



Republic v Mvurya, Cabinet Secretary Ministry of Mining, Blue Economy and Maritime Affairs & another; Karebe Gold Mining Limited (Exparte Applicant) (Judicial Review Miscellaneous Application E003 of 2023) [2023] KEELC 17889 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E003 OF 2023**

EK WABWOTO, J

MAY 25, 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI

AND PROHIBITION AGAINST THE CABINET SECRETARY, MINISTRY OF MINING, BLUE ECONOMY AND MARITIME

AFFAIRS

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF MANDAMUS

AGAINST THE CABINET SECRETARY, MINISTRY OF MINING, BLUE ECONOMY AND MARITIME AFFAIRS

AND

IN THE MATTER OF ARTICLES 10,22,23,40,47,48,50,232,258 AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 2, 147,173 AND 200 OF THE MINING ACT, 2016

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT OF 2015

BETWEEN

REPUBLIC APPLICANT

AND

HON. SALIM MVURYA, CABINET SECRETARY MINISTRY OF MINING, BLUE ECONOMY AND MARITIME AFFAIRS 1ST RESPONDENT



**CABINET SECRETARY MINISTRY OF INTERIOR AND NATIONAL
ADMINISTRATION 2ND RESPONDENT**

AND

KAREBE GOLD MINING LIMITED EXPARTE APPLICANT

JUDGMENT

Introduction

1. By a Chamber Summons dated February 1, 2023, the *ex parte* applicant sought leave to apply for the Judicial Review orders of *certiorari* quashing the directive embodied in the letter dated January 26, 2023 issued by the Cabinet Secretary, Ministry of Mining, Blue Economy and Maritime Affairs.
2. Upon leave being granted on February 2, 2023, the *ex parte* applicant filed the substantive motion dated February 9, 2023 seeking the following orders: -
 1. That an order of *certiorari* do issue to bring into this Honourable Court for purposes of quashing the directions (hereinafter ‘the impugned directive’) embodied in the 1st Respondent’s letter, Ref No MoMIBESM/CONF/1/2023 dated January 26, 2023. (hereinafter “the impugned letter”
 2. That an order of prohibition do issue to forbid and or preclude the Respondents, their agents, or other state officers and agencies from implementing the impugned directive as contained in the 1st Respondent’s letter Ref No MoMIBESM/CONF/1/2023 dated January 26, 2023 (hereinafter “the impugned letter”)
 3. The costs of this application be provided for.
 4. Such further and any other relief that the Honourable court may deem just and expedient to grant.
3. The court in issuing its directions directed that the application be canvassed through written submissions.

The Ex-parte Applicant’s Case.

4. The application for Judicial Review was based upon the grounds set out in the Notice of Motion dated February 9, 2023 and the affidavit in support. It was the *ex parte* applicant case that the Applicant was issued with a Mining License by the 1st Respondent granting it the exclusive right to mine Precious metals (gold) within and over the mineral right area for a period of 25 years which is set to expire in April 1, 2046.
5. It was also averred that the mining license covers an area approximately four (4) Cadastral Blocks (4CBs) situated in Nandi County, delineable on Muhoroni topographical sheet 117/1 of scale 1.50,000.
6. It was stated that on January 26, 2023, the 1st Respondent issued the letter Reference Number MoMIBESM/CONF/1/2023(hereinafter, “the impugned letter”) suspending the Applicant’s mining



- licence registration Number ML/2018/0049 for a period of 30 days (hereinafter, “the impugned directives”).
7. The *ex parte* applicant further stated that the exclusive right to mine precious metals (gold) granted to the Applicant includes winning of mineral ore, extraction of the mineral ore, processing of the mineral ore and the subsequent sale and that the implication of suspension *vide* the impugned letter is that the Applicant shall not exercise the exclusive right to mine granted to it *vide* the Mining Licence Registration Number ML/2018/0049.
 8. It was also the applicant’s case that the impugned directive has subsequently halted processing of the already extracted mineral ores which occurs at the processing plant which is not located within the four (4) cadastral blocks in the mining licensed area. As a consequence of the 1st Respondent’s issuance of the impugned letter, the Applicant’s business has been brought to a sudden halt and operations have been closed down due to the 1st Respondent’s unilateral decision to suspend its Mining License Registration Number ML/2018/0049.
 9. It was also argued that the implementation of the impugned letter will cause great upheaval, chaos, loss, harm and damage to the Applicant including but not limited to:
 - i. Provisions of monthly drugs to five (5) clinics;
 - ii. Provision of school busaries;
 - iii. Stalling of numerous buildings (dormitories, social halls, administration blocks, toilets currently being built);
 - iv. Halting of community water supply, roads, sports team sponsorship;
 - v. The lack of operation due to the suspension of the said Mining License has caused anxiety, jitters and suspense to the Applicant’s employees as to the fate of the source of their livelihood;
 - vi. The lack of operation due to the suspension of the said Mining License has deprived local natives, who are engaged as casuals in day-to-day activities, of their daily bread;
 - vii. Leaving the underground tunnels unattended can lead to collapse of tunnels and/or flooding underground rendering development investments worthless as well as destruction of mining equipment which is currently located in the underground tunnels;
 - viii. The suspension of the license by the 1st Respondent continues to expose the applicant to heavy financial losses due to the interference with its operations.
 - ix. Political in with the Applicant’s day-to-day operations.
 10. It was contended that that the impugned letter brazenly contravenes the express provisions of Section 173 (2) of the *Mining Act, 2016* which makes it a mandatory requirement that before suspension under subsection 1, the Cabinet Secretary shall give the holder of the licence or permit written notice requiring the holder to either comply with the condition or obligation within a reasonable time or where this is not possible to show cause within that period why the licence should not be suspended or revoked. The applicant was not issued with any notice or show cause requiring them to comply with any condition or obligation before the 1st Respondent’s unilateral issuance of the impugned letter and further the impugned letter and impugned directives contravene provisions of Section 173(1) of the



Mining Act, 2016 as the reason cited in the impugned letter does not form part of the grounds laid down under the said section.

- a. That additionally, the impugned letter and the impugned directives are *ultra vires* and illegal as they contravene;
 - i. Article 10,22,23,40,47,48,50,232,258 and 259 of the *Constitution of Kenya, 2010*;
 - ii. Section 4,5,7,9,10,11 and 12 of the *Fair Administrative Action Act, 2015*.
 - b. That the 1st Respondent's action of issuing the impugned letter and directive, is tainted with procedural impropriety, illegality and is *ultra vires* for contravening section 173 (1) and (2) of the *Mining Act, 2016*.
 - c. That the 1st Respondent's decision was not made according to the law and was made in breach of the rules of natural justice in that the Applicants' license was suspended without according the Applicant an opportunity to be heard.
 - d. That the 1st Respondent's decision did not take into account the relevant consideration and provisions of the law governing suspension of a mining license and the Applicant's constitutional rights. The same is therefore a flagrant abuse of the legal process to achieve extraneous objective and ought to be quashed.
 - e. That in the prevailing circumstances, the 1st Respondent's actions are not only procedurally unfair, but also against the rules of natural justice since the Applicant has complied with all the licensing requirements.
 - f. That Applicant having complied with all conditions, standards and quality obligations required as per the *Mining Act, 2016* which obligations included, but were not limited to; extensive work programmes, substantial expenditure obligations, payment of the Mining Licences' renewals and rents had the legitimate expectation that its license would operate seamlessly up and until the year 2046 as when it expires.
 - g. That if the court does not intervene and grant the orders sought, the Applicant will suffer irreversible harm and financial loss that cannot be compensated by an award of costs.
 - h. That there are sufficient and reasonable grounds to warrant the granting of the orders sought.
11. The Exparte Applicant urged the court to allow the application and grant the judicial review remedies sought.

The Respondent's case.

12. The Respondents opposed the application vide a Replying Affidavit sworn by Elijah Mwangi, the Principal Secretary in the Ministry of Mining, Blue Economy and Maritime Affairs on February 28, 2023.



13. It was averred that the decision to suspend the mining license Registration No ML/20180049 granted to the applicant herein by the 1st Respondent was a statutory mandate.
14. It was deposed that the 1st Respondent on the basis of the information before him, that a deadly blast occurred in an underground mine located on Land Parcel Number Nandi Chemase/974 an area on which mining license was issued to the Applicant causing the three deaths was justified to make the decision that he did suspending the Applicant's mining license and operations in the mining area.
15. It was contended that the 1st Respondent was fully justified in suspending the mining operations in the area.
16. Elijah Mwangi deposed that in issuing the letter suspending the mining license, the 1st Respondent did not act *ultra vires* since the Constitution embodies the doctrine of precautionary principle such that in exercise of their authority public officers are enjoined to act responsibly and within the confines of the law and the Constitution.

The Exparte Applicant's submissions.

17. The Exparte Applicant outlined three issues in its submissions for consideration by the court. These include the following: -
 - i. Whether the 1st Respondent's impugned letter contravenes the principles of fair administrative action as enshrined under Article 47 of the Constitution of Kenya, 2010.
 - ii. Whether the Applicant is entitled to an order of *certiorari* as against the 1st and 2nd Respondents.
 - iii. Whether the Applicant is entitled to an order of prohibition as against the 1st and 2nd Respondent.
18. On the first issue, it was submitted that pursuant to Article 47 of the Constitution, Section 4 and 7 (2) of the Fair Administrative Action Act, 2015 every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair, right to be given written reasons for any administrative action that is taken against him and right to give prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representation in that regard.
19. Referring to Davis Oliver, Is the ultra vires Rule the Basis of Judicial Review (1987) PL 543, defining *ultra vires* as;

“Referring to a situation where an authority has done or decided to do an act that it does not have the legal capacity to do.”

Peter Kaluma, Judicial Review Law Procedure and Practice, 2nd Edition page 32 defines *ultra vires* as follows: -

“*ultra vires* literally means beyond the scope of power, jurisdiction or authority granted, or permitted by law.”



20. Reference was also made to section 173 (2) of the [Mining Act, 2016](#) which provides as follows;
- “Before suspending or revoking a license or permit under subsection (1) of the Cabinet Secretary shall give the holder of the licence or permit the holder-
- a. To comply with the condition or obligation within a reasonable period of time or
 - b. Where this is not possible, to show cause within that period, why the licence should not be suspended or revoked;
21. Counsel submitted that impugned letter contravenes section 173 (2) of the Mining Act since no written notice was issued to the applicant to show cause why the license should not be suspended or revoked. Reference was made to the following cases in support of the said contention [Maina v Nairobi Ligour Licensing Court](#) (1973) 319- 321, [Republic v Public Procurement Administrative Review Board & 2 other’s](#) (2019) eKLR, [Republic v National Hospital Insurance Fund Board Of Management & Another Exparte Law Society of Kenya](#) (2019) eKLR And [Republic v Principal Secretary, Ministry Of Defence & 2 others; Kenya Tents Limited \(Interested Party\) Exparte Unique Supplies Ltd](#) (2019) eKLR.
22. On the aspect of Natural Justice, Counsel in making reference to Section 173(2) of the [Mining Act](#) and the Court of Appeal decisions made in [JMKV v MWM & Another](#) (2015) eKLR, [David Oloo Onyango v The Attorney General](#) (1987) eKLR, [Mbaki & Others v Macharia & Another](#) (2005) 2 eKLR together with the High Court decision of [Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 Others](#) (2020) eKLR, it was submitted that the 1st Respondents actions are not only procedurally unfair but also go against the rules of natural justice for reasons that there is a constitutional and statutory obligations placed on the 1st Respondent to ensure that before aiming at a decision the procedure followed must be fair.
23. On the issue of legitimate expectation Counsel submitted that the Applicant having complied with all conditions, standards and qualify obligations required as per the [Mining Act, 2016](#) they had legitimate expectation that the licence would operate seamlessly up and until the year 2046 when it was scheduled to expire. Reliance was made to the cases of [Republic v Kenya Revenue Authority and Proto Energy Limited](#) (2022) eKLR and [Communications Commission of Kenya & 5 others v Royal Media Services & 5 others](#) (2014) eKLR.
24. On whether the Applicant is entitled to an order of *certiorari* as against the 1st and 2nd Respondents it was submitted that the 1st Respondent’s actions were unconstitutional and illegal and offended the provisions of the [Fair Administrative Action Act](#), the Applicant was never issued with any notice or show cause and that the decision taken by 1st Respondent was in contravention of Section 173 of the [Mining Act](#). Reliance was made to the case of [Megalith Mining Co. Ltd v Cabinet Secretary Ministry of Mining](#) (2019) eKLR where Okongo J held that:
- “In summary, Section 27 of the Act provides that in the event of any breach by the holder of a licence of any of the terms and conditions of the licence or any of the provisions of the Act or any of the regulations, the Commissioner is supposed to call upon the licensee to show cause within a specified time why his licence should not be revoked and if no response is received to the notice within the prescribed time or the cause shown is in the opinion of the Minister of Mining inadequate, the Minister may proceed to revoke the license.
- Special condition No 24 of the licence which I have reproduced is subject to the foregoing section of the Act Section 27 of the Act provides for the procedure to be followed before a



licence is revoked. According to the Gazette Notice through which the appellant's licence was revoked, the revocation was undertaken on the ground that the appellant's licence was non-performing. The revocation was purportedly carried out under section 27 of the Act. What "non-performing" means is not defined in the Act or in the licence.

The respondent contended however that the appellant breached its reporting obligations under the special conditions of the licence by its failure to submit quarterly progress reports to the Commissioner. The appellant denied this contention and submitted through further affidavit sworn by Abhimanyu Garwal on 5th December, 2017 various quarterly reports that were submitted by the appellant to the commissioner in the years 2014/2015. The respondent did not controvert the contents of this affidavit. It follows therefore that the reports attached to the affidavit had been submitted to the commissioner and as such failure to submit quarterly reports could not have been the non-performance which formed the basis of the respondent's decision to revoke the appellant's licence.

Even if it assumed that the appellant's licence was non-performing, was it revoked after the due process? As I have mentioned earlier in this judgment, the respondent filed a replying affidavit in response to the appeal. Apart from one letter dated 30th September, 2009 informing the appellant that it had not submitted its quarterly progress reports, the respondent submitted no evidence that the Commissioner and the respondent complied with the provisions of section 27 of the Act before revoking the appellant's licence. There was no evidence that the appellant was called upon to show cause why its licence could not be revoked before the same was revoked. Article 47 of the *Constitution* guaranteed the appellant a right to a reasonable and fair administrative action. By failing to comply with the provisions of section 27 of the Act which provided for the application of the rules of natural justice while revoking the appellant's licence, the respondent violated the appellant's right to a fair administrative action and protection of the law. The issues raised in the respondent's replying affidavit and submissions did not answer the grounds upon which the appellant challenged the revocation of its licence.

Due to the foregoing, it is my finding that the revocation of the appellant's licence through Gazette Notice No 3264 dated 24th March, 2015 published on 8th May, 2015 was unlawful. I therefore allow the appeal and set aside the said revocation. The appellant's licence is reinstated and shall run its full term until 30th June, 2021 unless otherwise lawfully terminated before then. The appellant shall have the costs of the appeal."

25. The court was therefore urged to allow the application with costs.

The Respondents submissions

26. The Respondents filed submissions dated 9th March 2023 which were filed by Ngira Lynn, Litigation Counsel. The Learned Counsel outlined two issues for consideration by the court;

- i. Whether the applicant is entitled to the orders sought against the 1st and 2nd Respondents.
- ii. Whether the 1st Respondent's suspension of the Applicant's licence was *ultra vires*.

27. On the first issue it was submitted that the urgency in respect to the issuance of the letter was necessary because, there was need for the 1st Respondent to fully implement all steps needed to suspend the



Applicant's licence and to cut any further deaths and injuries since the lives and safety of workers were at stake.

28. It was also submitted that the decision to suspend the licence was not in excess of powers. The same was made in line with the [Mining Act](#) as well as with the [Constitution of Kenya, 2010](#) under Articles 10 and Articles 26 (1), 41 (2) (6).
29. It was also submitted that prohibition orders should not be issued for the reasons of the applicant's failure of divulging the reasons behind the issuance of the said letter dated 26th January 2023. The main reason for the issuance of the suspension letter being the blast that caused the three deaths and injuries. Reliance was made to the cases of [Independent Electoral and Boundaries Commission \(IEBC\) v National Super Alliance \(NASA\) & 6 others](#) (2017) and [Oluoch Dan Owino & 3 others v Kenyatta University](#) (2014) eKLR in support of this position.
30. On whether the 1st Respondent's suspension of the Applicant's licence was *ultra vires*, Learned Counsel Ms. Ngira submitted that the doctrine of *ultra vires* and Articles 10 (2) and 47 of the [Constitution](#) protect public interest by ensuring that public officers act strictly within and according to the law to prevent abuse of power and that in this case, the Cabinet Secretary did not act *ultra vires*. It was submitted that the Applicant has not demonstrated how the 1st Respondent's actions were unconstitutional, illegal or how the action offended Articles 47 of the [Constitution of Kenya](#). The court was urged to dismiss the application with costs to the Respondents.

Issues and Determination.

31. The court has considered the application for judicial review and the submissions filed by the parties. The court is of the view that the following key issues arise for determination: -
 - i. Whether the Applicant was denied an opportunity to be heard.
 - ii. Whether the Applicant has made out a case for grant of the judicial review orders sought.
 - iii. What orders should issue as to costs.
32. On whether or not the ex parte applicant was denied an opportunity to be heard, i wish to begin by citing the provisions of Article 47 of the [Constitution](#) which stipulates as follows:-Article 47
 - “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
33. Fair administrative action, as per Article 47 of the [Constitution](#) of Kenya, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. Article 47 of the [Constitution](#) codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.



34. The parameters of judicial review were set out by the Court of Appeal in the case of *Republic vs Kenya National Examinations Council ex parte Gatbenji & Others* Civil Appeal No 266 of 1996 where the court stated as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...

33. In the instant case, the evidence on record confirms that the Exparte Applicant was not given any notice or show cause as stipulated under section 173 (2) of the *Mining Act*. I do not agree with the 1st Respondent’s contention that the notice was not issued because of the urgency of the matter since the law stipulates otherwise. In view of the foregoing, it is the finding of this court that the 1st Respondent acted *ultra vires* and contrary to the law While issuing the letter dated 26th January 2023.

Issue No 2

Whether the Applicant has made out a case for grant of the judicial review remedies sought.

34. As aforesaid, the Applicant is seeking the orders *certiorari* and Prohibition. The learned authors of H. W. Wade and C. F. Forsyth, Administrative Law, 10th Edition, have stated as follows at page 509 on the remedies of *certiorari* and Prohibition;

“The quashing order and prohibiting order are complementing remedies, based upon common law principles....a quashing order issues to quash a decision which is *ultra vires*. A prohibiting order issues to forbid some act or decision which will be *ultra vires*. A quashing order looks to the past, a prohibiting order to the future.”

35. In the instant case, it is evident that the impugned letter dated January 26, 2023 contravenes Section 173 (2) of the *Mining Act* since no written notice was issued to the applicant to show cause why the license should not be suspended or revoked.
36. In the circumstances and as aptly submitted by the Applicant, the court is satisfied that the Applicant has made out a case for grant of the judicial review orders sought.

Issue No 3.

Who should bear the costs of the application.

37. Although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the provisions to section 27 of the *Civil Procedure Act* (CAP



21). A successful party should ordinarily be awarded costs of an action unless the court for good reasons directs otherwise. In the instant case, I will direct each party to bear own costs of the application.

Final Orders.

38. Accordingly, for the reasons set out above, this court finds that the Applicant's Notice of Motion dated February 9, 2023 is merited and is allowed as follows:

- i. An order of *certiorari* is hereby issued for the purposes of bringing to this court and quashing the 1st Respondent's letter Ref No Momibesm/conf/1/2023 dated January 26, 2023.
- ii. An order of prohibition is hereby issued prohibiting the Respondents, their agents, or other officers and agencies acting under their instructions from implementing the impugned directive as contained in the 1st Respondent's letter ref No Momibesm/conf/1/2023 dated January 26, 2023.
- iii. Each party to bear own costs of the application.

39 It is so ordered.

DATES, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF MAY 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Ms. Owino h/b for Mr. Brian Otieno for Applicant.

Ms. Ngira for the Respondents.

Court Assistant: Caroline Nafuna.

