiving a complaint from the petitioner on 7/07/2020, the 1<sup>st</sup> IP visited the site on 7/10/2020 and collected views on the complaints raised by the petitioner, Ramba Community Committee (Ramba CC) and other stakeholders.
16. The findings of its engagements established the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had an EIA license that was issued on 1/10/2020, these respondents' activities operated on land parcel no. Siaya/Ramba/711, they had an Occupational Safety *Health Act* (OSHA) certificate, noise emission permit, heavy machinery that caused noise and carbon emissions, used mercury to separate gold from dust without mitigation measures with a possibility of causing pollution, and employed close to 100 people.
17. According to it, these respondents violated Section 87 of EMCA for improper discharge of water thus causing pollution, lacked safety equipment for workers, and an EIA license. Accordingly, it made several recommendations on how the shortcomings can be mitigated and stated a water analysis report was being awaited from the Water Resources Management Authority (WRA) to establish the extent of pollution by these mining activities to the nearby river.
18. In opposition, the 2<sup>nd</sup> respondent filed a replying affidavit sworn on 2/11/2020 and associated himself with the 3<sup>rd</sup> respondent's replying affidavit. In addition to the 3<sup>rd</sup> respondent's averments, he stated the allegations made against him and the 3<sup>rd</sup> respondent by the petitioner were defamatory and Siaya/Ramba/711 was distant from Siaya/Ramba 788, 716, 719, and 720 and that the petitioner was pursuing his private interests and the mining activities employed several people and closure would spell doom to their livelihoods and that an expert report to substantiate the alleged pollution had not been availed.
19. In opposition, the 3<sup>rd</sup> respondent filed a replying affidavit in opposition to the summons and stated that licenses on mining activities are ordinarily issued by the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents upon satisfaction conditions had been met and that his mining activities were restricted to land parcel no. Siaya/Ramba/711 in which he and the 2<sup>nd</sup> respondent are lessees and he was not corrupt.



20. Furthermore, he stated that before undertaking the mining activities, he presented an EIA report to the 6<sup>th</sup> respondent and he also had a noise emission permit from the 6<sup>th</sup> respondent, a certificate of registration of workplace, a building occupation certificate, and a license issued by the 7<sup>th</sup> respondent and that the petitioner's allegations were preposterous.
21. He averred that the mining activities and its waste had not spilled over to adjoining parcels of land and there was no evidence placed before the court that the alleged owners of land parcels no. Siaya/Ramba 719, 720, and 550 existed or that waste and effluence had been channeled through them to river Odundu or that their mining activities had caused diseases. The 3<sup>rd</sup> respondent contended that he had never threatened the petitioner.
22. Mr. Joshua Mboga who is in the employ of the 8<sup>th</sup> respondent and with its authority, deposed a replying affidavit on 23/11/2020 which was in opposition to the summons. He denied the 8<sup>th</sup> respondent had trespassed on Siaya/Ramba 788, a complaint had ever been raised by the petitioner and stated a cause of action against the 8<sup>th</sup> respondent had not been disclosed. He contended that parcels of land within Ramba were unadjudicated and the orders sought ran afoul of the principles of mandatory and permanent injunctions and urged the court to dismiss the summons.

### **Interested parties' responses**

23. In response to the summons and petition, the 2<sup>nd</sup> IP filed a replying affidavit deposed by Mr. Leonard Ngaluma who is its secretary. He averred that in giving effect to Article 35 of *the Constitution* and on receipt of a complaint from the petitioner on 25/07/2019, the 2<sup>nd</sup> IP discharged its mandate by inquiring from the 4<sup>th</sup> respondent which unfortunately failed to elicit a response thus, it issued an order against it.

### **Petitioner's submissions**

24. By his law firm on record M/s Kairu Mbuthia LLP, the petitioner filed written submissions dated 10/11/2020 and they were largely a rehearsal of his affidavits which have been summarised in this ruling and this court will not belabour much in reiterating them. Counsel submitted the petitioner's right to information was anchored in Article 35 which is intended to protect constitutional rights and freedoms.
25. In his submission, counsel disparaged the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' documents and contended some of them had expired, and were issued several days before the issuance of the alleged EIA license. Counsel submitted the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had breached the provisions of Regulations 2 and 4 of the Water Quality Regulations and had failed to comply with certain regulations whose proper citations were not provided for in the submissions.
26. To buttress his arguments, he relied on two authorities one of which was *Platinum Distillers Limited v Kenya Revenue Authority* [2019] eKLR where the court stated its role in conservatory orders is thus: -

“The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.”



27. Counsel also relied on the decision of the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR which settled the tenor, import, and nature of a conservatory order in the following words:-

“(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

### **Respondents’ submissions**

28. The 2<sup>nd</sup> respondent’s law firm on record Ms. Bruce Odeny & Co. Advocates filed written submissions dated 28/11/2020 and submitted the petitioner needed to fulfill the 3 tests set out in the case *Giella vs. Cassman Brown & Company* [1973] EA 358 which are an applicant must demonstrate he has a prima facie case with a probability of success, he will suffer irreparable injury if the orders sought were not granted and if the court is in doubt, it can decide the case on a balance of convenience. According to counsel, the petitioner had failed to meet the threshold.

29. Counsel submitted that the definition of prima facie was defined in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd* (2003) eKLR as: -

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

30. On the principle of prima facie case, counsel submitted the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ mining license, and the 6<sup>th</sup> respondent’s license to them had not been challenged by the petitioner, and that mining activities were conducted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on land parcel no. Siaya/Ramba/711 and not the alleged disputed parcels of land.

31. On the principle of irreparable harm, counsel submitted the petitioner had not adduced tangible evidence to substantiate threats to his person such as a report to the police. Moreover, the counsel submitted the allegations of flouting laws or causing pollution had not been corroborated.

32. On the last principle, counsel submitted the balance of convenience tilted in the 2<sup>nd</sup> respondent’s favour as he and the 3<sup>rd</sup> respondent had licenses and public interests should prevail as the mining activities employed several people.

33. The 8<sup>th</sup> respondent’s submissions dated 24/11/2020 which were filed by counsel M/s. Ochieng J dealt with the spent issue of this court’s jurisdiction.



### Interested Parties' submissions

34. By counsel M/s. Viola Ochola, the 2<sup>nd</sup> IP filed written submissions dated 2/12/2020 which were on the spent issue of jurisdiction and on an issue not raised in the summons which was whether the 2<sup>nd</sup> IP had discharged its mandate.
35. By its law firm on record M/s. Coulson Harney LLP, the 5<sup>th</sup> IP filed written submissions dated 27/11/2020 and submitted the constitutional foundation of conservatory orders is found in Article 23 of *the Constitution*, and the law was settled and relied on similar authorities as the petitioner.
36. On the principle of prima facie case, counsel submitted the summons had met the threshold as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had flouted the provisions of Articles 26, 27 (1), 35 (1), 42, 43(1), 47, 69 (1) and 70 of *the Constitution* and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had not traversed the petitioner's allegations that they were carrying out mining activities without a permit as envisaged by the *Mining Act*.
37. Therefore, counsel submitted the petitioner had met the test of Article 23 of *the Constitution* and buttressed this argument by relying on Centre for Rights Education and Awareness (CREAW) & 7 Others V Attorney General [2011] eKLR where the court stated: -

“I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”
38. Counsel submitted the mining activities would pose a danger to the community and the health and well-being of the petitioner and that it only supported the petitioner to the extent that the 5<sup>th</sup> IP was protecting its prospecting license held over the Ramba area.

### Preliminary issues

39. Before I delve into the issues for determination, I must deal with how the petitioner has moved the court by summons instead of by a notice of motion as envisaged by Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
40. Blunders will often be made and it is my considered view that this was a technical error that did not go to the root of the issues for determination and it is curable by Article 159(2)(d) of *the Constitution*.

### Issues for determination, Analysis, and Determination

41. I have carefully considered the summons, its grounds, affidavits including rival affidavits, submissions, provisions of law relied upon, and well-cited authorities, and in my view the issues the court is called upon to decide at this point are whether the petitioner has met the conditions for the grant of conservatory orders and what orders should this court issue including an order as to costs. These two issues will be dealt with together. I will now proceed to address the issues for determination.
42. As a court of equal status as 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.



43. However, the exercise of such jurisdiction is limited to a particular category of rights or fundamental rights which include a right 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).
44. As earlier highlighted in this ruling, the petitioner has sought several conservatory orders and this court is alive that it is close to 4 years since the summons was filed and circumstances may have changed but a request for the parties to abandon the summons and for the matter to proceed with the main petition was declined and for that reason, the court had to deal with this summons before dealing with the main petition.
45. As rightfully submitted by the petitioner and 5<sup>th</sup> IP, at this level of the proceedings and not to prejudice any party or compromise the outcome of the petition, this court's mandate at this stage is restricted to probing and appraising the facts and evidence that are before it and determine if the petitioner has met the threshold to warrant a grant of conservatory orders. See *Platinum Distillers Limited* (Supra).
46. In my considered view, in determining whether to grant a conservatory order and in the exercise of judicious discretion, a court has to consider 5 tests in exercising such discretion.
47. Firstly establish a prima facie case with a probability of success [See *Centre for Rights Education and Awareness* (Supra)]; secondly, he will suffer irreparable harm as a result of the violation or threatened violation of *the Constitution* [See *Platinum Distillers Limited* (Supra)]; thirdly, because of the public law nature of conservatory orders, public interest must be considered before granting of a conservatory order [See *Gatirau Peter Munya* (Supra)], fourthly, if failure to grant the conservatory order will render the petition nugatory [See *Martin Nyaga Wambora v Speaker of The County Of Assembly Of Embu & 3 Others* [2014] eKLR], lastly, the court cannot issue final substantive orders at the interlocutory stage [See *Federation of Women Lawyers-Kenya & 28 Others v Attorney General & 8 Others* [2015] eKLR and *John Harun Mwau v Linus Gitahi & 13 others* [2016] eKLR].
48. On the last principle of seeking final orders at the interlocutory stage Lenaola J (as he then was) in *John Harun Mwau* (Supra) weighed in with approval on the decision of *Federation of Women Lawyers-Kenya* (Supra) and stated as follows on whether a party should be granted orders on access to information at an interlocutory stage as espoused by Article 35 of *the Constitution*: -

“...it does not follow that the right to information should be enforced simultaneously with or after proceedings for the enforcement or protection of other rights have been instituted. At this stage of the proceedings, it is not clear which other right the Applicant wants to enforce or protect other than the right to information itself. This Application therefore brings to the fore this conundrum and where an Applicant wishes to have final substantive orders under the Bill of Rights at the interlocutory stage of pending substantive proceedings for enforcement of the same right.

- (22) It is also my view that, by attempting to enforce the right at this stage of the proceedings, the Applicant has thereby subjected himself to rules applicable to interlocutory applications. In addition to satisfying the ordinary balance of probabilities test therefore, he will have to satisfy tests peculiar to interlocutory applications under Article 23(3) of *the Constitution* and in fact, this reduces the status of the right to information (which is a substantive right) to that of a procedural right and a mere stepping stone to the realisation of other rights when it is meant to be a right in itself, a position I find untenable.”



49. In both the summons and petition, the petitioner is seeking certain orders against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents for denying him access to information, and particularly in the petition, he has sought a declaration that they denied him access to information. Being guided by the above authorities, it is my considered view that this limb of the summons which seeks final orders at an interlocutory stage cannot be granted.
50. I will now turn to the other conservatory orders. However, it must be borne in mind that being an environmental court, apart from the general guiding principles that govern other courts, this court has unique principles that guide it as 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.
51. Turning to the material presented before this court and on the principle of prima facie case with chances of success, the petitioner has described the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' property which has allegedly flouted several provisions of law as either plot Ramba 716 or plot 711 while the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents and 1<sup>st</sup> IP and the EIA report and EIA license have described the subject property as Siaya/Ramba/711. It appears the petitioner is uncertain of the property upon which the 2<sup>nd</sup> and 3<sup>rd</sup> respondents alleged mining activities are carried out.
52. In addition, apart from the official search of Siaya/Ramba/788 all documents to prove the existence of the other alleged parcels of land such as Siaya/Ramba 719, 720, and 550 which the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have ostensibly violated have not been tendered and at this stage, it is uncertain if they exist.
53. On the issue of compliance with statutory provisions, at this point, it is noted the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have allegedly not demonstrated they obtained a license from the 4<sup>th</sup> respondent as envisaged by Section 32 of the [Mining Act](#) for them to carry out mining activities on Siaya/Ramba/711.
54. The petitioner contended the 6<sup>th</sup> respondent issued a stop order against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in July 2019, however, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents countermanded this by allegedly demonstrating that an EIA license was issued to them on 1/10/2020 and a permissible noise permit was tendered to them by the 6<sup>th</sup> respondent on 10/09/2020.
55. It appears that before the mining activities, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had not complied with statutory provisions of EMCA to enable it to operate mining activities in Siaya/Ramba/711, and some of the requisite licenses were not issued until after the petition was filed on 03/09/2020.
56. In the circumstances, the petitioner was entitled to seek conservatory orders prohibiting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from continuing with the mining activities, although at the moment and based on the issuance of an EIA license, nothing turns on the issue and whether or not it was properly issued or not is not the subject of the instant determination.
57. As to the conservatory orders on alleged threats to the petitioner's life by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the alleged collusion between them and the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 7<sup>th</sup> respondents for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to carry out mining activities that were unconstitutional and in contravention of statutes, I am not satisfied at this stage of the proceedings that the petitioner has established a prima facie case.



58. As to the principle of the petition being rendered nugatory, Black's Law Dictionary, 11<sup>th</sup> Edition has defined the term nugatory as:

“Of no force or effect; unless; invalid...”

59. A scrutiny of the reliefs sought in the petition does not demonstrate the petition will be rendered nugatory if the conservatory reliefs are not granted and further, some of the statutory licenses have allegedly been issued to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by the 6<sup>th</sup> respondent. I find the petitioner fails on this principle.

60. As to irreparable harm or real danger, Mwongo J in Martin Nyaga Wambora (Supra) defined this term as follows: -

“I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual, and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

61. Applying this definition to the issue at hand, a cursory look at the documents tendered by the petitioner does not demonstrate the actual alleged threats to his life or alleged collusion activities between various parties to his grave detriment.

62. Still, it is common knowledge that mining activities harm the environment and can negatively affect people. However, and bearing in mind the principle of public interest, this court is cognizant that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have allegedly employed close to 100 people and their means of livelihood will be curtailed if the orders sought are granted.

63. In the final analysis and for the foregoing reasons, I find no merit in the chamber summons dated 1/09/2020 and I hereby dismiss it. Since costs follow the event, costs shall be in the cause. Let parties appear before this court for directions on disposal of the main petition on 30/09/2024.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**13/6/2024**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Petitioner present

Miss Akinyi for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents

Miss Sakami for the 6<sup>th</sup> respondent

Miss Sakami h/b for Mr. Ngara for the 8<sup>th</sup> respondent

Miss Kinama for 3<sup>rd</sup> interested party

Mr. Muchiri h/b for Ms. Deya for the 5<sup>th</sup> interested party

Court assistant: Ishmael Orwa

