Case Number:	Petition 613 of 2006
Date Delivered:	19 Dec 2006
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Joseph Gregory Nyamu
Citation:	RODGERS MWEMA NZIOKA v THE ATTORNEY GENERAL & 8 OTHERS [2006] eKLR
Advocates:	-
Case Summary:	
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 613 of 2006

RODGERS MWEMA NZIOKA ..... PETITIONER

VERSUS

THE ATTORNEY GENERAL ..... . 1ST RESPONDENT

THE COMMISSINER OF MINES & GEOLOGY ..... 2ND RESPONDENT

THE DISTRICT COMMISSINER, KWALE DISTRICT.....3RD RESPONDENT

DISTRICT OFFICER I, KWALE DISTRICT ..... 4TH RESPONDENT

TIOMIN KENYA LIMITED ..... 5TH RESPONDENT

PIUS KASSIM ..... 6TH RESPONDENT

COLLINS FORBES ..... 7TH RESPONDENT

JUMA LUMUMBA ..... 8TH RESPONDENT

THE CHAIRMAN, KWALE COUNTY COUNCIL .....9TH RESPONDENT

JUDGMENT

Before the Court is an amended Petition dated 28th November, 2006 which is grounded on s 84(1) 73, 74, 75, 76, 77, 81 and 82 of the Constitution. It is supported by the following:

(1) Affidavit of Rodgers Mwema Nzioka filed on 19th October, 2005

(2) Petitioners Supplementary Affidavit filed on 23rd November, 2006

(3) Petitioners skeleton Arguments filed on 24th November, 2006.

The following documents have been filed in opposition.

(i) Replying Affidavit sworn by Colin Forbes and filed on 15th November, 2006

(ii) Replying Affidavit sworn by Colin Forbes and filed on 17th November, 2006

(iii) 5th-8th Respondent written submissions filed on 23rd November, 2006

(iv) 1st-4th Respondents replying Affidavit sworn by LOJOMON KIPSANG BIWOT and filed on 24th November, 2006

(v) 1st and 4th Respondents grounds of opposition filed on 24th November 2006

(vi) Supplementary Affidavit sworn by Colin Forbes and filed on 27th November, 2006

(vii) Replying Affidavit sworn by Colin Forbes ad filed on 27th November, 2006

(viii) Further Affidavit sworn by Samuel Mulwa and 2 others and filed on 1st December, 2006

(ix) 5th – 8th Respondents Reply to the Petitioners submissions filed on 7th December, 2006

(x) Further Supplementary Affidavits sworn by Colin Forbes and filed on 8th December, 2006

(xi) 10th Respondents Replying Affidavit sworn by Mrs Okungu and filed on 8th December, 2006

In the Petition the Petitioner is seeking 14 reliefs and with the consent of Counsel when the matter cause before me under a certificates of urgency and conservatory orders were given Counsel agreed that since the other (7) seven suits are similar to this matter it should be treated as the test case and the judgment in this matter to apply to all the other seven matters namely p 626/06, p627/06, p 628/06, p728/06, p729/06, p732/06 and p 750/06.

The 5th to 8th Respondents had filed a Notice of Motion on 1st November 2006 seeking to have the conservatory orders discharged but the same was abandoned when Counsel agreed to have the Petition heard before me instead.

Factual Background

Tiomin Resources Inc of Canada developed interest in the country's mineral potential during an Investment Promotion by the Government during the 2nd World Bank Mining Conference in Montreal Canada in May/June 1995. Consequently between November, 1995 and September, 1996 the Company applied for (4) exploration licences in Malindi, Kilifi, and Kwale Districts to explore for titanium minerals. After a successful potential analysis the company applied for a special mining lease over the Kwale deposits in August 1997.

The Petition concerns the mining of Titanium minerals on land situate in Kwale District which includes the Petitioners land LR Kwale Mwaweche/232 and the Petitioners rights over the said parcel of land.

Relief Claimed

(i) It be declared that s 75 of the Constitution embodies the willing seller willing buyer principle

(ii) It be declared that the 1st Respondent has not compulsorily acquired the petitioners parcel, namely Kwale/Maweche/232

(iii) It be declared that the purported lease dated 6th July 2004 entered into by the 1st and 5th Respondents was made in contravention of the petitioner's rights under sections 72,73,74,75,76, and 81 of the Constitution in so far as it touches the petitioners LR Kwale/Maweche/232.

(iv) It be declared that the agreement made on 6th July 2004 and varied thereafter by the 1st and 4th respondents for the purchase of petitioners LR No Kwale/Mawecha/232 at Kshs 80,000, per acre was made in contravention of the petitioners' rights under sections 72,73,74,75,76 and 81 of the Constitution is not binding on the petitioner and is null and void

(v) It be declared that the said special lease granted by the 1st respondent to the 5th respondent on 6th July 2004 is null and void for contravening sections 7 (seven) and 55 of the Mining Act Cap 306 of the Laws of Kenya

(vi) It be declared that the order of 3rd Respondent that the petitioner goes to his office on 26th July 2006 to sign the "compensation and resettlement agreement" was a misfeasance in public office, and a contravention of the petitioner's rights under sections 72, 73, 74, 75, 76 and 81

(vii) It be declared that the 5th Respondent has enlisted the State's coercive power to enhance its bargaining power in its bid to purchase the petitioners said LR No Kwale/Mawache/232

(viii) It be declared that the 7th Respondents order on 18th July 2006 that the petitioner signs the "compensation and resettlement agreement" was an action of both the 1st and 5th Respondent

(ix) It be declared that the assistance of the 1st and 4th Respondents to the 5th Respondent to purchase the petitioners said LR No Kwale/Mawecha/232 at a price determined by both is a callous abuse of power and is unconstitutional

(x) It be declared that the purported "compensation and resettlement agreement" in respect of the petitioners' parcel of land is null and void for want of petitioners' consent and the Land Control Boards consent

(xi) A permanent injunction to restrain the 3rd to 9th Respondents by themselves servants and agents from Intimidating the petitioner to sign the compensation and resettlement agreement or/and entering into the petitioners LR Kwale/Mawecha/232 for any purposes whatsoever

(xii) General damages

(xiii) Exemplary damages

(xiv) The costs of this suit

After the amended Petition was filed the following two reliefs were claimed and the Petition was renumbered.

(xv) It be declared that the Land Acquisition Act is ultra vires section 75(1) and (2) of the Constitution to the extent to which it does not provide for the maintenance of the status quo in the suit property until the petitioner has exercised his right of access to this Honourable Court under Section 75(2) and 84 of the constitution

(xvi) A prohibitory order to restrain the 10th respondent from undertaking under section 9 of the Land Acquisition Act on December 21st 2006 an inquiry under section 9 of the Land Acquisition Act.

The Court has considered the contents of all the documents filed on behalf of all the parties to this Petition.

Observations

· The exhibited Leases by some of the land owners affected by the intended mining and registered in the Land Register on 8th December, 1999 have an arbitration clause 9.1 in the event of any dispute. Out of over sixty registered land owners only 8 have brought suits and no leases executed by them and registered have been exhibited

· Special Lease No 173 was registered on 17th April 1997

· The Chief of Msambweni had on 31st January 1997 given consent to the exploration by a letter of the same day

· The Provincial Administration gave the 5th Respondent approval on 23rd January 1997

· The Kwale County Council had given their approval on 22nd January 1997

· The licence for exclusive prospecting licence was approved as far backas 1995, and 1996

· The Lease approved was thereafter abandoned although it is clear to the Court that at that time the 5th Respondent was negotiating directly with the owners of private land

· Nothing has been exhibited to show that there was no consent from the Land owners including the applicants during this phase of the project. At least no formal objection that there was no consent as contemplated by s 7 of the Mining Act

· When the Government gave the special lease No 173 in 1999 it proceeded on the basis that the private Land owner had given their consent as required under s 7 of the Mining Act. It is noted that the majority of land owners gave leases to the 5th Defendant of up to 21 years.

· After the Prospecting phase the Government pursuant to s 55 of the Mining Act decided that in the light of the provisions of s 55 of the Mining Act the 21 year leases granted to the 5th Respondent were not sufficient for the purpose of complying with the law and therefore could not form the basis of a Special Mining Lease under s 55 of the Mining Act because the land did not belong or was not owned by the Government. It was decided that a way had to be found to have the land registered in the Government or on behalf of the Government

· The 5th Respondent was informed that the Government had the option either to acquire the land compulsorily from the private landowners or alternatively negotiate a compensation package with the land owners

· The Government preferred to negotiate a compensation package with the affected landowners. Under this arrangement if the compensation package was acceptable to the private landowners and an agreement was reached on the compensation package, the private landowners would hold the land on behalf of the Government pending payment of the compensation and relocation. This would then satisfy the requirements of s 55

· In the year 2003 the new Administration commenced negotiations with the private landowners to acquire their respective parcels of land for the said project in consideration for a comprehensive package to be agreed upon.

· It is not denied that the Government set up a Cabinet Sub Committee to handle the issue on behalf of the Government and the landowners in turn gave mandate to a farmers committee which had been established by the farmers in 1998 to negotiate with the government on behalf of the landowners.

· It is not in dispute that meetings were held between the Government and the private landowners

· Following several meetings between the Government and minutes have been exhibited as "CF 1" it is evident that

(i) The Petitioner was a member of the said Farmers Committee

(ii) The Committee agreed with Government on compensation package to be paid to each private landowner and this explains why the majority have accepted the package of Kshs 80,000 per acre (excluding extras),

· It is evident that there was an agreement between the Government and the farmers in 2003 before the grant of the Special Mining Lease on 6th July 2004

· The Government requested the 5th Respondent to provide funds to assist the Government in paying the necessary compensation to the private landowners. This was agreed upon and the agreement was reflected in clause 21 of the Special Mining Lease

· After the 6th July 2004 the Government constituted the District Resettlement and Compensation Committee at District Level headed by the District commissioner Kwale District as Chairman

· It is not in dispute that the DRCC has held meetings with the farmers in order to explain the package

· Further pursuant to s 58 and 59 of Environmental Management Co-ordinate Act EMCA the necessary public consultations and public participation was undertaken and an EIA (Environmental Impact Assessment Report obtained

· The 5th Respondent has entered into an Investment Agreement with the government which has an arbitration clause in the event of any dispute

· There is evidence to show that after obtaining the Special Mining Lease and the Investment Agreement the 5th Respondent has procured funds and engaged contractors in readiness to commence the project

· From the documents exhibited up to the June 2006 over three quarters of the private landowners had already signed the compensation agreements with the Government

· The Agreement with the private land owner is to the effect that the land is to vest in the Government

The Court has considered the oral arguments by counsel and the written submissions including all the exhibits presented to the court. The courts findings as under:

(1) <u>Special Mining Lease</u>

Although the Government (the last regime appears to have started on a false step) in 1999 in terms of its legal position concerning the legality of the Lease under s 55 of the Mining Act the position was subsequently rectified in 2004 by the negotiations and the agreement with the private Land owners. The Special Mining Lease of 1999 is in the view of the court invalid for want of proper consent whereas the one granted in 2004 is valid in view of the negotiated Agreement with the farmers.

(2) <u>Petitioner's Position and others</u>

It is not denied that he took part in the meetings and was both a principal and an agent, the private landowners having mandated the farmers Committee to negotiate on their behalf. The fact that over three quarter (75%) have signed the agreements with the Government is indicative of the extensive if not total mandate of the farmers Committee to negotiate with the Government. It is also significant to observe that from 1995 up to June 2006 when the project was about to take off there is no evidence of any objection protest or any form of challenge by the Petitioners yet it is clear to the court that there was extensive public participation at all levels and in all the phases of the project including the environmental approval phase.

The Petitioners are therefore bound by the agreement negotiated and agreed upon on their behalf by their appointed committee. From the evidence this challenge appears to be an after thought in the hope that better compensation would result from the challenge.

It is also clear to the court that the Petitioner admits that the real objective of the Petitioner is to obtain for himself an award of a higher compensation than what is contained in the compensation package and if there is no agreement the petitioner would like the court to award more than is being obtained hence the emphasis on the right of access to this court.

Thus, is the affidavit in support of the Chamber Summons seeking conservatory orders para 4 the Petitioner depones and I quote:

"That since 1997 when the 5th Respondent herein announced at public meeting that it had discovered huge deposits of titanium in my parcel of land in parcels of land owned by my neighbours I have delayed in making great investments in it because of the looming possibility of its being needed in connection with titanium mining."

And in the Affidavit in support of the Petition paragraphs 28,33,51 and 60 the Petitioner depones:

"28.

That although the land owners like me were not opposed to making way for the mining of the titanium they were dissatisfied with the terms of the leases which the 5th Respondent was making. These were that the land owner leases to the 5th Respondent one acre of land for Kshs 2000 for a period of 21 years and receives Kshs 9,000/- to assist him and his family move to an area of his choice. The undertaking was that upon the exhaustion of titanium the 5th Respondent would return the land to its owners."

"33

That most of the land owners including me wanted the 5th or 1st Respondents to buy our parcels of land out right if the commercial exploitation of the titanium was to take place."

"51

That before the said meeting I had instructed Mr Gitonga Aritho a valuer to undertake a valuation of my said property for the purposes of negotiating the purchase price with either the 1st or 5th Respondent. The said valuation is referred to above."

"60

That I told him that the 5th Respondent and the DRCC's offer of the purchase price of my said piece of land was unacceptable but hastened to add that I was prepared to negotiate a price accepted with either the

DRCC or the 5th Respondent."

Surely from the above it is clear that the Petitioner clearly recognizes or acknowledges the mandate of DRCC and since the DRCC had successfully negotiated better terms thereafter the Petitioner should be taken to have been bound by the agreement negotiated on his behalf by the DRCC as per his affidavit. This is the package of Kshs 80,000 per acre plus extras. It follows therefore that the only outstanding issue between the Petitioner (including the Petitioner in the other related Petitions) is the quantum of compensation because apparently they regard themselves as not bound by the Committee's negotiated package. In the view of court Petitioners having elected to negotiate with the Government instead of the Government invoking the compulsory acquisition which was the other option open to the Government are now estopped from backing out of the package which was negotiated on their behalf by their appointed Landowners or Farmers Committee. Both the government and the 5th Respondent did act on the petitioners' representation that the Committee had their full mandate. Having made the election of the negotiation option, justice demands that they be held to their bargain under the doctrine of estoppel.

The court has read the affidavit sworn by Samuel Mulwa Tuno the Chairman and two others dated 1st December, 2006 para 6 states:

"The above Exhibit "A" contains the true and correct sequence of events in the negotiations between the landowners/farmers and the Government which culminated in an agreement for the farmers to receive compensation in consideration for surrendering their respective properties to the Government for this project."

I believe the deponent who is the Chairman of the committee of Landowners. Since the agreement entered into by the Government and the Landowners has been acted on both by the majority of the landowners themselves by signing it and receiving necessary payments and by the Government itself by giving a Special Mining Lease and signing an Investment Agreement, and the 5th Respondent has in turn procured finances and is at the point of taking possession of the project to commence the Petitioner/or petitioners are estopped from backing out of the arrangement freely negotiated on their behalf and which the petitioner admits as above.

Thus, although the Petitioner had two choices he elected to be bound by an out and out negotiation to purchase his land and he opted out of the compulsory acquisition choice (which apparently he is also now opposing in these proceedings) – he cannot approbate and reprobate)

Apart from the factor of election as defined above his election and representations have been acted on by the Government and the 5th Respondent including their financiers. Surely the injustice of allowing the Petitioner to back out is manifest.

I accept as good law that the second element of estoppel after election is the injustice of letting the Petitioner back out in the circumstances set out above. The principle has been well defined in the case cited by the 5th to 8th Respondents' counsel Mr Oyatsi namely; ***NEWBON v CITY MUTUAL LIFE ASSURANCE SOCIETY LTD*** as follows:

"But, even so, yet another element is required to make out the estoppel. The reason for precluding a party from relying upon an actual state of affairs as the formulation of his rights lies in the injustice of permitting him to depart from some contrary assumption if another party has based his conduct upon it ....

The Government has inter alia acted as follows:

(a) Issued a Special Mining Lease

(b) Has set aside land at the host site to resettle the Petitioner and other affected parties

(c) Funds to the tune of Kshs 3 billion to pay the affected parties have been secured from the 5th Respondent by the Government and there is part payment to some of the Landowners

(d) Government has signed an Investment Agreement

(e) The 5th Respondent has entered into contracts with others in relation to the Project

I therefore find and hold that the petitioner, along with all the other landowners is bound by the agreement reached on his behalf and is estopped from backing out at this late hour or at all.

(3) Compulsory acquisition

On this the 8 landowners have threatened to back out and their action is threatening the commencement of the project and the Government is perfectly entitled to take the other option which the Petitioner had earlier opted not to take namely compulsory acquisition by invoking s 7(3) of the Mining Act and the Land Acquisition Act Cap 295 of the Laws of Kenya.

I hold that both the Mining Act and the Land Acquisition Acts are the laws stipulated under s 75(1) of the constitution. The three preconditions are s 75(a) (b) and (c):

Under

(a) the Government is: entitled to take possession or acquire because it is necessary in the interest of utilization of property (i.e. the intended land) for utilization of property so as to promote the public benefit – the public benefit here is to exploit the minerals – a natural resource thereby improving the economy of the country

(b) The causing of hardship is necessary and avoidable in the circumstances but the Government has given alternative land to ameliorate the hardship

(c) Provision to acquire is being effected in accordance with the two Acts of Parliament and therefore the principle of legality has been duly complied with.

In addition the acquired land is going to vest in the Government itself and is not being acquired by the 5th Respondent. The Government has a reversionary interest in the land after the Lease to the 5th Respondent. Moreover s 75(6) a (iii) clearly allows taking of possession or acquisition as an incident of a lease tenancy or mortgage etc.

Although Gazette Notices 9248/49 are under challenge my holding is that this does not call for determination in a Constitutional application – this being the province of judicial review of public bodies. However prima facie and without adjudication on at this stage the fact that the titanium mining project is going to be located on Government Land and there is an investment agreement defining the public benefit this satisfies the public benefit requirements.

In the circumstances described to the court and the documentary evidence the Government is perfectly entitled to invoke s 7(3) of the Mining Act. The consent of the Petitioner is in the circumstances unreasonably being withheld to the detriment of others including the project although he is still bound by the Farmers Committee agreement with the government and there is nothing to stop the government from relying on the agreement but after the Gazette Notices the Government must allow the due process contemplated by the intended acquisition.

Moreover this option in now in line with the Petitioner's wish to individually negotiate in order to attain market rates. The Government can either hold the Petitioners to their joint bargain with the others or compulsorily acquire and proceed thereafter as provided under the law. It is for the Government to elect how to proceed in the light of this judgment.

(4) PUBLIC BENEFIT & INTEREST

According to one of the Petitioners exhibits "RMN2" a letter dated 28th September, 2006 the benefits of the project include:

(i) It is the largest investment into Kenya and the first major investment in the minerals and mining section

(ii) Generation of Government Income and increase of GDP of about 1%

(iii) Creation of wage employment in the Coast Province of about 2-3%

(iv) Development of mining skills and competencies

(v) Improvement of infrastructure

(vi) Development and creation of social services and modern settlement scheme.

(5) ALLEGED VIOLATION OF THE CONSTITUTION

Under s 4 of the Mining Act all unextracted minerals under/or upon any land are vested in the Government

Under s 7 as per the evidence adduced there is consent of the landowners that the land vests in them on behalf of the Government.

From the above it is clear that what the Petitioner is pursuing is compensation which has not been refused and in addition he is bound by the package negotiated just like the other farmers. The question then arises is he entitled to the declarations sought in the Petition.

The court's findings on this are:

(1) He has not shown any infringement of the cited sections 73, 74, 75, 76 and 81 or reasonable apprehension of any such contravention. However the earlier lease as prior to year 2003 did not sufficiently address the issue of consent under section 55 of the Mining Act and is invalid. But all subsequent Leases and agreement were based on a negotiated consensus by farmers on behalf of their committee. In the view of the Court the consent contemplated under s 55 has been validly given in the 2004 Lease.

(2) Similarly he has not shown any breach of any of the cited constitutional provisions

(3) And neither the Government nor the other Respondents including the 5th, 6th, 7th, 8th, 9th, or 10th Respondents have in the circumstances violated any of the Petitioner's rights. Indeed the right to receive compensation as per s 75 is still open to the applicant and if he is aggrieved he can pursue the matter under the Mining Act and seek compensation as stipulated therein. Any challenge has to comply with the Mining Act and the Land Acquisition Act.

(6) Litany of alleged violations

1. s 73 of the Constitution. In the circumstances described to the court nothing indicates or suggests even remotely that the right of protection from slavery ad forced labour has been violated. No facts points to this at all or any reasonable apprehension

2. s 74 of the Constitution. It has not been shown that the protection against inhuman treatment has been violated. The applicants are being monetarily compensated according to a negotiated proposal and alternative settlement site is on offer. No basis for apprehension

3. s 75 of the constitution. No property has been taken away yet, without compensation. The Mining Act provides for this including the Land Acquisition Act. Whereas the applicants were initially contending that the compulsory acquisition procedure which leads to fair compensation had not started and that the court should so declare the court notes that after the Commissioner Gazette Notice to acquire the 8 parcels the applicants are now opposed to it. They seem unclear as to what their best interests and are. They are blowing hot and cold so to speak. This provision can only be violated if there is a successful taking away of property without compensation.

4. s 76 of the constitution. Again it has not been shown how the protection against arbitrary search or entry has been violated.

Under s 4 of the Mining Act the Government owns the unextracted mineral and it is in the public interest to exploit them. The government has an implied right to enter the land for the purpose and has an equal right of taking reasonable possession under the Act for the purpose of enforcing the public interest through its agents such as the District Commissioners and the Commissioner of Mines and Geology. Under the Land Acquisition Act this possession is after the award and after serving the stipulated notice.

5. S 81 of the constitution. It has not been shown how this section has been contravened or the basis for any apprehension. How has the applicant's right of movement been curtailed"

This court has in the past held that the right of access to court under s 84 is a fundamental right itself but the court does frown upon any practice to triviliase this important jurisdiction. Sadly this appears to be the case here. The applicants' case is grounded on sinking sand. It is built on an estoppel. No constitutional contravention can sustain itself this way. The application cannot stand. While the court accepts the persuasiveness of the many authorities cited by the learned Counsel, Dr Kamau Kuria he has sadly not linked them to any Constitutional contraventions at all. This court has now severally held that under s 84 of the Constitution the court's powers to grant remedies to secure fundamental rights and freedoms have not been fettered at all. Indeed in fitting situations the court can invent new remedies – but not on sinking sand!

Indeed the right to receive compensation as per s 75 is still open and the applicant if aggrieved can articulate the his grievance under the Mining Act to seek compensation as stipulated therein. Any challenge must be within the scope of the Mining Act the Land Acquisition Act and s 75. Seeking restraining orders now based on alleged violation or apprehension or feared violation of Constitutional rights is in the view of the court premature.

In the case of

(1) ***BOOTH v MOMBASA WATER COMPANY Misc Civil Application No. 1052 of 2005.***

At page 8 this Court observed and I quote:

"I wish to reiterate and to reinforce the principles I endevoured to define and establish in my recent ruling in the case of *LABHSONS LTD v MANULA HAULIERS LTD HCCC No 204 of 2005*where I held inter alia in the articulation of and enforcement of fundamental rights this court cannot disregard the

fundamental principles of law such as res judicata, limitation, laches, and if I may add to the list estoppel, waiver and compromise."

At page 10 this Court stated!

"Our Constitution does assume that there are also fundamental principles of law in existence although the constitution does itself so to speak occupy the position of the super structure. That superstructure has a foundation and one of the foundations is the existence of fundamental principle of law. It is reckless for applicants to ignore the fundamental principles of law when filing or articulating constitutional applications. Many of the identified fundamental principles of law are based on public policy principles of fairness and justice....

In the same ruling at page 9 this court went on to strike out a constitutional application and concluded:

"Our Constitution is not a cloud that hoovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, values and on political cultural social and economic situations. Its dynamics and relevance is deeply rooted in these values. Cut off from these factors it would become redundant and irrelevant. I refuse to accept that the Constitution is a skeleton of dry bones without life and spirit. The least it is expected to have and which we cannot deny it is the spirit of its Framers. To me we must give it much more:"

This is why this court cannot be persuaded to limit the ambit of public interest or agree to confine it only to past definitions or categories. Our Constitution inspires me to give public interest the widest leverage and to uphold it. If the venture will raise the GDP by 1% it does not matter who is at the wheel the public interest looms large and must prevail.

(2) ***KENYA BUS COMPANY v ATTORNEY GENERAL & OTHERS Misc Civil Application No. 413 of 2005***

And in this case this Court held:

(i) An unchallenged court order cannot be the basis of a Constitutional application (to prevent execution)

(ii) Non disclosure of material facts is sufficient to warrant the dismissal of a Constitutional application

(iii) A Constitutional court has inherent powers to prevent abuse of its process

(iv) A Constitutional application brought in violation of fundamental principles of law is incompetent and should be dismissed.

This court has held that constitutional jurisdiction should not be trivialised and should be confined to purely constitutional matters. Where the ordinary law provides for relief that relief must be pursued. In this case there are provisions for relief by way of compensation under the Mining Act and this is what the Petitioner is entitled to pursue as a remedy. This is why I feel greatly indebted to Mr Oyatsi Counsel for the 5th to 8th Respondents for citing the important case of **HARRIKISOON v ATTORNEY GENERAL** [1979] 3 WLR 63 where the Privy Council states:-

"The notion that whenever there is a failure by an organ of the Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or

fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an Originating application to the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms."

.....

"What the appellant was entitled to under the paragraph was the right to apply to a court of justice for such remedy (if any) as the law .... gives him. There is nothing in the material before the High Court to give any colour to the suggestion that he was deprived of the remedy which the law gave him. On the contrary he deliberately chose not to avail himself of it."

I fully endorse this holding and hold that it applies in all situations where remedy has been provided by any written law or common law and a party instead chooses to bring a petition under the Constitution.

In the matter before me the Mining Act provides a remedy and in the event of any disagreement the right of access to this court has been clearly stipulated in the Act.

Moreover the contested Agreements and Leases have arbitration clauses and therefore under s 10 of the Arbitration Act the principle of party autonomy must be honoured by the court. The validity of the signed agreement or leases is a matter for the arbitral tribunal and not this court.

As regards the commencement of the compulsory acquisition pendency process during the pendency of this Petition the court does frown upon the action by the Commissioner of Lands and would like to point out no organ or authority has the power to take away a matter or any issue from the seat of justice. Only courts of law have the authority to adjudicate as per s 77 of the Constitution. Having said so it is also trite law that a Court of law should never act in vain. It is quite evident that the only outstanding issue in this matter is that of compensation and since the commissioner has set the ball rolling towards its determination as a matter of law it would be illogical to restrain the Commissioner – indeed even if the court were to nullify the notice (and it would be so entitled) there is nothing to stop the Commissioner from issuing a fresh one. The court has no time for an exercise in futility.

(7) <u>PRIVATE OWNERSHIP AND THE PUBLIC INTEREST IN THE MINERALS</u>

In considering whether the alleged violations of the Constitution have been established the Court has taken the view that since under s 4 of the Mining Act the resources intended to be exploited are vested in the Government, in practice, where such resources have been discovered there is a shared ownership of the land in that the minerals until extracted form part of the land. In such situations the Court has to balance the individual rights of ownership with the public interest of having the resources exploited for the public good. It follows therefore that from the date of discovery, the State – through the Government agencies cannot be denied reasonable access to the land which has the natural resources to be exploited. Thus the articulation of the public interest by the state agents cannot be reasonably be taken to be violations of the Constitution or the right of access be taken to be trespass or forcible entry provided the public interest is asserted in a humane and reasonable manner. The offer by the Government of a monetary sum, plus an offer of alternative resettlement including compensation for trees and

crops and other items as set out in the Mining Act cannot by any standard be said unreasonable or conducive to violation of Chapter 5 rights and freedoms.

Public interest, in my view must be as eloquently articulated as any other constitutional right and should enjoy its pride of place in Constitutional adjudication and interpretation. In the structure of our Constitution and in particular s 70 even the cherished individual rights and freedoms are subject to the right of others and the public interest This explains the reason why the Court cannot as invited so to do restrain the Commissioner of Lands from compulsorily acquiring the parcels in question with a view to securing the public interest – because on the other end of the scale the registered owners right to compensation is set out and a proper machinery for the determination of fair compensation provided. However the right of access to this court is at the moment premature and speculative until the process is commenced and an award given.

The right to taking possession must therefore be seen from the standpoint of vindicating the public interest and securing the private individual interest. After 2003 the court wishes to observe that it has not found anything which disturbs the balance of the individuals private interest in the land with that of the public interest. The courts are the guardians of the Constitution, but they must equally uphold the public interest. Notwithstanding its antiquity and ancient origins I wish to endorse as good law in our country the following quotation from Justice Marshall in *McCULLOCH v MARYLAND US* (4 Wheat) 316, 421 (1891):

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and the spirit of the Constitution, are constitutional."

(8) <u>ABUSE OF THE COURT PROCESS</u>

Where a party deliberately avoids to pursue the statutory remedies for compensation or any other remedy (as has happened in this case where specific remedies are set out in the Mining Act and also given a specific right of access to this court) and he instead purports to invoke s 84 of the Constitution I find that such a move constitutes abuse of the court process and also trivializes the Constitutional jurisdiction Vindication of any breach of contractual right or alleged duress can be articulated as a private right in the courts of this land. S 84 was clearly intended for vindication of pure fundamental rights and freedoms violations which in turn necessarily never constitute causes of action elsewhere.

Freedom of contract although a laudable principle is not absolute nor are property rights absolute. In the view of the court, positive governmental intervention would be constitutionally justified under s 70 of the constitution in order to articulate and advance the public interest. In addition as stated elsewhere the principle of estoppel could restrain an individual from backing out of an election he had made and upon which others had acted upon and therefore resulting in an unjust situation to the victims.

Except for the argument as to what is public benefit under the acquisition statutes and what a public body is, what the provisions of s 75 of the Constitution and the Land Acquisition Act represent is one fundamental principle – governmental seizure of private property for public use – an unequivocal laying on of official hands e.g. by a District Commissioner – followed by a transfer of possession and title to the general public is unconstitutional unless followed by payment to the former owner of the fair market value of what was taken.

In the cases presented to the court none of the above ingredients exist or have taken place. An ineffective attempt to have a private contract entered into with the government does not per se violate s 75 of the Constitution or other sections upon which the Petition claim is based. S 75 is not a willing buyer willing seller provision – instead it lays the basis for compulsory acquisition. Acquisition is a process. One cannot justifiably apprehend that one will not be paid a fair market price in future and before the process is anywhere near the end. Such an owner

would have no right to rush to a constitutional Court – nor would he be right in the view of the Court to contest in a Constitutional court that an arrangement or contract entered on his behalf lacks Land Board consent because the Constitutional court is not the proper forum for adjudication of contracts for purchase of land. In any event where Government is itself a party, Land Board consent would not be required.

In addition the Petitioner would not be entitled to the declarations sought to the effect that constitutionally the required Constitutional pre requisites for compulsory acquisition had not taken place and therefore what the Government was trying to do was unconstitutional because the unconstitutionality of the taking would only arise as defined above and not earlier. In any event should any of the essential steps as per the due process of acquisition be overlooked there are statutory provisions and a Constitutional provision to refer the matter to the High Court. The applicant has a fundamental right of access to this court.

(9) FUNDAMENTAL RIGHTS AND FREEDOMS PRINCIPALLY VERTICAL NOT HORIZONTAL

The Petition is also incompetent in joining Respondents 5 to 8 because fundamental rights and freedoms are guaranteed by the Government to the individuals and are vertical not horizontal. The correct party to join even in the case of the Government is the Attorney General. The petition is also dismissed as against these Respondents on this ground.

In this regard please see this court's ruling in ***RICHARD NDUATI KARIUKI v R NDUATI KARIUKI Misc Civil Application No. 7 of 2006.***

For the above reasons this Petition and all the other petitions described elsewhere in the judgment are dismissed with costs to the Respondent. Costs awarded in respect of this (one) Petition only but to be split equally by all the Petitioners and paid to the Respondents.

DATED and delivered at Nairobi this 19th day of December, 2006.

J.G. NYAMU

JUDGE

Dr Kamau Kuria for the Petitioners

Mr Meso for the 1st to 4th and 10th Respondent

Mr Oyatsi for 5th to 8th Respondent