



**Marsabit County Sakuye Community Council of Elders & 1007 others v Mining Corporation of Kenya through the Cabinet Secretary & 5 others (Environment and Land Judicial Review Case E007 of 2023) [2024] KEELC 5986 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5986 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2023**

**AA OMOLLO, J**

**SEPTEMBER 19, 2024**

**AN APPLICATION BY MARSABIT COUNTY SAKUYE COMMUNITY COUNCIL OF ELDERS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS**

**AND**

**IN THE MATTER OF ARTICLES 43, 60, 62, 63, 66, 67, 69, 70 AND 71 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF MINING ACT LAWS OF KENYA**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENT ACT LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT AND IN THE MATTER OF PROTECTION & PRESERVATION OF THE MINERAL RIGHTS THE DAVAL & SAKUYE LOCAL COMMUNITIES**

**AND**

**IN THE MATTER OF THE SAKUYE COMMUNITY LAND MANAGEMENT & RESOURCE SHARING**

**BETWEEN**

**MARSABIT COUNTY SAKUYE COMMUNITY COUNCIL OF ELDERS & 1007 OTHERS & 1007 OTHERS ..... APPLICANT**

**AND**

**MINING CORPORATION OF KENYA THROUGH THE CABINET SECRETARY ..... 1<sup>ST</sup> RESPONDENT**



NATIONAL LAND COMMISSION .....	2 <sup>ND</sup> RESPONDENT
CABINET SECRETARY OF INTERIOR .....	3 <sup>RD</sup> RESPONDENT
ATTORNEY GENERAL .....	4 <sup>TH</sup> RESPONDENT
ROTOR SYSTEMS LIMITED .....	5 <sup>TH</sup> RESPONDENT
COUNTY GOVERNMENT OF MARSABIT .....	6 <sup>TH</sup> RESPONDENT

## JUDGMENT

1. The Exparte applicants brought the Notice of Motion dated 9<sup>th</sup> November, 2023 premised on the provisions of Section 8 and 9 of the Law Reform Act, Order 53 of the Civil Procedure Rules and articles 62, 66, 67, 69, 70 and 71 of the Constitution plus all the applicable laws. They sought to be granted the following reliefs;
  - i. The Applicants be hereby granted the relief of CERTIORARI to remove to this Court the Respondents decision of failure to engage in public participation of the mining activities on the Applicant’s land.
  - ii. The Applicants be hereby granted the relief of PROHIBITION against the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents to interdict, and bar them from issuing exploration, prospecting, or mining Licenses to the 5<sup>th</sup> Respondent, or any other party thereof on the Applicant’s land without subject the Licensees public participation.
  - iii. An Order of Mandamus be issued by the court directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents compelling them to stop, and interdict any mining or related activities by them within the Dabel/Sakuye area of Dabel Location, in Marsabit County.
  - iv. That the costs of this Application be provided for.
2. The Application was based on the grounds listed on its face as follows;
  - a. The Applicants are the local residents, and inhabitants of the impugned Dabel area by virtue of being their ancestral and,
  - b. The Applicants’ and their inherent rights to their community land are threatened to go into deplorable extinction unless this Honourable Court intervenes.
  - c. All attempts to engage the Respondents in order for the Respondents to protect the environmental rights of the Applicants have proved futile as the Respondents continue to actively ignore their pleas.
  - d. Other regions of the Republic that experienced similar fate, and circumstances were quickly assisted by the Respondents, thereby portending vivid discrimination in the case of the Applicants’ complaints to the Respondent over the Dabel region.
  - e. The ex-parte applicants are members of the Dabel/Sakuye marginalized community, and inherent owners of that community land area known as Dabel/Sakuye in Dabel Location of Marsabit County.
  - f. There has been in the last year a great migration of societies and other communities occasioned by an influx of private companies into the Dabel/Sakuye Area. The individuals involved (in



these private companies), have a sole aim to seek to prospect, and mine the mineral deposits sitting in Davel Location, that is inhabited by the Dabel/Sakuye community.

- g. Following this influx, the Ex-Parte Applicants' land has been recklessly utilized by non-residents, damaged, open manholes caused by the rampant mining and scramble for mine fields multiplied, sexual offences against women and children multiplied and same reported to the 2<sup>nd</sup> Respondent to no avail.
  - h. The Applicants petitioned the Respondents, and thereby served them with letters raising attention of the desperate situation at the Dabel/Sakuye region. However, the Respondents either ignored, or dismissed the claims by the ex-parte pleas, and instead embarked on an unlawful discriminative process of approving consents for prospecting, and mining of the natural resources from the ex-parte Applicants' land.
  - i. Despite the protests, the Respondents have ignored, and encouraged the intruders who have milled into the Applicants land, and have excluded, refused, and denied the Applicants from the full management of their impugned land.
  - j. The strange intruders have not sought out their issues regarding the requisite, and necessary licenses according to law, AND, the Applicants' complaint is also that the Respondents have refused, and/or failed to arrest the bad situation from getting worse.
  - k. The Respondents received complaints, and objection letters from the Applicants' leaders, but the Respondents have gone ahead on several occasions to mobilize meetings, and excursions without any participation of the Applicants whatsoever.
3. Mr. Adan Mamo Elema swore an affidavit on 9<sup>th</sup> November, 2023 in support of the motion. He deposed that he is the Chairman of the 1<sup>st</sup> exparte, applicant hence duly authorised to swear the affidavit. He stated that it came to the attention of the elders and the membership that the environmental resources of the Dabel/Sakuye people were being rampantly and carelessly destroyed.
  4. The community also realised that its school going children had dropped out of school; contracted STIs and some because pregnant and the situation was getting out of hand. Hence the Applicants sought government intervention by writing several letters and memoranda to the government institutions including the Respondents for action.
  5. Mr. Adan deposed that despite the government receiving their objections, the Respondents have ignored and encourage intruders who have milled into the Applicants land. That the Applicants have been excluded and denied the full management of their impugned land. Consequently, they met on 8<sup>th</sup> August, 2023 and resolved as a community to file this suit to obtain recourse from the court. They pleaded with the court to grant the reliefs sought in the present motion.
  6. The 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents opposed the Application vide the Replying Affidavit of Thomas Mutwiwa. He deposed that the National Mining Corporation is established under the [Mining Act](#) No. 12 of 2016 with a mandate to be the investment arm of National government in respect of minerals. He also deposed that community land is governed by the [Community Land Act](#) No. 27 of 2016 which Act defined community land as any land converted into community land under any law.
  7. That before the issuance of prospecting of mining license to an Applicant, consent must be obtained where the parcel is community land, from the respective county government. Mr. Mutwiwa denied that the 1<sup>st</sup> Respondent plays any role in the issuance of the license alluded to in this application. Further, he averred that the 1<sup>st</sup> Respondent has not applied for mining permit within Marsabit County



- neither does its own any land in the disputed region. He added that the 1<sup>st</sup> Respondent has been wrongfully sued.
8. The 2<sup>nd</sup> Respondent also opposed the judicial review application vide the replying affidavit of Ben Opa sworn on 28<sup>th</sup> November, 2023. Mr Opa deposed that the 5<sup>th</sup> Respondent made an application for consent to enable them mine chromites and gold in Dabel area in Marsabit County vide their letter dated 1<sup>st</sup> August, 2023. The 2<sup>nd</sup> Respondent confirms receipt of objection from Nyaribo & Co advocates that the grounds for seeking the consent were made in bad faith.
  9. The 2<sup>nd</sup> Respondent deposes that it is mandated under the provisions of article 62(1) (f) of the Constitution to manage public land which includes minerals on behalf of the National government. They added that as a standard procedure for safeguarding the public interest, the 2<sup>nd</sup> Respondent undertakes due diligence before issuing such a consent. It is in this light that Mr Opa deposes that the 2<sup>nd</sup> Respondent engaged the Applicants and other stakeholders vide their letter of 13<sup>th</sup> Sept 2023 for a scheduled ground visit to assess the conditions of the land and gather information in relation to the request.
  10. The 2<sup>nd</sup> Respondent deposed that prior to the ground visit, they also engaged the Applicants vide a letter dated 13<sup>th</sup> October, 2023 for a virtual consultative meeting regarding the 5<sup>th</sup> Respondent's application. That the said meeting took place on 18.10.2023 and there was general consensus that the 2<sup>nd</sup> Respondent does visit the site which would inform their decision. He added that the 2<sup>nd</sup> Respondent is yet to undertake this exercise and no further steps have been taken in regard to the application for consent made by the 5<sup>th</sup> Respondent. The 2<sup>nd</sup> Respondent avers that this application is prematurely lodged before this court hence it is an abuse of the court process.
  11. Directions were taken for prosecuting the application by way of written submissions. All parties filed their written submissions except the 6<sup>th</sup> Respondent. The Applicants filed their written submissions dated 29<sup>th</sup> April, 2024 which they opened by giving a summary of the pleadings filed and the prayers they seek. They proceeded to submit on what they titled as the situation since filing the application.
  12. Under this heading they submitted on facts inter alia;
    1. The huge insecurity witnessed as violence broke up and several people were killed evidenced by the newspaper excerpt attached to the submissions.
    2. The Interior minister, (the 3<sup>rd</sup> Respondent) personally visited the Dabel mining fields on 15<sup>th</sup> March, 2024 and inspected the damage caused and witnessed for himself the wide scale of violence and threats to security which visit & violence were widely reported on Media.
    3. The 3<sup>rd</sup> Respondent issued an order stopping all activities on his own volition as Security minister to stop further precipice and the stoppage was also widely reported in the national media and is in public domain.
    4. The 5<sup>th</sup> Respondent in utter disregard of the orders of this court and the administration order of the 3<sup>rd</sup> Respondent breached all protocols and orders and severally visited the impugned Dabel Mining fields to prospect and prepare the ground for mining against the order of Court. Locals took photos and sent them to social media. Same are hereby attached.
  13. The Applicants also raised the following issues which they submitted on;
    1. Whether there has been public participation in issuing or an intention to grant mining consent by the Applicants to the 5<sup>th</sup> Respondent or any other person in the impugned area.



2. What is the importance of the Meeting of the 2<sup>nd</sup> Respondent of 18<sup>th</sup> October, 2023 and to what extent does the meeting reveal the true plight of the Applicant case;
  3. What is the Law protecting the local communities, the Applicants, in relation to mining; Has this law been breached?
  4. Are the Respondents' failure to protect the residents of Dabel from insecurity caused by influx of Miners discriminating the Applicants and ultra vires to the Law;
  5. Does the Applicants case warrant issuance of the Orders sought?
14. The Applicants submitted that the Respondents are fully aware that the land problem at Dabel is volatile and sensitive. That the 2<sup>nd</sup> Respondent acknowledges in their affidavit to receiving complaints from Applicants but they did nothing about it which shows the usual high handedness of the Respondents. The Applicants state they have brought this case to demonstrate that Kenyans in this region have been discriminated so as to give opportunity to foreign and local companies the Fair administrative action and *the constitution*.
15. The Applicants proceeded to itemise what they have titled as evidence of discrimination. These include;
1. The Respondents are aware of several commissioned papers by the academia as well as the state over the situation at the Marsabit county as a whole as well as the Dabel region more specifically in the Marsabit County government's modern integrated Plans for the year since 2013 to 2027.
  2. That the Respondents also have several documents prepared by the central government where the Respondents actively participated outlining the best practices in helping alleviate the plight of ASAL communities of which the Applicants fall under yet none of these documents were used to respond to the cries of the Applicants.
  3. The 2<sup>nd</sup> Respondent has confirmed in the replying affidavit of Ben Opa at para 6 that the Applicant's lawyers wrote a protest note to them. The same Respondent being central in overseeing the manner in which the land resources that touch on its mandate would be utilized instead did not engage the Applicants by any response hence the perception that even the 2<sup>nd</sup> Respondent indeed discriminated against the Applicants without any reasons whatsoever. Had the 2<sup>nd</sup> Respondent written back to explain itself and how it was organizing itself to assist the Applicants then they would have been fair.
  4. The 2<sup>nd</sup> Respondent cannot now be heard to say that he engaged on what the Applicants wanted without the Applicants. This disregard ought to be frowned upon by the courts as it is the reason the Applicants have come to court. There is a public service ethical expectation that the Respondents should be clear in their communication.
  5. Mining activities in Marsabit are currently taking place in three locations: The Chinese mines located to the east of the town of Marsabit, the quarry and cement factory in Kalacha near the Chalbi desert, and a site giving off "ruby" "around North Horr. All these sites are meticulously regulated by the Respondents and order exists in those areas. The question that begs to be answered is why not treat the Applicants the same way?
16. On the relevant law, the Applicants cite the provisions of articles 10, 40, 62 and 63 of *the Constitution*. They also referred to Section 16 & 17 of the *Land Act* which they submit give this court powers to interfere with state processes that would be unjust to the Applicants. That the purpose of this



proceedings is to invite the court to stop the ongoing discrimination. They add that the *Mining Act* also protects the interests of the exparte Applicants and the local community.

17. It is the Applicant's case that where the 2<sup>nd</sup> Respondent has been mandated with the authority to manage public land then the first priority is to call local communities to understand them and appreciate their plight with or without the Mining license. To this regard they urged the court to find that the intention of the 2<sup>nd</sup> Respondent is suspect and evil in the circumstances. The applicants complain to the court is that the intention of the 2<sup>nd</sup> Respondent is to side with the 5<sup>th</sup> Respondents against the applicant's wishes. That the Administrative Action espoused by *the Constitution* and the Act have been violated.
18. They submitted that the *Mining Act*, 2016 at Section 8 requires consultation with local communities before the grant of mineral rights. Section 9 provides for community development agreements to ensure benefits from mining accrue to affected communities. Section 28 empowers the Cabinet Secretary to designate areas as restricted or controlled for mining activities, taking into consideration community interests. Section 34 mandates environmental impact assessments (EIAs) for mining activities and requires public participation in the EIA process. Section 109: Establishes the Mining Cadastre Office to manage mining rights and facilitate community participation. None of these officers have visited the Applicants to understand their plight before the process of licensing and prospecting can commence.
19. The exparte applicant cited the case of African Commission on Human and Peoples' Rights vs Republic of Kenya, application *No. 006/2012* which addressed the historical land rights and conservation – related governance of the Ogiek indigenous people of Kenya. The African court ruled in favour of the Ogiek finding that Kenya had violated their rights to property, culture, religion and development. In conclusion, they urged the court to grant the application.
20. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed submissions dated 9<sup>th</sup> July, 2024. They raised one issue for determination; whether there is a cause of action against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. It is their contention that no cause of action has been raised against them.
21. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted on the functions of the Corporation which is at section 24 of the *Mining Act* No. 12 of 2016. The said functions are;  

“engage in mining prospecting and mining; and any other related activities; invest of behalf of national government; acquire by agreement or hold interests in any undertaking enterprise or project associated with the exploration, prospecting and mining; and shares or interest in any firm, company or other body of persons, whether corporate or unincorporated which is engaged in the mining, prospecting, refining, gra... producing, cutting, processing, buying, selling or marketing of minerals; and carrying its business, operations and activities whether as a principal agent, contractor otherwise, and either alone or in conjunction with any other persons, firms or body corporate.”
22. That there is no provision in the Act that empowers the 1<sup>st</sup> Respondent to grant consents for mining activities and hence the allegations made against them are baseless. They also submitted that there was no evidence produced to support the claim that the 3<sup>rd</sup> Respondent failed to protect them from intruders who are mining in the suit property.
23. They submitted that in the absence of both mining permits/licenses and ownership of land by the 1<sup>st</sup> Respondent in Marsabit County, any attempt to involve the corporation in the suit would lack merit and basis. They urged the court to dismiss the claim as against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.



24. Vide the submissions dated 3<sup>rd</sup> June, 2024, the 2<sup>nd</sup> Respondent submitted that the Applicants have misapplied the replying affidavit sworn by Ben Opa. They stated that the 2<sup>nd</sup> Respondent has no constitutional or statutory power to issue a mining licence to any prospecting or exploration company. That it only issues consent to a prospecting company to enable the company apply for a mining license where the subject land is unregistered community land.
25. That before filing of this suit and grant of the consent, the Applicants participated in the consultative meeting held on 18<sup>th</sup> October, 2023. They also argue that the Applicants have not met the threshold to warrant the grant of judicial review orders. This premised on the assertion that there is no decision that has been made by the 2<sup>nd</sup> Respondent on the 5<sup>th</sup> Respondent's application as claimed.
26. The 2<sup>nd</sup> Respondent avers that after the consultative meeting of October, 2023, it was to conduct a site visit to ascertain the ground status of the subject area. That the site visit did not take place because of the court order issued in favour of the Applicants in this matter. They aver that the site visit was to be part of the continued public participation exercise.
27. They referred this court to the cases inter alia Republic Vs. National Land Commission Exparte Farmers Choice Ltd (2020) EKLK which discussed the basis upon which judicial review orders should be granted. It was held thus;

“Judicial review is more concerned with the manner in which a decision is made than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include when the decision complained of is tainted with illegality, irrationality and procedural improprieties (where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may always be issued where the decision is made without or in excess of jurisdiction.”

28. Further, they relied in the decision of Pastoli vs Kabali District Local Government Council & Others (2008) 2 EA 300 which held thus;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedure impropriety ....illegality is when the decision-making authority commits on error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission....Irrationality is when there is such gr....unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision there is a failure to act fairly on the part of the decision-making authority in the process taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act with procedural fairness towards one to be affected by the decision. It may also invo... failure to adhere and observe procedural rules expressly laid down in a statute or legislature Instrument by which such authority exercises jurisdiction to make a decision.”

29. The 2<sup>nd</sup> Respondent contend that in exercise of its powers granted under section 38(1) of the *Mining Act* and with its internal procedures has exercised a proper balance between rights & liberties of persons



affected as it did hold consultative meeting and had planned as site visit. In support, they cited the case of Investments Limited vs. Ministry of National Heritage and Culture & 3 Others (2016) eKLR. They reiterated that the 2<sup>nd</sup> Respondent is yet to make any decision with regard to the 5<sup>th</sup> Respondent's application for consent.

30. They urged the court to find the present application as premature, untenable and misconceived and should be dismissed.

**Determination:**

31. Having read the pleadings and analysed the submissions rendered by the parties do frame three questions for determination;

- i. Whether or not the application meets the threshold for grant of orders of judicial review.
- ii. If answer to (i) is yes, whether there is merit in the application.
- iii. Who bears the costs of this application?

32. The Applicants contend discrimination and negative consequences on their land. They pleaded and submitted that they filed the present suit because despite their complaints made in writing to the said Respondents, no action has been taken. Thus they continue to suffer from the consequences of the inaction such as their children dropping out of school, their resources being utilized to their disadvantage.

33. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents stated the application has no bearing on them because the 1<sup>st</sup> Respondent has no mandate to issue license while no evidence was presented to demonstrate the inaction of the 3<sup>rd</sup> Respondent. To prove the claim against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the Applicants in the submissions made references to social media reports and some photographs which they attached to the submissions. It is trite law that evidence cannot be adduced through submissions. In the case of Nancy Wambui Gacheru vs Peter Wanjiru Ngugi Nairobi HCCC 36 of 1993, Mwera J expressed thus:

“indeed and strictly speaking submissions are not part of the evidence in a case. Submissions to the court's view are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest attention in order to firmly establish a claim/charge or disapprove it. Once the case is closed, a court may well proceed to give judgment. There are many cases especially where parties act in person where submissions are not heard. Even some counsels opt not to submit. So submissions are not necessarily the case.”

34. In the event the applicants required to rely on the documents they annexed in the submissions, all they needed was to seek leave to file a further/supplementary affidavit to introduce them as part of their evidence. Be that as it may, the matter of Judicial Review deals with the legality or otherwise of the process decision making by public bodies. The social media reports and photographs do not constitute decision making process by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The Applicants producing these documents did not elaborate how these documents support their claim to have orders sought granted.

35. As submitted by the 2<sup>nd</sup> Respondent, Judicial Review serves the purpose of questioning the decision-making process of a public body. The 2<sup>nd</sup> Respondent pleaded that it had not made any decision. They admit that the 5<sup>th</sup> Respondent had submitted an application for consent to enable it apply for a license. They also admit that the land in question is unregistered community land. However, they aver that



- no consent had been issued and that interim orders were issued while they were still in the process of undertaking public participation.
36. Proceedings brought under order 53 of the Civil Procedure Rules and Section 9 of the *Law Reform Act* are treated as special proceedings. In most instances, it has been held that Judicial Review is intended to question the process of decision-making and not the merits of the decision. In the case of Republic vs. Jomo Kenyatta University of Agriculture & Technology Ex parte Elijah Kamau Mwangi (2021) eKLR, Nyamweya J (as she then was) observed thus at paragraph 8 & 9 of her judgment;
8. It is notable that the ex parte Applicant has sought an orders of mandamus against the Respondent to compel them to accept his intent to submit his PHD Thesis for examination. The purpose of an order of mandamus is to compel the performance of a public duty or any act contrary to or evasive of the law. It therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; the court will not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will pose implementation challenges that require the Court's supervision. See in this regard the decision in Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application *No. 40 of 2000*.
  9. It was further been held in Republic vs The *Commissioner of Lands & Another Ex-Parte Kitbinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012* that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has "a public element" which may take any forms."
37. The Applicants in their pleadings have not stated the date of the decision by the Respondents that they want removed considering the explanation offered by the 2<sup>nd</sup> Respondent that there is no decision reached and the act of public participation was ongoing. Since the correspondences exhibited by the 2<sup>nd</sup> Respondent demonstrate some steps they have taken towards engaging the Applicant, the averment of inaction on their complaint is also not merited. If the Exparte wanted to challenge the manner in which the public participation was being undertaken, then approaching this court by way of Judicial Review does not accord them such opportunity. The orders of certiorari can also not apply as against the 5<sup>th</sup> Respondent who is a private entity.
38. The Exparte applicants urged this court to issue an order of prohibition directing the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents to interdict and bar them from issuing any exploration/prospecting mining license to the 5<sup>th</sup> Respondent or any other party over the applicant's land without subjecting them to public participation. None of the Respondents sued are mandated in law to issue a prospecting/mining license.
39. The applicants and 2<sup>nd</sup> Respondent referred to a virtual consultative meeting held on 8<sup>th</sup> October, 2023 touching on the impugned application for license. The 2<sup>nd</sup> Respondent state that its statutory mandate is limited to granting consent over unregistered community land to enable such an applicant apply for exploration or prospecting mining license. The 1<sup>st</sup> Respondent also submitted that its



mandate does not include issuing licenses for exploration/prospecting. The 6<sup>th</sup> Respondent (the County Government) by law also does not have mandate to issue a mining license. The 5<sup>th</sup> Respondent was the one applying for the impugned license so it cannot grant a license to itself.

40. The order (iii) of the application as worded seems to be directed to the wrong parties as it is intended at stopping any mining activities in the area whether licensed or not. Courts do not issue orders in vain neither can orders be issued against parties who are not joined to a suit as that amounts to condemning them unheard. I have looked at the applicable law regarding which authority is given the mandate to license exploration/prospecting of minerals.
41. Section 31 (1) of the [Mining Act](#) 2016 provides thus;

“The functions of the Mineral Rights Board Functions of the Mineral Rights shall be to advise and give recommendations, in writing, to Bo. the Cabinet Secretary on the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements; the areas suitable for small scale and artisanal mining; the areas where mining operations may be excluded and restricted; the declaration of certain minerals as strategic minerals; cessation, suspension, or curtailment of production in respect of mining licenses; fees, charges and royalties payable for a mineral right or mineral; and any matters which under this Act, are required to be referred to the Mineral Rights Board. (2) The Mineral Rights Board may for the purpose of facilitating the performance of its functions establish such number of committees to advise the Mineral Rights Board on matters relating to mining and minerals.”
42. The Mining Corporation of Kenya is described under Section 22 as a body corporate with perpetual succession capable of suing and being sued. Hence it did not have to be sued through the Cabinet Secretary of mining. The power to grant/reject application for mining rights falls under the mineral rights board appointed by the Cabinet Secretary Mining. The Cabinet Secretary was not sued on its own name.
43. The Applicant also sought for an order of mandamus compelling the Respondents to stop and interdict any mining or related activities within Dabel/Sakuye area of Marsabit County. The Ex parte applicants do not disclose who are the persons undertaking the mining activities given the 5<sup>th</sup> Respondent is yet to be licensed. Further, there was no evidence presented of ongoing mining activities on the subject land. The court can only grant orders in so far as they refer to the parties before it and which it appears the 5<sup>th</sup> Respondent is yet to commence any mining activities.
44. Granting the orders as presented/prayed are untenable on account of; absence of decision being challenged which implies lack of license issued to the 5<sup>th</sup> Respondent. Again, if the Exparte applicant has complaints of activities already undertaken which resulted in gaping holes and which activities are deleterious to the community land and the environment. then they ought to have filed a suit or constitutional petition that would have given them the latitude to adduce evidence and seek appropriate reliefs.
45. In light of the foregoing analysis, I conclude that the application does not meet the threshold of a Judicial Review proceeding and the orders sought are not supported by evidence adduced. Consequently, the application fails and is hereby struck out. An order is made that each party meets their respective costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. OMOLLO**



**JUDGE**

