



**Karebe Gold Mining Limited v Republic & another (Criminal Revision
E208 of 2022) [2023] KEHC 321 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E208 OF 2022
RN NYAKUNDI, J
JANUARY 25, 2023**

BETWEEN

KAREBE GOLD MINING LIMITED APPLICANT

AND

REPUBLIC 1ST RESPONDENT

SIMON CHERUIYOT & 27 OTHERS 2ND RESPONDENT

RULING

1 By a notice of motion application dated July 26, 2022, the Applicant seeks orders that: -

1. Spent.
2. Spent.
3. That this Honourable Court be pleased to call for and examine the record of proceedings and order of the Honourable D. Mikoyan (CM) in the Chief Magistrate's Court at Eldoret in Criminal Case No. E2298 of 2021, Republic V Samuel Cheruiyot & 27 Others dated June 17, 2022 for purpose of satisfying itself as to the correctness, legality, regularity and or propriety of the said record, proceedings and order.
4. That this Honourable Court be pleased to set aside the order dated June 17, 2022 and be pleased to order the detention and preservation of all the physical exhibits and protection of the same from interference by third parties until the hearing and determination of the Criminal Case No. E2298 of 2021, Republic V Samuel Cheruiyot & 27 others.
5. That costs of this application be in the cause.

2 The application is premised on the grounds on the face of it and is further supported by the affidavit sworn on July 26, 2022 by David May, the Managing Director of the Applicant.



The Applicant's Case

- 3 The Applicant deposed that on October 28, 2021, charges were preferred against the accused persons in which included arson contrary to section 332(a) of the Eldoret Criminal Case No.E2298 of 2021 [Penal Code](#), malicious damage of property contrary to section 339(1) of the [Penal Code](#), obstructing the holder of a Mineral Right from engaging in mining activities contrary to section 204 of the [Mining Act](#) and engaging in mining activities without licence or permit contrary to section 202 of the [Mining Act](#).
- 4 The Applicant further deposed that vide the orders dated June 17, 2022 the accused persons obtained orders to the effect that the “the officer commanding station Songhor Police Station or any other officer under him be and is hereby directed to release the tractor, 8 motorcycles and the equipment listed in the schedule attached to the application dated December 22, 2021 to the Applicants.” The applicant deposed that went the matter was mentioned on July 26, 2022, the trial Magistrate directed that the orders of June 17, 2022 be complied with before July 27, 2022 noon.
- 5 The Applicants contends that from the record, it is clear that the order of the trial Magistrate is incorrect, illegal, improper and will prejudice the fair hearing of the case now that the exhibits are to be released. The Applicant contends that some of the owners of the said equipment are suspects who are yet to be arrested and charged and if the said items are released to them, they might run away and consequently defeat the ends of justice.
- 6 The Applicant maintains that the consequence of the release order of June 17, 2022 is that the released equipment is primarily used for mining and hence the accused person will continue with the illegal mining activities of parcels of land known as Nandi/Legemet/224, Nandi/Chemase/974,Nandi/Chemase/1184 and Nandi/Chemase/1185 the very charge that is facing them before the Chief Magistrate's Court.
- 7 The applicant contends that the order of the release of the exhibits was pre-mature in the absence of them not being marked, identified and admitted in evidence thus breaking the evidentiary chain of custody and negating the exhibits probative value.
- 8 The applicant further contends that the orders issued on June 17, 2022 are in direct conflict with the orders issued by the Environment and Land Court in ELC Case No. E009 of 2022; Karebe Gold Mining Limited v Cheseret Arap Korir & Another where the Court directed that status qui be maintained with regards to parcel of land known as Nandi/Legemet/224 and Nandi/Chemase/974.
- 9 The applicant deposed the order of June 17, 2022 is illegal for reasons that section 204 of the [Mining Act](#) provides that it is a criminal offence punishable by imprisonment and a fine of not less than five million or both for a person to obstruct or hinder the holder of a mineral right, or agent or employee of the holder from doing an act which he is authorized.
- 10 The applicant contends that the said order is improper as the said equipment were seized at the crime scene for safe custody as they happened an integral part of the prosecution's case necessary for discharging their evidentiary burden of proof at the trial court.
- 11 The applicant faults the prosecution for not opposing the notice of motion application dated December 22, 2021 seeking the release of the equipment in total disregard of the procedural laws. The Applicant contends that it was not enough for the court to direct that the investigating officer to only take photographs of the said equipment sought to be released as the same would not be sufficient to meet the threshold set for a conviction in a criminal case which is beyond reasonable doubt. The Applicant maintains that section 121(1) of the [Criminal Procedure Code](#) envisages the detention of



exhibits until the case is heard and determined. The Applicant contends that the release orders were irregular as the Court failed to address the issue of preservation of the exhibits.

12 The Applicant prayed that the orders sought be granted so as to preserve the substratum of the subject matter of the dispute before the trial Court.

13 The Applicant filed a further affidavit on July 28, 2022 in which it reiterated the contents in its supporting affidavit save for mentioning that the Constitution of Kenya, 2010 and the Victims Protection Act gives a victim of an offence a right to access justice and a right to a fair trial.

The 2nd Respondents' Case

14 The 2nd Respondents filed Grounds of Opposition dated August 8, 2022 citing the following grounds:

1. That the impugned orders were a product of a consent between the parties and the Applicant has not demonstrated coercion, fraud, undue influence or illegality to warrant the setting aside of the consent or otherwise.
2. That the subordinate Court did not make a ruling on the application for release of exhibits, but the parties recorded a consent. This Honourable Court has no jurisdiction to revise the consent as the same was a product of the parties and not the subordinate Court as envisaged by Section 362 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.
3. That the orders of June 17, 2022 were directed at the 1st Respondent and not the Applicant herein.
4. That the Applicant has assumed the roles of the Director of public prosecutions and the state in criminal proceedings and has grossly violated the Criminal Procedure Code and the Constitution.
5. That photographs of the exhibits were taken and that the Respondents are ready and willing to avail them when needed. This was a pre-condition to the release.
6. The applicant has not demonstrated any prejudice to be suffered by it where the exhibits are released.
7. The applicant main apprehension is that where the exhibits are released, the respondents will engage in illegal mining. That is not in the province of the applicant but the state to maintain law and order.
8. The application is calculated at delaying the 2nd respondent justice.

15 The application was canvassed vide written submissions. The 2nd respondents filed their submissions on November 14, 2022 whereas the applicant filed their submissions on December 7, 2022.

Determination

16 This court has considered the notice of motion application dated July 26, 2022 and the supporting affidavit thereto, the 2nd respondent's grounds of opposition dated August 8, 2022, and the parties submissions thereto as well as the legal provisions that the application was brought under. The issue for determination is whether the Applicant made a case for grant of the order sought in the application.

17 First and foremost the constitution has created various organs of governance under the doctrine of separation of powers. The residual review jurisdiction of the court to interfere with the functions of



when such constitutional bodies is to be exercised sparingly and as a last resort. I think this is what the court had in mind as elucidated in the case of *Paul Ng'anga Nyaga vs Attorney General & 3 others* (2013) eKLR it was held that: “ this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence tht they have acted in contravention of the constitutions.

- 18 The position which is consonant with the facts of this case is well illustrated where the principles in the case of : *Diamond Hasham Lalji& Another v A.G & 4 others* (2018) eKLR which this court was referred to by both counsels, the court of Appeal stated:

.....it is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as article 165(2) (d) ii) of the *Constitution* ordains. However, the doctrine of separation of power should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion: by acting under the control and direction of another person, failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process, and by action in breach of fundamental right and freedoms of an individual.

- 19 The DPP is entitle dot make errors within his constitutional jurisdiction and the decision will not be revised solely on the ground tht it was based on misapprehension of facts and the law.(*Matululu and Anor v. DPP*(2003) 4 LRC 712. Further, authority show that courts are generally reluctant to interfere with prosecutorial decision made within jurisdiction.”

- 20 The office of the director of the public prosecution is a constitutional office which enjoys a vital role in the administration of justice in criminal cases of matters. As such the exercise of prosecutorial discretion is vested with some measure of judicial defence which restrains the courts from interfering with that mandate. That accordingly the act and conduct of director of public prosecution in conceding to the application on release of exhibits which are at the centre of the prosecution is a matter not within the purview of this court. The applicant faults the conduct of the DPP in Cr. Case No E2298 of 2021 but in the phrases under article 157 (6), (7) (9) and (10) of the *constitution* there are no reasonable grounds to impeach that decision. It is crystal clear that the DPP in discharging his functions is required to engage in a series of tasks for the fair administration of criminal justice. In the circumstances, of this motion, the court has not been told that the discretionary power by the prosecutor was carried out as a consequence of bad faith or in contravention of the legitimate public interest. The factual matrix upon which the accused persons are being prosecuted is clearly set out in the charge sheet authorised by the DPP.

- 21 The traditional role of victims in a trial is often perceived to be that of a witness of the prosecution. It is common that victims are required to provide testimony about what has happened to them without being given a true choice as to whether they would like to do so, or the terms on which they would like to share this information. (Edwards, 2004; Wemmers, 2017). Victims in role of witness are obliged to provide information, and they may feel that they have no power. They may be asked questions by the judge, the public prosecutor, and/or the defense lawyer, which they feel they need to answer.”See (Edwards, Ian (2004). An ambiguous participant: The crime victims and criminal justice decision making. *British Journal of Criminology*, vol. 44(6), 967-982).

- 22 As part of the application the court is being asked to set aside the consent order. I am of the view in so far as the issue is concerned the principles is Civil Law will apply Mutatis Mutandis as I will demonstrate shortly.



- 23 The Applicant herein seeks to set aside the orders that were made by the trial Court on June 17, 2022 releasing the all the exhibits in Eldoret Criminal Case No. E2298 of 2021 to the 2nd Respondents herein. the Applicants contends that the said orders were irregular and unlawful in light of the pending criminal case before the Chief Magistrate’s Court. The applicant’s contends that in releasing the said exhibits, the evidentiary purpose will be defeated.
- 24 The Respondents on the other hand maintain that the impugned orders of June 17, 2022 were as a result of a consent between the parties. The respondents argued that in filing this instant application, the applicant is performing the functions of the 1st Respondent in the circumstance. The respondent contends that the applicant has not demonstrated to the court how the release will be prejudicial to it and has further not shown that there was coercion, fraud, undue influence or illegality to warrant the setting aside of the consent.
- 25 I have keenly perused the trial Court’s record and note that on March 18, 2022 by consent between the 1st and 2nd Respondents the trial Court ordered that; “compressor serial No.89284632 yellow, tractor and trailer and motorcycles be released upon proof of ownership. Tools of trade and equipment be kept in police custody. Compressor and tractor KTCB 156T and (7) motorcycles be released pending hearing and determination. The said trailer and motorcycles be availed in Court all when required.”
- 26 The central issue for my consideration is whether the threshold to warrant for setting aside of the consent has been satisfied by the Applicant.
- 27 The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya*(1975) EA 266 where Mustafa Ag. VP stated thus;
- The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
- 28 And in the case of *Flora N. Wasike vs Destimo Wamboko*[1988] eKLR Hancox JA cited Setton on Judgments and orders (7thedition) vol 1 page 124, and reiterated that;
- Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”
- 29 Essentially, the above cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of fraud or misrepresentation or mistake by the 1st respondent that would lead to setting aside of the order of March 18, 2022 and consequently the impugned order of June 17, 2022. The errors which informed such a decision by the DPP is not an error which goes to the scope of this court to vitiate that exercise of discretion



30 From the evidence on record there is no evidence whatsoever to indicate that the consent order of March 18, 2022 was obtained through fraud or misrepresentation of material facts, undue influence or mistake on the part of either party.

31 It must also be noted that the Applicant herein save for being represented by the 1st Respondent is not a party in the proceedings before the trial Court and therefore cannot seek to set aside the consent order that was entered into by the parties with a state in the outcome of the case. In criminal proceedings, the complainant is always the Republic which is represented by the DPP and thus cannot bring this instant application on its own motion. The Office of the Director of Public Prosecutions is a constitutional office set out under article 157 (1) of the *Constitution of Kenya* . The functions of the directorate are clearly outlined in terms of sub section (6) (7),(8),(9), & 10 of the *constitution*.

32 These among others are to institute and undertake criminal proceedings against

- (1). Any person before any Court in Kenya other than the Court Martial, in respect of any offence that contravenes the Laws of Kenya; -
- (2). To take over and continue any such proceedings that may have been instituted by any other person or authority.
- (3). To discontinue at any stage before any judgement is delivered any such criminal proceedings instituted or undertaken by the directorate or any other person or Authority.

33 In accordance to Article 157 the powers conferred upon the Director of Public Prosecutions are vested exclusively to that office in exclusion of any other person or organ of government. It is therefore correct to state that the Director of Public Prosecutions has unfettered discretion to bring charges against a person and that prerogative is exercised without any control or interference from any other authority or person. I find that there is basis on which the DPP has been proved to have acted in bath faith or unreasonably and in the circumstances there is no basis the court can set aside the impugned consent order. It is also worth pointing out that Court orders are not issued in vain and must be capable of enforcement. In my view the exception circumstances to review or set aside the order have not been proved by the applicant.

34 For those reasons, the notice of motion dated July 26, 2022 lacks merit and is hereby dismissed to no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2022.

.....

R. NYAKUNDI

JUDGE

