



**Krystalline Salt Limited & 3 others v Cabinet Secretary, Ministry of Mining and Petroleum & another (Environment and Land Petition 14 of 2021) [2023] KEELC 11 (KLR) (12 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 11 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND PETITION 14 OF 2021**

**MAO ODENY, J**

**JANUARY 12, 2023**

**IN THE MATTER OF: ARTICLES 19,20,21,22  
AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10 (1) (A), (B), (C) & (2) (A), (B),27,40,209 AND 210 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES,2013**

**AND**

**IN THE MATTER OF: SECTION 3 (1) (A) AND (C),4(1), (2)  
AND (3) AND 5 OF THE FAIR ADMINISTRATION ACT**

**AND**

**IN THE MATTER OF: THE MINING ACT,2016**

**BETWEEN**

**KRYSTALLINE SALT LIMITED ..... 1<sup>ST</sup> APPLICANT**

**KURAWA INDUSTRIES LIMITED ..... 2<sup>ND</sup> APPLICANT**

**MALINDI SALT WORKS LIMITED ..... 3<sup>RD</sup> APPLICANT**

**KENSALT SALT LIMITED ..... 4<sup>TH</sup> APPLICANT**

**AND**



**The mining of edible salt is regulated within the ambit of the Mining Act, 2016**

Reported by Kakai Toili

*Environmental Law* – minerals – regulation of mining activities – scope of regulation – regulation of edible salt mining – scope of powers of the Cabinet Secretary in regulating mining activities – whether the mining of edible salt fell within the ambit of the Mining Act, 2016 – Constitution of Kenya, articles 60, 62(1)(f), 66(2), 69, and 71; Mining Act (cap 306) section 2(1) and (2), and First Schedule.

*Statutes* – interpretation of statutes – Mining Act, 2016 – transitional provisions – effect of commencement of the Mining Act, 2016 on pre-existing salt harvesting leases – whether the commencement of the Mining Act, 2016 extinguished leasehold interests over land used for edible salt extraction—Constitution of Kenya, article 40.

**Brief facts**

The petitioners were engaged in the extraction of sea salt from seawater, refining and packaging it for sale and human consumption. They were registered proprietors of several parcels of land (“the suit properties”) held under unexpired leasehold titles, which were used exclusively for salt harvesting. The petitioners contended that their right to extract edible salt from the suit properties was tied to the land leases and would automatically lapse only when they ceased salt harvesting operations.

They argued that the Mining Act (cap 306) expressly brought “industrial and construction salt” within its scope but made no reference to “edible salt,” and that under section 7 of the Act, certain substances, including salt customarily taken by members of a community, were exempt from regulation. The petitioners challenged the respondents’ position that the Mining Act (cap 306) had extinguished their salt harvesting rights and that they must obtain fresh licences from the Cabinet Secretary to continue operations.

Through a notice of motion, the petitioners sought conservatory orders restraining the respondents from exercising regulatory or other authority over the extraction, sale, export, or other dealings in edible sea salt from the suit properties. In the substantive petition, they sought, among other reliefs, a declaration that the Mining Act (cap 306) did not govern the extraction, sale, export, or dealings in edible sea salt.

**Issues**

- i. Whether the mining of edible salt was regulated within the ambit of the Mining Act (cap 306).
- ii. What was the scope of the Cabinet Secretary’s powers in regulating mining activities?
- iii. Whether the commencement of the Mining Act (cap 306) extinguished leasehold rights over parcels of land used for mining edible salt.

**Held**

1. Sections 2(1) and (2) of the Mining Act stipulated that the Act applied to minerals specified in the First Schedule, which the Cabinet Secretary could amend by Gazette Notice. In the First Schedule, “salt” appeared at entry No. 42 under “construction and industrial minerals” without any distinction between “edible” and “industrial” salt. The Act therefore regulated salt in all its forms, whether consumed as food or used industrially, bringing edible salt squarely within its ambit.
2. The second limb of the definition of “mine” in the Act included the carrying out of any mining operation, including tailing. “Mining operation” was defined as an operation carried out in connection with a mine to win a mineral from where it naturally occurred. Since salt was expressly classified as a mineral in the First Schedule, its extraction constituted a regulated mining operation under the Act.
3. Section 7 of the Mining Act preserved certain customary rights, allowing members of a community to take substances such as soil, clay, iron, salt, or soda from land, except where that land lay within an



- area covered by a mineral right, if such taking was in line with long-standing custom. The petitioners did not qualify under that exemption, as they were not engaging in customary collection but rather in commercial extraction of edible salt. Their activities were therefore subject to regulation by the Cabinet Secretary.
4. Under the Act, the Cabinet Secretary could, with the advice of the Mineral Rights Board and by Gazette notice, prescribe materials of customary usage. This aligned with constitutional provisions—articles 60, 62(1)(f), 66(2), 69, and 71—which require that land and natural resources be held, used, and managed equitably, efficiently, productively, and sustainably.
  5. Regulating edible salt extraction was also consistent with article 69 of the Constitution, which obligated the State to ensure the sustainable exploitation, utilization, management, and conservation of the environment and natural resources, and to ensure equitable sharing of benefits. Such matters could not be left to the discretion of private actors; the State must regulate through licensing and royalties to guarantee sustainability and fairness.
  6. The Mining Act, 2016, did not extinguish the petitioners’ leasehold rights over the suit properties; rather, it brought their activities under the Act’s regulatory framework.
  7. The record disclosed no evidence that the petitioners held any mining right—such as a lease, prospecting right, exclusive prospecting licence, special licence, or location—granted under any of the repealed laws listed in section 225(1) of the Act. The repealed laws were the Mining Act (cap 306), the Trading in Unwrought Precious Metals Act (cap 309), and the Diamond Industry Protection Act (cap 310). The petitioners did not show that they had been regulated under any of those statutes prior to 2016, nor that their rights qualified for automatic transition under section 225.
  8. The petitioners’ non-compliance with the Mining Act stemmed from the mistaken belief that “edible salt” was excluded from the Act’s scope. Section 202 of the Act required the holder of a mineral right in respect of a large-scale operation to, within 18 months of enactment and the making of regulations, update its mine plan to comply with the Act’s provisions on employment, health and safety, environmental management, and community social investment.
  9. Article 40 rights had not been violated; no proprietary rights had been expropriated. The petitioners remained entitled to extract edible salt from their leasehold lands, with the balance of their lease terms unaffected save for compliance with the Act. The Cabinet Secretary retained the statutory mandate to set royalty rates, and such royalties would henceforth be levied under the Mining Act regime rather than under the former Commissioner of Lands framework.
  10. The petitioners’ leases continued to be governed by law, and the commencement of the Mining Act, 2016, did not terminate them. However, compliance with the Act’s requirements was mandatory, ensuring their operations were regularized within the current statutory framework, consistent with their status as lawful operators under the Registration of Titles Act.

*Petition partially allowed.*

### **Orders**

- i. *The letters dated May 12, 2021, by the respondent for compliance were quashed and the respondent was at liberty to start a fresh process for compliance to bring the petitioners within the purview of the Mining Act bearing in mind that the petitioners were within their rights to extract the salt in a previous regulating regime.*
- ii. *Each party to bear their own costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Miscellaneous Civil Application 743 of 2006; [2007] KEHC 3680 (KLR); [2007] 2 KLR 240 - (Explained)



2. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petitions 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); [2015] eKLR - (Mentioned)
3. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
4. *Mwangi, Patrick Waweru & another v Housing Finance Co of Kenya Ltd* Civil Suit 595 of 2012; [2013] KEHC 1903 (KLR) - (Explained)
5. *Philma Farm Produce & Supplies & 4 others v Attorney General & 6 others* Petition 194 of 2011; [2012] eKLR - (Explained)
6. *Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) ex parte Unilever Tea Kenya Limited* Miscellaneous Civil Application 668 of 2007 - (Explained)

## Statutes

### Kenya

1. Constitution of Kenya articles 10, 40, 27, 47, 60, 62 (1)(f), 66(2), 69; 71; 183(1)(2); 209, 210; 225(3) - (Interpreted)
2. Diamond Industry Protection Act (Repealed) (cap 310) In general - (Cited)
3. Land Act (cap 280) section 106 (1)(2) - (Interpreted)
4. Land Registration Act (cap 300) sections 2(1); 107(1)(2) - (Interpreted)
5. Mining Act (cap 306) sections 2, 6, 7(1); 10; 60; 62(1) (f), 66(2); 71; 83(1)(2); 202(1); 225(1)(3); schedule 1- (Interpreted)
6. Registration of Titles Act (Repealed) (cap 281) section 29- (Interpreted)
7. Trading in Unwrought Precious Metals Act (Repealed) (cap 309) In general- (Cited)

## Texts

1. Klein, DB., Robinson, J., (Eds) (2011), *Property: A Bundle of Rights? Prologue to the Property Symposium* Econ Journal Watch Vol 8(3) pp 193 -204
2. Clark, JM., (Ed) (1926), *Social Control of Business* Chicago: University of Chicago Press 2nd Edn

## Advocates

*Dr Arwa* for the petitioners

*Ms Lutta* for the respondents

## JUDGMENT

### Introduction

1. The petitioners are duly registered Companies engaged in the extraction of sea salt from sea water which is refined and packaged for sale and distributed for consumption in domestic and export markets throughout East African region and beyond.
2. The 1<sup>st</sup> respondent is the Cabinet Secretary in charge of the Ministry of Petroleum and Mining established under the [Mining Act, 2016](#).
3. The 2<sup>nd</sup> respondent is the Attorney General of the Republic of Kenya who is the Principal Legal Advisor to the government of the Republic of Kenya and authorized by law to represent the National government in court where it is a party.
4. The petitioners commenced these proceedings *vide* a notice of motion application dated July 12, 2021 whereby they sought conservatory orders *inter alia*, barring the respondents jointly and severally either by themselves, agents, servants or officials from purporting to exercise regulatory or other authority



- over the extraction, sale, export or other dealings on the edible sea salt extraction rights held by the applicants.
5. The notice of motion was accompanied by a constitutional petition dated July 12, 2021 in which the petitioner sought the following orders: -
- a. A declaration that the *Mining Act, 2016* does not govern the extraction, sale, export or other dealings with edible sea salt;
  - b. A declaration that the petitioners are under no obligation to comply with the provisions of the *Mining Act, 2016*;
  - c. A declaration that since the petitioners have already been granted by the government all the necessary authorizations and approvals to extract, sell, export or otherwise deal with edible sea salt extracted from their respective parcels of land, they are not required to obtain fresh approvals and/or authorizations from the same Government (whether through the Ministry of Mining or otherwise and whether in the form of license or permits) for remainder of their respective leases;
  - d. A declaration that the Cabinet Secretary for mining cannot legally, constitutionally or otherwise terminate, revoke or otherwise interfere with the enjoyment by the Petitioners of their edible salt extraction rights as contained in their leases;
  - e. A declaration that any attempt by the Cabinet Secretary for mining to terminate, revoke or otherwise interfere with the petitioners' edible salt extraction rights without following due process of the law and without compensation constitute a violation of articles 40, 27, 47, 209 and 210 of the *Constitution* and all the provisions of the constitution cited herein;
  - f. An order of certiorari removing to this court for purposes of quashing the 1<sup>st</sup> respondent's decision contained in the letters dated May 12, 2021 addressed to petitioners demanding their full compliance with the requirements of the *Mining Act 2016*.
  - g. A permanent injunction barring the respondents jointly and severally by either themselves, agents, servants, employees or persons claiming under them from revoking, cancelling, suspending, altering or in any other way altering the petitioners' edible salt extraction rights as contained in their respective leases until the expiry of the said leases.
  - h. Costs of this petition
  - i. Any other relief or orders that this honourable court shall deem just and fit to grant.
6. The respondents filed a replying affidavit sworn by Raymond Mutiso, dated August 23, 2021 and an application to set aside the *ex parte* order that was issued on July 14, 2021.
7. By consent of counsel on record, both applications by the parties were abandoned and agreed to canvas the main petition by way of written submissions which were duly filed.

### **Petitioners' Case**

8. It is the petitioners' case that they are the registered proprietors of the various parcels of land where they have been carrying on salt harvesting of which the title deeds issued to all the petitioners by the Government of Kenya with respect to the subject parcels, all contain the following clauses: -
- a. The land (and buildings erected thereon) shall be used only for extraction of salt (Condition No 5 on each of the applicant's title deeds)



- b. If the grantee closes his operations of extraction of salt from the land hereby granted, the said land will automatically revert back to the government without payment of compensation (Condition No 19 on each of the applicant's title deeds)
  - c. The grantee shall pay to the Commissioner of Lands during manufacturing period (ie the term of the lease) Royalty on salt extracted at a rate of Kshs 2.0 per metric ton or Kshs 160,000/= whichever is higher. (Clause No 17 on each of the applicant's title deeds)
  - d. The grantee shall not sell, transfer, sublet, charge or part with possession of the land or part thereof (Condition No 10 on each of the applicant's title deeds)
9. According to the petitioners, their titles were all granted to them under the *Registration of Titles Act* and that they have unexpired leasehold rights ranging between 50 years and 99 years. Further that since the petitioners' parcels of land can only be used for extraction of edible salt it follows that their salt extraction rights therein must automatically determine as soon as the petitioners cease to harvest salt thereon.
  10. It was the petitioners case that anything that purports to either diminish or extinguish their right to harvest salt on the aforesaid parcels of land automatically abrogate their proprietorship rights over the said parcels of land, whether it takes the form of an administrative or legislative act.
  11. The petitioners stated that in 2016, a new mining legislation (*Mining Act, 2016*) was passed by Parliament which Act brought within its regulatory ambit "Industrial and Construction Salt" but did not refer at all to "edible salt". However, under section 7 thereof, it exempted certain products which have been customarily taken by members of the community, (and which included "salt") from the provisions of the Act.
  12. The petitioners faulted the respondent's argument that the salt harvesting rights that the petitioners have always enjoyed on the subject parcels were extinguished by the *Mining Act, 2016* and if the petitioners want to continue harvesting salt on their respective parcels of land, then they must seek fresh salt harvesting rights from the respondent.
  13. The petitioners therefore state that the all the conditions stipulated on the petitioners titles which the petitioners are mandatorily required to comply with as mentioned above should now be ignored in spite of the fact that the said titles explicitly state that failure to comply with those conditions automatically lead to forfeiture of the rights granted thereby.
  14. It is the petitioners further case that the respondent's arguments suggest that the *Mining Act, 2016* abrogated the petitioners' proprietary rights over the subject parcels of land without due process and without compensation; and with absolutely no regard for investments worth billions of shillings which the petitioners have made on the subject parcels of land, in the expectation of recovering the same before expiry of their respective leases.
  15. The petitioners submit that their vested proprietary rights which consist of their right to harvest salt on the subject parcels of land are protected by article 40 of the *Constitution* and cannot therefore be taken away without due process and without compensation by any agency of government, including parliament.
  16. Further that the same land use system cannot be subjected to two conflicting regulatory regimes and consequently, that the mandatory conditions stipulated in their titles were preserved upon the repeal of Registration of Titles Act, by section 107 of the *Land Registration Act* which expressly provide that all 'right', interests, titles, powers and 'obligations' acquired (pursuant to the provisions of Registration



of titles Act) before its commencement shall continue to be governed by the law applicable to it before the commencement of that Act.

### **Respondent's Case**

17. In response to the petition, the respondents filed replying affidavit sworn by Raymond Mutiso who stated that the salt is first and foremost a mineral before any classification is assigned to it on basis of its uses or otherwise. Further that section 2(1) of the Act as read with Part A of the first schedule of the Act titled Construction minerals and industrial minerals lists Salt as a mineral therefore the same is lawfully subject to regulation under the Act.
18. The deponent further gave a detailed explanation of the classification of salt as commonly used in the mining industry and stated at paragraph 13-17 of the Affidavit that in the Mining Industry, salt is not classified beyond being a mineral and is therefore not classified in mining framework as edible, industrial or construction salt.
19. The respondent further stated that salt is widely classified in other disciplines on the basis of its chemical composition (normal salt, basic salt and acid salt) and on the basis of its application (dietary, non-dietary including for production of other sodium compounds and chloride chemicals, drilling for oil and gas, among other applications).
20. It was the respondent case that they have the jurisdiction to regulate the activities being undertaken by the petitioner and the petitioners' claim that the [Mining Act, 2016](#) does not govern extraction, sale, export or other dealings with edible salt and also that they are under no obligation to comply with the provisions of the [Mining Act, 2016](#) is misplaced and does not hold water.
21. Similarly, the respondent stated that the petitioners did not have any right in form of a lease, prospecting right, exclusive prospecting license, special license and location granted under any of the laws repealed under section 225(1) which was subsisting immediately before the commencement of the [Mining Act, 2016](#), for such right to be allowed to continue in force until expiration by passage of time as per section 225(3) of the Act.
22. It was the respondents' case that pursuant to articles 60, 62(1)(f), 66(2), 69 and 71 of the [Constitution](#) and the long title and sections 2, 6, 10 of the [Mining Act](#), there exists no other regulatory framework for mining in Kenya contrary to the petitioners' allegations of double regulation and taxation. the respondents urged the court to dismiss the petition with costs.

### **Petitioners' Submissions**

23. Counsel for the petitioners identified three issues for determination namely: -
  - a. Whether extirpation or diminution of the petitioner's rights to harvest salt on their subject parcels of land automatically extinguish all their proprietary rights over the parcels of land.
  - b. Whether the petitioner's proprietary rights over their subject parcels of land could constitutionally be expropriated by the [Mining Act, 2016](#), without due process and without compensation.
  - c. Whether and to what extent a particular land use system can be subjected to two conflicting regulatory regimes that impose conflicting obligations simultaneously
  - d. Whether edible sea salt in which the petitioners deal, is regulated under the [Mining Act, 2016](#).



24. On the first issue as to whether extirpation or diminution of the petitioner's rights to harvest salt on their subject parcels of land automatically extinguish all their proprietary rights over the parcels of land, counsel referred to John Maurice Clark 1939-1994 in his book, *Social Control of Business* which defines ownership and property in the following terms: -
- ‘Most people think of property as a tangible thing which somebody owns but the important question is what is the ‘thing’ we call ownership? Ownership consists of a large and varied ‘Bundle of rights and liberties.’
25. Dr Arwa further cited an article entitled, *Property: A Bundle of Rights? Prologue to the Property Symposium*. (Econ Journal Watch 8(3) September 2011: 193-204) where Daniel Klein wrote thus:-
- ‘The word bundle of plainly carries the connotation of its etymological roots from the word ‘bind ‘or ‘binding’. Binding items together is an intentional Act done by someone. The items bound together existed separately and independently prior to the creation of the bundle as in a bundle of groceries or a bundle of sticks.’
26. It was counsel's submission that a registered proprietor of a parcel of land enjoys a bundle of rights which include but not limited to the right to grow crops on the land, the right to graze animals in the land, the right to build residential or commercial premises on the land and the right to do whatever it is that they please to do on that land which are the bundles of rights that are ordinarily incidental to ownership of land.
27. Counsel submitted that the rights granted to the petitioners herein were however significantly attenuated as the petitioners were denied the rights that are ordinarily incidental to ownership of land save the right to extract salt from the subject parcels. Counsel also submitted that the rights to sell, charge, let, sublet, transfer of the subject parcels of land were all denied to the petitioners under condition no 10 of each of the said titles.
28. Dr Arwa further submitted that the petitioners rights to extract salt from the subject parcels of land for the period indicated in their respective titles was therefore entitled to protection under article 40 of the *Constitution* and could not be extirpated abrogated or diminished without due process or compensation whether through an Administrative or legislative Act.
29. On the second issue as to whether the petitioners' proprietary rights over their subject parcels of land could constitutionally be expropriated by the *Mining Act, 2016*, without due process and without compensation, counsel submitted that the subject parcels of land are classified as private lands under the Constitution of Kenya therefore the petitioners' proprietary rights thereto are protected under article 40 of the *Constitution* and cannot be abrogated, curtailed nor denied by anyone without following due process, and without compensation. Therefore, any legislation that purports to do that is inconsistent with the constitution and therefore null and void. Counsel submitted that the *Mining Act, 2016* purports to do so.
30. Dr Arwa relied on the case of *Philma Farm Produce & Supplies & 4 others v Attorney General & 6 others* [2012] eKLR, where the court held that in order to enforce the right to property, a party must demonstrate that it is entitled to the property in issue and the proprietary interest sought to be protected is defined by existing laws of which counsel stated that the petitioners have demonstrated that how they are entitled to the property and to the proprietary interest therein.
31. On the third issue whether and to what extent a particular land use system can be subjected to two conflicting regulatory regimes that impose conflicting obligations simultaneously, counsel submitted



that petitioners' titles to the subject parcels were "conditional" meaning that for them to maintain ownership of the subject parcels of land, they were obligated to strictly observe the conditions stipulated in the titles of the subject parcels of land.

32. Additionally, counsel submitted that the petitioners had an agreement with the Government of Kenya when the parcels of land were granted to them and that terms of the agreement were to the effect that they would harvest edible salt from the sea water and pay their royalties to the Government to the Ministry of Lands until when the leases expire and that after the [Mining Act, 2016](#) was enacted, they continued enjoying the same rights for four years only to be shocked four years later when the respondent demanded that they seek fresh salt harvesting rights under the Act if they wished to continue harvesting salt on their subject parcels of land.
33. That the titles given to each of the petitioners contained a set of rules which they were required to follow and an example of one of the clauses states as follows: -

“The grantee shall pay to the Commissioner of Lands during the manufacturing period Royalty on Salt extracted at the rate of Shillings two (2) per metric ton or shillings 160,000/- whichever is higher. At the end of each calendar year the grantee shall submit to Commissioner of Lands an audited certificate for salt production figure for information and verification of royalty payable.
34. It was counsel's submission that upon the coming into force of the [Mining Act 2016](#) the petitioners continued to adhere to the conditions set out in their leases and to strictly comply with the rules that governed their operations in the subject parcels of land but after four years the petitioners were informed via a letter from the respondent that they were governed by the said Act and that they are now required to get fresh permits and licenses if they wished to continue harvesting salt from their subject parcels of land and also pay royalties for the harvesting of salt to the Ministry of Petroleum and Mining.
35. Counsel stated that the method of calculating the royalties' payable is totally different from what is indicated on the petitioners' titles; the period of time during which they are supposed to pay the royalties is also different and all other terms and conditions upon which they are now required to operate are totally different.
36. According to counsel, the petitioners are now subjected to two contradictory regulatory regimes: one under the [Land Registration Act](#) as well as the [Land Act](#) while the other is under the [Mining Act, 2016](#). That the two regulatory regimes oblige the petitioners to pay different amounts of royalties, calculated in accordance with different formulas, to different departments of government at different times, and prescribe different consequences in case of default.
37. Counsel relied on section 29 of the Registration of Titles Act which enjoins all persons to whom grants had been issued under the Act to comply strictly with all the agreements and conditions attached to the grant, and which are indicated in the titles issued to the petitioners.
38. Counsel also cited the case of *Patrick Waweru Mwangi & another v Housing Finance Co of Kenya Ltd* [2013] eKLR the court stated that the savings and transitional provisions with respect to rights, actions, dispositions are provided under sections 107(1) & (2) of the [Land Registration Act](#) and sections 106(1) & (2) of the [Land Act](#) that unless the contrary is specifically provided for in this Act", any rights, interests, obligations acquired, accrued, or established before the commencement of the Act shall continue to be governed by the law applicable.



39. Dr Arwa therefore submitted that it is upon those provisions that the petitioners contend that the only reasonable interpretation of the [Mining Act 2016](#) is one which preserves the Petitioner’s salt harvesting rights over the said parcels of land till the expiry of their leases.
40. On the last issue as to whether edible sea salt in which the petitioners deal, is regulated under the [Mining Act, 2016](#). It was counsel’s submission that the same is not regulated by the [Mining Act](#) on the following grounds: -
- a. The definitions of the terms “mine” and “mineral” that are used in the [Mining Act, 2016](#) confirm that the Act only governs minerals that are “produced from rocks” through a process of “excavation” and not edible sea salt which is not produced from a rock and whose production does not involve any excavation.
  - b. The [Mining Act, 2016](#) at section 7 thereof expressly exclude from the operation of the Act soil, clay, iron, salt or soda from any land but subject to such conditions as may be prescribed by the Cabinet Secretary.
  - c. The [Mining Act, 2016](#) in the First Schedule thereto excludes from the ambit of the Act all salts except for “construction” and “industrial” salts whereby mine means:
    - (a) when used as a noun, includes an excavation or system of excavations made for the purpose of, or in connection with, the extraction of minerals or mineral products, and includes an open-cast pit, quarry and any area where a mineral is won by dredging brine pumping, evaporation or other means, and
    - (b) when used as a verb, means the carrying out of a mining operation and includes tailing;
41. According to counsel for the petitioners, the definition emphasizes that a mine refers to an “excavation” or a “system of excavations” for extraction of minerals and therefore it follows that there can be no mine without excavation, and further that a mineral is defined as a “geological substance” a substance that is derived from a rock, hence the significance given to “excavation”.
42. It was counsel’s contention that edible sea salt, in which the petitioners deal is neither produced from a rock nor through a process of excavation hence it does not fall within the ambit of the [Mining Act, 2016](#).
43. Counsel relied on the case of [Republic v Commissioner of Domestic Taxes \(Large Taxpayers Office\) Ex-parte Unilever Tea Kenya Limited](#) [2017] eKLR where the court held that: -
- “.....the court is not entitled to attempt a discovery at the intention of the legislature but must restrict itself to the clear words of the statute”.
44. Counsel further cited the provisions of section 7(1) of the [Mining Act](#) which expressly exclude salt from the provisions of the [Mining Act](#), subject to such conditions as may be prescribed by the cabinet secretary. The section provides that: -
1. Nothing in this Act shall prevent any person from taking, subject to such conditions as may be prescribed from time to time by the Cabinet Secretary, soil, clay iron, salt or soda from any land, except land within the area of a mineral right, from which it has been the custom of the member of the community to which that person belongs to take the same.



45. Dr Arwa submitted that section 7(1) aforesaid expressly permit the taking of salt subject to such conditions as may be prescribed and that there is no doubt that edible salt has always been customarily taken by every community in this country.
46. Counsel also relied on the case of *Keroche Industries Limited vs Kenya Revenue Authority & 5 others* [2007] 2 KLR 240 where the court stated that even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject and urged the court to find favour with the Petitioners claim with costs.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions**

47. Counsel for the respondents identified two issues for determination namely: -
- a. Whether this honourable court can issue the orders sought by the petitioners
  - b. Whether the petitioners constitutional rights were violated by the respondents
48. On the first issue whether this honorable court can issue the orders sought by the petitioners, counsel submitted that the respondents are clothed with the requisite mandate under the Constitution and relevant statutory regime to regulate and administer on matters pertaining mining in the country pursuant to article 60, 62(1)(f), 66(2) and 71 of the Constitution, the *Mining Act, 2016* was enacted to provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes.
49. According to counsel, the inability to exercise lawful regulatory authority over the salt-subsector deprives the people of Kenya national revenues that come from the extraction, export and other dealings in sale and that holders of mineral rights must pay royalties which are determined by the respondent under section 183(1) and (2) of the Act which states that: -
- 183(1) The holder of a mineral right shall pay Royalties. Royalty to the state in respect of the various mineral classes won by virtue of the mineral right.
  2. The Cabinet Secretary shall prescribe the rates payable under sub-section (1).
50. Ms Lutta submitted that the severity of the loss of revenue was captured in the Auditor General's Report for the Financial Year 2018-2019 as deponed in the affidavit of Raymond Mutiso, that the Auditor General queried why the salt mining operations had not conformed to the requirements of the *Mining Act* by acquiring the necessary licenses and permits, paying the requisite royalties for their products as well as obtaining export permits for salt export consignments.
51. Counsel further submitted that regulation in the mining industry goes a long way to mitigate the adverse effects of and risks associated with mining and thus maintaining necessary checks and balances including but not limited to the principle of sustainability.
52. It was Ms Lutta's submission that the petitioners do not and did not have any right in form of a lease, prospecting right, exclusive prospecting license, special license and location granted under any of the repealed laws under section 225(1) of the Act which was subsisting immediately before the commencement of the Act for them to be allowed to continue until expiration by passage of time as per section 225(3) of the Act as the rights being claimed by the petitioners were not mining rights or any rights contemplated by the *Mining Act*.



53. Counsel also stated that any mining rights subsisting before the commencement of the Act, were required to be regularized so as to conform to the provisions of the Act including with respect to exportation and levying of charges.
54. Ms Lutta submitted that it has been an established principle that where there is a mandate by an organization or any government body to carry out certain obligation, then there ought to be no interference with such a duty and cited the Court of Appeal case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and a three Judge Bench decision in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR where the court held that where there is a clear procedure for redress of any grievance prescribed by the Constitution or an Act of Parliament the same should be strictly followed.
55. Counsel therefore submitted that the petitioners have refused and or neglected to obtain permits and licenses to formalize their salt extraction operations despite being sensitized and reminded on several occasions, hence they are continuing to operate contrary to section 202(1) of the *Mining Act*.
56. On the issue whether the petitioners' rights have been violated by the respondents, counsel submitted that the allegations at paragraph 28 of the petition to the effect that subjection of the petitioners to licenses, permits or mining rights fees amount to double taxation thus contravening their fundamental rights and freedoms of the *Constitution* in article 10, 27, 40, 47, 209 and 210 are not supported by any proof as there exists no other regulatory framework for mining in Kenya contrary to the petitioners allegations.
57. According to counsel, the petition does not disclose any violation of constitutional rights by the respondents and does not meet the threshold of constitutional petition as set out in the case of *Anarita Karimi Njeru* case and further that upon the filing of the application by the respondent to set aside the *ex-parte* orders the petitioners proceeded to obtain a valid licence from the respondent which conduct in essence dilutes the arguments made in the petition and defeats the substratum of the petitioners' claim.
58. Ms Lutta finally submitted that the declaratory orders sought are contrary to the accepted principles on which the court exercises its jurisdiction to make a declaration of rights as declaratory judgment cannot confer a right where no such right exists and urged the court to dismiss the petition with costs to the respondents.

### **Analysis and Determination**

59. I have considered the petition, the response and the submissions by counsel and come to the conclusion that the issues for determination are as follows: -
  - a. Whether the petitioner's proprietary rights over their subject parcels of land have been violated;
  - b. Whether the respondents have the mandate to regulate the extraction of edible sea salt by the petitioners under the *Mining Act, 2016*;
  - c. Whether there is double regulation of the petitioners right to harvest salt and automatically extinguish all their proprietary rights over the parcels of land;
  - d. Whether this honourable court can issue the orders sought by the petitioners



60. Before considering these issues, it is imperative to quote the title of the *Mining Act* which provides as follows: -

“An Act of Parliament to give effect to articles 60, 62(1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes

61. The Act gives effect to article 60 of the Constitution that deals with the principles of land policy which provide that land shall be held, used and managed in a manner that is equitable, efficient productive and sustainable and in accordance with the principles of: -

- a. equitable access to land,
- b. security of land rights,
- c. sustainable and productive management of land resources,
- d. transparent and cost effective administration of land,
- e. sound conservation and protection of ecologically sensitive areas,
- f. elimination of gender discrimination in law, customs and practices related to land and property and
- g. encouragement of communities to settle disputes through recognized local community initiatives consistent with this Constitution

62. The Act further gives effect to articles 62(1)(f), 66(2), 69 and 71 of the *Constitution* which provides for all minerals and oils under article 62(1)(f) and 66(2) which deals with regulation of land use and property and enjoins Parliament to enact legislation ensuring that investments in property benefit local communities and their economies.

63. Article 69 obliges the state to ensure sustainable exploitation, utilization and management and conservation of the environment and natural resources, and equitable sharing of the accruing benefits. It further provides that every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

64. The reason for enumerating the title of the Act and the provisions of the *Constitution* is to give a clear background of the foundation of the Act and the purpose for which it was enacted.

65. It is the petitioners' case that they are the registered proprietors of the various parcels of land where they have been carrying on salt harvesting of which the title deeds issued by the Government of Kenya with respect to the subject parcels, all contain the following clauses: -

- a. The land (and buildings erected thereon) shall be used only for extraction of salt (Condition No 5 on each of the applicant's title deeds)
- b. If the grantee closes his operations of extraction of salt from the land hereby granted, the said land will automatically revert back to the Government without payment of compensation (Condition No 19 on each of the applicant's title deeds)
- c. The grantee shall pay to the Commissioner of Lands during manufacturing period (ie the term of the lease) Royalty on salt extracted at a rate of Kshs 2.0 per metric ton or Kshs 160,000/= whichever is higher. (Clause No 17 on each of the applicant's title deeds)



- d. The grantee shall not sell, transfer, sublet, charge or part with possession of the land or part thereof (Condition No 10 on each of the applicant's title deeds)
66. According to the petitioners, their titles were all granted to them under the Registration of Titles Act and that they have unexpired leasehold rights ranging between 50 years and 99 years. Further that since the petitioners' parcels of land can only be used for extraction of edible salt it follows that their salt extraction rights therein must automatically determine as soon as the petitioners cease to harvest salt thereon.
67. The main issue of contention according to the petitioners is whether edible salt is classified as salt under the ambit and regulation of the *Mining Act 2016*. If this is resolved, then the court would determine whether the petitioner's extraction of salt should be left out of such regulation.
68. This calls for the perusal of the Act and establish its scope which is provided for under section 2(1)(2) that the Act shall apply to minerals specified in the First Schedule and that the Cabinet Secretary may from time to time, by notice in the Gazette, amend the first schedule to this Act.
69. Looking at the first schedule, salt is listed at No 42 under "construction and industrial minerals" and it is not classified anywhere in the Act as edible salt.
70. Under the definition section "mine" is described as: -  
    "when used as a noun, includes an excavation or system of excavations made for the purpose of, or in connection with, the extraction of minerals or mineral products, and includes an open-cast pit, quarry and any area where a mineral is won by dredging brine pumping, evaporation or other means, and  
    (b) when used as a verb, means the carrying out of a mining operation and includes tailing;
71. It follows that the Act does not differentiate "edible salt" and salt as the petitioners would want it to be. We are therefore left with salt which is defined as construction and industrial mineral. This means that the salt is either used as edible or industrial including construction hence is regulated within the ambit of the *Mining Act, 2016*.
72. The second limb of the definition of "mine" when used as a verb means the carrying out of a mining operation and includes tailing. The Act defines mining operation as an operation carried out in connection with a mine (a) to win a mineral from where it occurs.
73. Having found that salt is classified under First Schedule as a mineral, the mining operation involving salt extraction is done where the mineral known as salt occurs.
74. Counsel for the petitioners laid emphasis on section 7 of the *Mining Act, 2016* and submitted that the same expressly exclude from the operation of the Act soil, clay, iron, salt or soda from any land but subject to such conditions as may be prescribed by the Cabinet Secretary.
75. This section deals with saving custom to allow members of the community to take soil, clay iron, salt or soda from any land except land within the area of a mineral right from which it has been the custom of the member of the community to which that person belongs to take the same. This section does not aid the petitioners case as they are not part of the community members who would benefit from the taking of salt as a custom but are involved in mining salt for commercial sale christened edible salt. The taking is also regulated by the Cabinet Secretary.



76. It should be noted that the Cabinet Secretary may by notice in the Gazette and with the advice of the Mineral Rights Board, prescribe materials of customary usage. It means that the regulation of the activities of mining including salt extraction are in line with the provisions of article 60, 62(1)(f), 66(2) 69 and 71 of the Constitution which dictates that land shall be held, used and managed in a manner that is equitable, efficient productive and sustainable manner.
77. The regulation is further in line with article 69 of the Constitution which obliges the state to ensure sustainable exploitation, utilization and management and conservation of the environment and natural resources and equitable sharing of the accruing benefits. This cannot be left to the whims of individuals to ensure sustainable exploitation of the natural resources, salt in this case being one of them. The state must also regulate through licensing and payment royalties to ensure equitable sharing of the accruing benefits.
78. Section 83(1) and (2) of the Act provides that: -
- (1) The holder of a mineral right shall pay Royalties. Royalty to the state in respect of the various mineral classes won by virtue of the mineral right.
  - (2) The Cabinet Secretary shall prescribe the rates payable under sub-section (1).
79. This Section gives the Cabinet Secretary the mandate to prescribe the rates payable for the mineral rights granted.
80. On the issue whether the commencement of the *Mining Act* extinguishes the rights of the petitioners in respect of the leases on the parcels of land that they deal in extraction of edible salt, the Act does not extinguish the rights but brings the regulation of the petitioners activities with the ambit of the Act.
81. From the record it does not show that the petitioners had any right in form of a lease, prospecting rights, exclusive prospecting licenses, special licence and location granted under any of the repealed laws under section 225(1) which subsisted immediately before the commencement of the *Mining Act, 2016*. The Acts that were repealed by section 225(1) are *Mining Act* (cap 306), the *Trading in Unwrought Precious Metals Act* (cap 309); and the *Diamond Industry Protection Act* (cap 310). The section further provides that: -
- (2) Any regulations made under the laws repealed under sub-section (1) shall continue to be in force in so far as they are consistent with this Act until such time as they are revoked by the Cabinet Secretary.
  - (3) Any right contained in a lease, prospecting right, exclusive prospecting licence, special licence and location granted under any of the laws repealed in (1) and subsisting immediately before the commencement of this Act, shall continue in force until expiration by passage of time.
  - (4) Subject to sub-section (3) the holder of mineral right in respect of large scale operations as defined under this Act and relevant regulations, shall comply with all boundary provisions of the Act and regulations.
  - (5) Notwithstanding sub-section (4), the holder of any mineral right in respect of a large scale operation as defined under this Act, shall be required, not later than eighteen months following enactment of the Act and relevant regulations, to update its mine plan with regard to conditions of employment, health and safety, the management of the environment and community social investments in order to comply with provisions of the new Act and its regulations.



- (6) A mineral right for prospecting, mining or dealing in minerals granted prior to this Act shall not be extended or renewed but where the granted Mineral Right provided a right to apply for a renewal or extension of the right, the holder of that mineral right may apply, subject to this Act for a similar type of licence or permit as provided for under this Act on a priority basis.
- (7) Any pending applications made under the written laws specified in sub-section (1) shall be determined in accordance with the provisions of this Act and regulations.
82. The petitioners have not stated that they were regulated by any of the above repealed Acts which the current Act stipulates that any mining rights subsisting immediately before the commencement of the Act were required to be regularized so as to conform with the provisions of the *Mining Act*.
83. I suppose the reason for non-compliance with the provisions of the *Mining Act* are because the petitioners have had the mistaken belief that “edible salt” was not within the ambit of the *Mining Act* which the court finds that the classification is not provided for in the Act.
84. Further the petitioners had stated that they had an agreement with the Government of Kenya when the parcels of land were granted to them and that terms of the agreement were to the effect that they would harvest edible salt from the sea water and pay their royalties to the Government to the Ministry of Lands until when the leases expire.
85. It was counsel’s submission that after the *Mining Act 2016* was enacted, the petitioners continued enjoying the same rights for four years only to be shocked four years later when the respondent demanded that they seek fresh salt harvesting rights under the Act if they wished to continue harvesting salt on their subject parcels of land.
86. The Act provides that the holder of any mineral right in respect of a large scale operation as defined under this Act, shall be required, not later than eighteen months following enactment of the Act and relevant regulations to update its mine plan with regard to conditions of employment, health and safety, the management of the environment and community social investments in order to comply with provisions of the new Act and its regulations.
87. I have considered the petition, the submissions by counsel and find that the petitioners rights under article 40 of the *Constitution* have not been violated as no rights have been taken away from the petitioners. The petitioners still have the rights to extract the edible salt from their respective parcels of land and the remainder of their leases will not be affected save for being regulated vide the *Mining Act* where the Cabinet Secretary has the mandate to prescribe rates of royalties to be paid and be guided by the law. The petitioners were paying royalties under the old regime under the Commissioners of Lands and now they will pay within the ambit of the *Mining Act* regulations.
88. The petitioners’ leases were governed by the law and the commencement of a new Act does not extinguish their leases but they must be regularized within the Act taking into account that the petitioners were operating legally within the framework of the *Registration of Titles Act*.
89. Having found that edible salt is regulated by the *Mining Act* and that the petitioners’ leases were governed by law and were operating legally within the framework of the Registration of Titles Act, the letters dated May 12, 2021 by the respondent for compliance are hereby quashed and that respondent is at liberty to start a fresh process for compliance to bring the petitioners within the purview of the *Mining Act* bearing in mind that the petitioners were within their rights to extract the salt in a previous regulating regime.
90. The petition having succeeded partially I order that each party bear their own costs. The rest of the orders are therefore declined.



**DATED, SIGNED AND DELIVERED AT MALINDI THIS 12<sup>TH</sup> DAY OF JANUARY, 2023.**

.....

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

