



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima J.)

CONSTITUTIONAL PETITION NO. E008 OF 2021

-BETWEEN-

ROCKLAND KENYA LIMITED.....PETITIONER

-VERSUS-

1. THE CABINET SECRETARY MINISTRY OF PETROLEUM AND MINING

2. THE ATTORNEY GENERAL.....RESPONDENTS

RULING NO. 1

Introduction:

1. The Petitioner herein, *Rockland Kenya Limited*, is a limited liability company carrying out mining in Kenya. It claims that it holds a *Special Mining Lease No. 19* issued under The Mining Act (repealed) which lease allows it to export minerals.
2. The Petitioner contended that on 17th November, 2020, pursuant to the Special Mining Lease, it applied to the Director of Mines for an Export Permit. The permit was declined for the reason that there was in place a directive issued on 7th September, 2017 by the 1st Respondent herein that required such applications to be made to the 1st Respondent instead of the Director of Mines.
3. The Petitioner was aggrieved by the said refusal to be granted the Export permit. It challenged the said refusal.

The Petitioner's case:

4. The challenge on the refusal to issue the Export Permit was mainly on two fronts. Firstly, the Petitioner contended that Section 171(2) of the Mining Act requires an application for an Export Permit to be made to the Director of Mines.
5. Secondly, it asserted that despite the powers of the 1st Respondent to make Regulations under Section 12(3)(a) of the Mining Act, the directive of 7th September, 2017 was issued in contravention of Sections 5(1) and 11 of the Statutory Instruments Act which require stakeholder participation in instances where change in regulation is sought to be implemented.
6. The Petitioner claimed that the 1st Respondent is out to frustrate its business operations. It posited that the delay in processing the Export permit has resulted in violation of its right under Article 40(2)(a) of the Constitution which forbids the enactment of any law that arbitrarily deprives a person of property or interest therein.
7. The foregoing prompted the Petitioner to approach this Court through the Petition and the application by way of Notice of Motion dated 30th December, 2020. Both are supported by the Affidavit of *Wilson Ngumbi* deponed to on an even date.
8. The application sought the following orders: -

1. *Spent*

2. *The Honourable Court do issue a conservatory order staying any further implementation of the 1st Respondent's Directive dated 7th September 2017 referenced Processing of Export Permit pending the hearing and determination of this application.*

3. *The Honourable court to issue a conservatory order staying any further implementation of the 1st Respondent's Directive dated 7th September 2017 referenced Processing of Export Permit pending the hearing and determination of the Applicant's Petition.*

9. The Petitioner filed written submissions dated 12th July, 2021. It reiterated the position that Regulation 20 of the Mining (Dealing in Minerals) Regulations, 2017 states that an application for an Export Permit is to be made to the Director of Mines a position created under the provisions of Section 18(1) as read with Section 17(1)(a) of the Mining Act, 2016.

10. In urging the Court to allow the application, the Petitioner submitted that the application was indeed unopposed. It stated that the Respondents did not controvert the Petitioner's averments and evidence so far on record.

11. In reference to the provisions of Rules 16 and 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Petitioner submitted that the Respondents had been given enough notice and their failure to respond to the Petition and the application should not hinder this Court from determining the Petition and the application.

12. On the validity of the directive, it was submitted that the procedure of obtaining an Export Permit is laid out in Regulation 20 of the Mining (Dealing in Minerals) Regulations, 2017 which provides that such application is to be made to the Director of Mines.

13. The Petitioner further submitted that the decision of the of the 1st Respondent was made pursuant to statutory power granted to it by the Legislature. As such, it submitted that it was a statutory instrument and it had to comply with the law.

14. It was its case, therefore, that the decision was illegal. It referred to *Republic -vs- Attorney General Law Society of Kenya (Interested Party): exparte: Francis Andrew Moriasi* (2019) eKLR where the Court considered what a statutory instrument is in the following terms: -

23. The Statutory Instruments Act in this regard regulates the making, scrutiny publication and operation of statutory instruments, and defines a statutory instrument as any rule, order, regulation, direction, from, tariff of costs or fees, letters patent commission, warrant, proclamation, by-law resolution, guideline or o her statutory Instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued." Therefore, a statutory instrument is a category of delegated legislation, which must be made pursuant to express enabling statutory power.

26. From the definition given above of statutory instruments, and the powers granted to the Respondent it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative guiding implementation of standards in laws and policies. In the present application, the Circular dated 1st March 2018 set out its purpose as follows in paragraph 3 thereof:

... The purpose of this Circular is to set out the services provided by the Office of the Attorney General and Department of Justice (OAG&Do) and to guide all Government Ministries, Departments, Semi-Autonomous Agencies State Corporations, State Agencies, Constitutional Commissions and Independent Offices on the procedure to be followed when seeking legal services from the Attorney General.

27. There is no reference in the Circular dated 1st March 2018 to any statutory provision empowering the said Guidelines, or to indicate that the same were being made in exercise of any legislative powers. It is thus my finding that the said circular was not made in exercise of the legislative powers granted to the Respondent and that its purpose was dearly stated to be explanatory it is therefore not a statutory instrument as envisaged by the Statutory Instruments Act and was therefore not subject to the procedure set out in the said Act as regards enactment of statutory instruments, including the requirements of consultation and publication.

15. From the foregoing, and in reference to Section 171(2) of the Mining Act that provides that applications are made to Director of Mines, it was submitted that the directive of 7th September, 2017 was not purely executive in character since its implementation sought to usurp the powers granted to the Director of Mines by the legislature.

16. The Petitioner prayed that the application be allowed as prayed.

The Respondents' case:

17. Both Respondents did not enter any appearance in the matter.

Analysis and Determination:

18. Having read and understood the application, pleadings and submissions, I will undertake a discussion on the following areas:

i. The nature of conservatory orders;

ii. The guiding principles in conservatory applications;

iii. The applicability of the principles to the application.

i. The nature of conservatory orders:

19. In Petition E408 of 2020, ***Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties)*** [2021] eKLR, this Court, in reference to various authorities of superior Courts, discussed the nature of conservatory orders in the following way;

16. In ***Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014)*** eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

[86] Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.

17. The Court in ***Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016]*** eKLR defined a conservatory order as follows: -

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.

18. In ***Judicial Service Commission vs. Speaker of the National Assembly & Another [2013]*** eKLR the Court had the following to say about the nature of conservatory orders: -

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

19. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

20. The foregoing was fittingly captured by Ibrahim, J (as he then was) in ***Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011)*** eKLR. The Learned Judge, correctly so, stated as follows: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

21. The decisions in ***Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011)*** eKLR, ***Platinum Distillers Limited vs. Kenya Revenue Authority (2019)*** eKLR and ***Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017)*** eKLR also variously vouch the cautionary approach.

22. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

20. The foregoing elaborately defines and sets out the parameters for the operation of conservatory orders. A Court must exercise caution not to wade into the substance of the dispute but at the same time preserve its adjudicatory authority and the subject matter of the dispute.

ii. The guiding principles in conservatory applications:

21. In Civil Application No. 5 of 2014 ***Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014)*** eKLR the Supreme Court discussed the guiding principle in the grant of conservatory orders as follows: -

[86] Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

22. The principles which Courts ought to consider when dealing with applications for conservatory orders were set out in ***Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others*** Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR.

The Court observed as follows: -

- (a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
- (b) *Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and*
- (c) *The public interest must be considered before grant of a conservatory order.*

23. In Nairobi High Court Constitutional Petition No. E243 of 2020 **Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega)** it was also established that a Court has the obligation to ascertain whether the grant of conservatory orders will delay the early determination of the dispute.

24. With the above, this Court will now apply the principles to the application.

iii. The applicability of the principles to the application:

A prima-facie case:

25. In Petition E005 & E009 of 2021, **Okiya Omtatah Okioti & Another v Nairobi City County Assembly & 5 others; Mike Sonko Mbuvi Gideon Kioko & Another (Interested Parties)** [2021] eKLR this Court discussed this limb as follows: -

*A prima facie case was defined in **Mrao vs. First American Bank of Kenya Limited & 2 Others** (2003) KLR 125 to mean:*

.... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

*The Court of Appeal in **Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another** (2015) eKLR while dealing with what a prima facie case is made reference to Lord Diplock in **American Cyanamid vs. Ethicon Limited** (1975) AC 396 where the Judge stated thus: -*

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

*What constitutes a prima-facie case was further dealt with by the Court of Appeal in **Mirugi Kariuki -vs- Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156. (1992) KLR 8.** The Court in allowing an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -*

It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint..... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.

26. The Petitioner has contended that the impugned refusal to consider its application for Export Permit was based on a directive which was unconstitutional in that whereas the directive is a statutory instrument, it was not subjected to public participation.

27. There is usually a legal process upon which any regulation or directive ought to be hinged on. The process is elaborate and at the end of it, the enacted regulations or directive is deemed to be both constitutional and legal.

28. Depending on the manner in which the process is challenged, a *prima-facie* case may be established. In this case, the fact that the directive is impugned to be unconstitutional and there is so far no rebuttal no doubt places the Petitioner in a position of having established an arguable case. That is a *prima-facie* case.

Whether irreparable loss will occasion if orders are not granted:

29. The *Black's Law Dictionary 10th Edition Thomson Reuters* at page 1370 defines '**prejudice**' as follows: -

Damage or detriment to one's legal rights or claims.

30. The grant of conservatory orders also depends on the demonstration that an Applicant will suffer irreparable loss if the Court fails to grant them.

31. The Petitioner herein is a limited liability company allegedly dealing in mineral extraction. It also alleges to export minerals.

32. The Petitioner has not demonstrated that it is not carrying out the extraction of the minerals at the moment. It has also not demonstrated that it made the application for the Export Permit to the Cabinet Secretary under the impugned directive and the application was declined. The Petitioner instead took a position that it cannot make the application to the Cabinet Secretary, but only to the Director of Mines since that is what it understands the law to require. The Petitioner then decided to invoke the Court process.

33. The Petitioner has not tendered any evidence that it is currently involved in active extraction of the minerals in Kenya and if so, where. The Petitioner has also not proved that it has a ready export market. It is further not demonstrated how the failure to export the minerals is affecting the Petitioner.

34. There is, therefore, no proof of any loss the Petitioner is likely to suffer if the orders are not granted and the matter is instead fully heard. The loss, if any, will have to be ascertained at the hearing of the main Petition.

35. In the meantime, this Court finds that the Petitioner has not demonstrated any loss likely to be occasioned to it in the event the orders are not granted.

Public Interest policy:

36. Finally, on whether the case meets the public interest threshold, I will make recourse to the *Black's Law Dictionary 10th Edition* at page 1425. It defines *Public interest* as;

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

37. What is impugned in this matter are directives. At the moment, the directives are deemed constitutional and the issuance of the orders sought will effectively suspend the operation of the said directives.

38. In *Republic vs. National Assembly & 6 Others exparte George Wang'ung'u* (2018) eKLR the Court held that the power to suspend a legislation during peace time ought to be exercised with care and caution and ought to be allowed only when it is shown that the legislative provision is a danger to life and limb at the very moment or where there is imminent danger to the Bill of Rights, and where there are strong and cogent reasons for grant of the conservatory orders. In this case, none of those issues are demonstrated.

39. Whereas the public is likely to benefit from the mining and export of minerals in form of taxes and regulatory fees, the process of mining and export must be carried out within the law. Public interest demands industry regulation so that the country is not exploited and suffers loss.

40. Up until when the directives are otherwise declared unconstitutional, public interest tilts in favour of the position that the law currently in place be complied with.

Disposition:

41. The foregoing analysis has yielded that the Petitioner has not established a case worth grant of conservatory orders at the moment.

42. The hearing of the main Petition will, however, be expedited.

43. In the end, the following final orders hereby issue: -

(a) The Notice of Motion dated 30th December, 2020 is hereby dismissed.

(b) The Petitioner shall extract and serve a copy of this Order upon the Respondents within 21 days of this ruling.

(c) Directions on 2nd February, 2022.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2021

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Dr. Khaminwa, SC, Counsel for the Petitioner.

No appearance for the Honourable Attorney General for the 1st and 2nd Respondents.

Elizabeth Wanjohi – Court Assistant.