



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW & CONSTITUTIONAL DIVISION

JUDICIAL REVIEW APPLICATION NO. 9 OF 2018

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: MOMBASA CHIEF MAGISTRATE’S COURT CIVIL

SUIT NO. 51 OF 2018 BETWEEN KRONE LIMITED VERSUS KERILEE INVESTMENT LIMITED, K13R MINEALS, AND NAMAJIMANA ALEX

AND

IN THE MATTER OF: AN APPLICATION BY NAMBAJIMANA ALEX, K13R MINERALS LIMITED, AND KERILEE INVETSMEN TMINITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI TO REMOVW INTO THIS HONOURABLE COURT FOR PURPOSES OF BEING QUASHED THE ENTIRE PROCEEDINGS TOGETHER WITH DECISION/ORDER MADE THEREIN ON 17TH JANUARY, 2018 BY HONOURABLE C. N. NDEGWA (PRINCIPAL MAGISTRATE) IN MOMBASA CHIEF MAGISTRATE’S COURT CIVIL SUIT NO. 51 OF 2018 BETWEEN KRONE (U) LIMITED VERSUS KERILEE INVESTMENT LIMITED, K13R MINERALS AND NAMAJIMANA ALEX

BETWEEN

NAMAJIMANA ALEX.....1ST APPLICANT

K13R MINERALS LIMITED.....2ND APPLICANT

KERILEE INVESTMENT LIMITED.....3RD APPLICANT

VERSUS

THE CHIEF MAGISTRATE COURT AT MOMBASA.....RESPONDENT

AND

KRONE (U) LIMITED.....INTERESTED PARTY

RULING

The Application

1. By an application dated 14th February, 2018 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 and Articles 10, 47, and 159 of the Constitution of Kenya, 2010, the Applicant/Interested Party seeks the following orders:

- a) Spent

b) Spent

c) THAT the court be pleased to give an interpretation of the order issued by this court on 8th February, 2018. In particular, that the grant of leave to apply for Judicial review orders to operate as a stay of the order issued on 17th January, 2018 in Mombasa Chief Magistrate's Court Civil Suit No.51 of 2018 between Krone (U) Limited and Kerilee Investment Limited, K13R Minerals Limited and Namajimana Alex.

d) THAT the costs of this application be provided for.

The application is supported by the grounds set therein and those in the supporting affidavit of RONALD MURIISA sworn on 14th February, 2018.

2. The Applicant alleges that it filed Mombasa Chief Magistrate's Court Civil Suit No.51 of 2018 between Krone (U) Limited and Kerilee Investment Limited, K13R Minerals Limited and Namajimana Alex and on 17th January, 2018 an injunction was issued restraining the Defendants therein, its servants, employees, agents or assigns and in particular the Kenya Ports Authority from releasing for shipment the Wolfram minerals (Tungsten ores and concentrates) contained in container No. SEGU105572 and DFSU1199652.

3. The Applicant claims that on 26th January, 2018, the 1st Applicant herein filed an application seeking the discharge or setting aside of the orders issued on 17th January, 2018. The Applicant contends that on 7th February, 2018 all the parties in the suit agreed to dispose off applications dated 17th January, 2018 and 26th January, 2018 by way of written submissions which were to be highlighted on 15th February, 2018.

4. The Applicant alleges that on the same date of 7th February, 2017, the Applicants herein commenced these Judicial Review proceedings with the intention of quashing the proceedings and order made on 17th January, 2018 by the lower court. Once these proceedings were commenced, the Applicant alleges that orders were subsequently issued on 8th February, 2018.

5. It is the orders of 7th February, 2017 issued by this court that the Applicant/Interested Party contends were misinterpreted by the Applicants herein. The Applicant claims that the orders in issue stayed the proceedings in the lower court thus containers No. SEGU1055727 and DFSU1199652 are still to be held by the Kenya Ports Authority and could not be released for shipment. The Applicant/Interested Party claims that the Applicants are planning to ship away the containers on the basis of the order issued on 8th February, 2018 by this court.

6. It is the Applicant's case that this court did not set aside the orders issued on 17th January, 2018 in MSA CMCC No. 51 of 2018 and further that it is proper for this court to preserve the minerals whose ownership is the subject matter of the lower court suit pending the hearing and determination of these Judicial Review proceedings.

7. The 1st, 2nd and 3rd Applicants and the Respondent did not respond to the application.

8. The application came up for hearing on 21st February, 2018 and parties agreed to dispense with the application by way of written submissions. The Applicant/ Interested Party filed its submissions on 23rd February, 2018 while the 1st, 2nd and 3rd Applicants filed their submissions on 22nd February, 2018. The Respondent herein did not file any submissions. The parties highlighted the submissions on 23rd February, 2018.

9. Mr. Gikandi and Ms. Murage, learned Counsel for the Applicant/Interested Party submitted that order No. 3 of the Orders issued by this court on 8th February, 2018 stayed the suit before the lower court therefore the containers held by Kenya Ports Authority cannot be shipped away. Counsel submitted that the court could not have issued orders that have a final effect at the interlocutory stage.

10. Counsel submitted that it is the duty of the court to always sustain and preserve the subject matter of the suit pending determination of the proceedings before it. Therefore, the containers held by Kenya Ports Authority cannot be released to any party herein and if released then these proceedings will be rendered nugatory.

11. Mr. Kibara, learned Counsel for the 1st, 2nd and 3rd Applicants submitted that the orders issued by this court on 18th February, 2018 suspended the orders of the Chief Magistrate's court and the parties went back to the status quo that existed prior to the orders of the lower court. Therefore, Counsel contended that the 1st, 2nd and 3rd Applicants were free to ship the containers. Counsel cited the case of **Taib A. Taib vs. The Minister for Local Government & others, Mombasa HCMISCA No. 158 of 2006**, where the court held that:

“The purpose of a stay order in judicial review proceedings is to prevent that decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken.”

Determination

12. The issue for determination by this court is the interpretation of orders issued by this court on 8th February, 2017, specifically, Order No. 3.

13. By way of Chamber Summons filed on 7th February, 2018, the 1st, 2nd and 3rd Applicants commenced these proceedings and prayed for leave to apply for the Judicial Review remedy of Certiorari to quash the proceedings together with the decision and orders made in Mombasa CMCC No. 51 of 2018.

14. This court on 8th February, 2018 granted the 1st, 2nd and 3rd Applicants leave to commence judicial review proceedings and stayed the proceedings in the Chief Magistrate's Court. The 1st, 2nd and 3rd Applicants considered the stay order, which was order No. 3, as having suspended the proceedings and orders of the lower court with the effect that the containers aforementioned could be released.

15. The interpretation given to Order No. 3 issued on 8th February, 2018 by the 1st, 2nd and 3rd Applicants is wrong. This court intended for the leave to operate as a stay of proceedings in CMCC No. 51 of 2018. The stay order meant that the proceedings before the lower court were halted until the application for judicial review is heard and determined. The stay order was not directed at the injunction order issued by the lower court on 17th January, 2018.

16. As I understand it, the contention between the parties that led to the institution of the proceedings before the Chief Magistrate's court was the ownership of the minerals contained in the two aforementioned containers. The two containers are therefore the subject matter of the suit. This court would therefore not have issued a stay order suspending the decision of the lower court whose effect would be the release of the containers which could then be shipped by the 1st, 2nd and 3rd Applicants. If the containers are released then the subject matter of the suit will be lost and these judicial proceedings as well as those before the lower court will be rendered nugatory.

17. This court wishes to state categorically that Order No. 3 of the orders issued by this court on 8th February, 2018 was to the effect that the leave granted to commence judicial review proceedings operated as a stay of proceedings before the lower court in CMCC No. 51 of 2018 pending the hearing and determination of the judicial review. Order No. 3 does not in any way suspend the order issued by the lower court on 17th January, 2018. The two containers No. SEGU1055727 and DFSU1199652 are to remain in the possession of the Kenya Ports Authority pending completion of these proceedings.

Dated, Signed and Delivered in open court in Mombasa this 12th day of March, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Kibara for Applicants

Mr. Mwanjeje for Respondent

Ms. Murage for Interested Party

Mr. Kaunda Court Assistant