



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 106 OF 2011

KINGDON MINERALS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

CORTEC MINING KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

CORTEC (PROPERTY) LIMITED.....2ND DEFENDANT/RESPONDENT

STIRLING CAPITAL LIMITED.....3RD DEFENDANT/RESPONDENT

DAVID WARWICK ANDERSON.....4TH DEFENDANT/RESPONDENT

DONALD O'SULLIVAN.....5TH DEFENDANT/RESPONDENT

PACIFIC WILDCAT RESOURCES

CORPORATION.....6TH DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 24th July, 2017, brought under the provisions of Order 5 Rule 17(1) and (4) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law.

2. The Applicant is seeking for orders that:-

(i) *Leave be granted to the Applicant's Advocates M/s. Walker Kontos Advocates to effect service of a mention date on the 6th Defendant/Respondent by way of a substituted service by publication of an advertisement in any national newspaper.*

(ii) That costs of this Application be in the cause.

3. The Application is premised on the grounds on the face of it and is supported by an Affidavit dated 24th July 2017, sworn by Paul Wafula an Advocate of the High Court of Kenya practicing as such in the firm of Walker Kontos Advocates who have the conduct of this matter on behalf of the Plaintiff/Applicant.

4. The deponent avers that, when this matter came up for directions on 19th June 2017 on the prosecution of the main suit, the Court directed that the Plaintiff/Applicant serves all the parties herein including the 6th Defendant/Respondent before taking the said directions.

5. That on the same day, they instructed Leonard Muendo, a duly licensed court process server to serve all the parties herein with the mention notice of the matter scheduled to come up for a further mention on 29th June 2017.

6. However, the said Leonard Muendo was unable to effect service on the 6th Defendant/Respondent herein as their former Advocates M/s Hamilton Harrison & Mathews Advocates informed him that they had ceased acting for the said 6th Defendant/Respondent and had no

knowledge of its registered office or that of its directors. Thereafter, the process server expended utmost diligence in trying to effect service on the 6th Defendant/Respondent without success.

7. The deponent avers that, it is in the interest of that the 6th Defendant/Respondent be served by way of substituted service by publication of an advertisement in any national newspaper.

8. I have considered the Affidavit filed in support of this Application and I find that basically, the deponent relies on the averments in the Affidavit of Service sworn by the process server one Leonard Muendo which is allegedly marked "PWI" though not so marked. Be that as it were, I have gone through the same and I find that, the process server avers at paragraph 3 thereof, that the Law firm of Hamilton Harrison & Mathews Advocates informed him they have ceased to act for the 6th Defendant/Respondent and that they do not have the whereabouts of the 6th Defendant/Respondent's offices or that of its directors.

9. He then deposes that:-

"that since then, I have visited the Company's registry severally with intentions of tracing the 6th Defendant's file and establish the whereabouts of its registered office and the name of its directors in order to effect service to no avail". (emphasis mine).

10. He goes on to state;

"That I have also tried to trace the 6th Defendant's registered office and the directors through several enquiries in various departments and organizations and my efforts have been fruitless."

11. From these averments, I find that first and foremost, there is no evidence to support the averments that the 6th Defendant's file is not available at the Company Registry. If the Applicant made an inquiry to the Registrar of Companies seeking for at least the particulars relating to the registered office and/or domicile of the 6th Defendant Company, that would have been sufficient prove and it would be a confirmation of the lack of the file. Secondly, the various department/organizations referred to at paragraph 5 of the process server's Affidavit are not identified or named. Thirdly, at paragraph 3, the process server avers that he visited the Company's registry "severally", how many times did he visit? What does severally mean, twice, thrice etc.

12. In the given circumstances, I believe there is need for further particulars of the efforts made to trace and/or locate the 6th Defendant/Respondent for service as stated. I am inclined to decline to grant the orders sought.

16. It is so ordered.

Dated, delivered and signed in open court this 9th day of March, 2018

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Wafula for the Plaintiff/Applicant

No appearance for the 1st -5th Defendants/Respondents

No appearance for the 6th Defendant/Respondent