



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 28 OF 2016

REPUBLICAPPLICANT

VERSUS

1. THE CABINET SECRETARY, MINISTRY OF MINING

2. THE COMMISSIONER FOR MINES & GEOLOGY.....RESPONDENTS

AND

WANJALA MINING COMPANY LIMITED.....EX-PARTE APPLICANT

AND

KISHUSHE RANCHING CO-OPERATIVE SOCIETY LTD....INTERESTED PARTY

CONSOLIDATED WITH

JUDICIAL REVIEW NO. 40 OF 2016

IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF: AN APPLICATION BY WANJALA MINING COMPANY LIMITED FOR LEAVE TO APPLY FOR ORDER OF JUDICIAL REVIEW AGAINST THE DECISION OF THE MINISTERIAL LICENSING ADVISORY COMMITTEE IN THE MINISTRY OF MINING & GEOLOGY AND THE NOTIFICATION THEREOF BY THE ACTING COMMISSIONER FOR MINES AND GEOLOGY

R U L I N G

Outline of fact as pleaded by the parties applicant

1. By a special licence no. 251 made on the 27/9/2007 issued under the Mining Act, Cap 306, the *exparte* applicant was granted by the Respondent a full and exclusive liberty and licence to prospect and explore for NON-PRECIOUS MINERALS over a parcel of land delineated in Red for a term of two(2) years with effect from the 1st of October 2007. Being granted pursuant to a statute, the special licence was made subject to the provisions of the Act and the annual licence fees was pegged at Kshs.2500 per square kilometer subject to a minimum of Kshs.10,000/=

2. During the year 2008, the interested party, KISHUSHE COOPERATIVE RANCHING SOCIETY LIMITED laid a claim which the *ex parte* applicant considered wrongful and fraudulent, and filed HCCC No. 340 of 2008 to rebuff. In that suit the court issued orders that a joint survey be conducted to determine the entitlement of each side to the disputed land. After that order, it is said that the interested party did not pursue the matter hence the *ex parte* applicant did in 2014, file ELC NO. 260 of 2014 now against the said interested party after it learnt that the interested party was in pursuit to obtain a title over the suit land. The court did grant to the *ex parte* applicant orders restraining issuance of any title over the land upon which the *ex parte* applicant did carry its activities.

3. Sometimes in July 2014, the minister for mines, did make a decision, which the *ex parte* applicant considers to be wrongful and in disregard to the law regarding the mining rights as well as the proprietary rights over some 100,0000 tons of iron ore which had been excavated on site. The *ex parte* applicant did challenge such decision in Misc. Application no. 42 of 2015 and obtained some orders.

4. It would appear that the *ex parte* applicants licence was issued pursuant to a lease agreement dated 28/3/2007 between the *ex parte* applicant and the defunct, County Council of Taita Taveta.

5. With the dispute escalating, the *ex parte* applicant averred that the minister of mines appointed a task force to investigate into the competing claims over the subject property and not only the *ex parte* applicant and the interested party but also one SAMIRUDDHA RESOURCES KENYA LIMITED all attended and made representation and that a report was presented to the minister early in 2015. To the Applicant, the force behind the interested party is SAMRUDDHA RESOURCES who brags of deep pockets and have threatened the applicant that they will stop at nothing to ensure that the interested party get title to the land and then SAMRUDDHA gets mining right. The minister is then faulted for taking steps and making decisions grounded upon a title to the interested party issued contrary to a court Order which to it presents an abuse of their statutory powers.

6. On those facts the *ex parte* applicant sought and was granted leave to apply and indeed did for judicial review in the nature of:-

a) Certiorari to remove into the court the decision of the cabinet secretary and minister of Mines & Geology to review the status of the special licence no. 251 and mining location no. 2156/1-0 to 2161/1-10 by excluding therefore an area to which title was issued to the interested party contrary to court orders.

b) An order of prohibition against the cabinet secretary and the commissioner of mines & geology from interfering with or reviewing the terms of the applicant's special license no. 251 and mining locations no. 2156/1-10 to 2161/1-10 or granting a licence to any other party in respect of the area over which the applicants license was granted pending the hearing and determination of Misc. Applicant No. 42 of 2014, ELC No. 260 of 2014 and Misc. Application No. 42 of 2014.

c) An order of prohibition directed at the Cabinet Secretary and Commissioner for Mines & Geology from granting any mining rights and or permitting any other party from interfering with or converting to own use the iron ore already mined or the area subject to the applicants special licence.

d) Costs of the motion be met by the Respondent.

7. That motion was filed on 20/5/2016 after the leave had been granted on the 10/5/2016. In granting the leave the court differed the consideration on the prayer for stay and directed that the same be canvassed *inter-partes*. That did not happen as the *ex parte* applicant devised and opted for an easier and convenient strategy, go before another Judge of the court, seek leave and have the leave to operate as stay.

8. On 25/6/2016, some 5 days after the Notice of Motion was filed in No. 28 of 2016, the applicant once again approached the court and sought leave this time round to apply only for an order of certiorari and

directed at the ministerial licensing Advisory Committee, Ministry of Mining & Geology and the Acting Commissioner for Mines and Geology to quash the decision of the committee made on 4/5/2016 and contained in the letter by the Cabinet Secretary and Acting Commissioner of Mines and Geology in the lever of 10/5/2016.

9. In this latter application the applicant accuses the committee, the cabinet secretary and Acting Commissioner of Mines and Geology for being unreasonable, irrational and being in breach of the rules of Natural justice by failing to give to the *ex parte* applicant a fair hearing and by acting partially as if to demonstrate a vested intent to disposes the *ex parte* applicant of its mining rights. There are other grievance raised to vitiate the decision being; failure to discharge statutory duty, failure to take into account the findings and recommendations of a task force appointed to investigate the matters; failing to note that the matter was subjudice regarding the validity of the title to the interested party; that the ministerial licensing advisory committee lack statutory mandate to approve the variation of the special license and have acted ultra vires its powers and lastly that the decision was designed to defeat Misc. Judicial Review Applications No. 28 of 2016.

10. In JR No. 40 of 2016, there are exhibited a letter dated 10/5/2016, the Report of the taskforce on the land, newspaper cuttings with comments on the happenings on the ground, the record of the pleadings in JR 28 of 2016, Affidavit of Service to show that papers on JR 28 of 2016 were served upon the Respondents on 17/5/2016.

11. It would appear that the moment the Respondent and interested party learnt of the Orders of 25/5/2016, all ammunitions and arsenals were assembled ready to do battle. This is what I make of the number of applications filed to upset the leave and the stay granted with it.

12. The interested party filed a notice of appointment and simultaneously a Notice of Motion seeking to set aside the leave granted on 25/5/2016 together with the order for stay. Before that application could be heard both the Respondent and the interested party filed a Notice of Motion each, other sought to set aside and review the Court Orders of 5/10/2016 extending stay and to struck out the Notice of Motion dated 8/6/2017 for being an abuse of the court process.

13. By Court Orders issued on 5/10/2016 by Emukale J, in JR No. 28 and by Otieno J, on 13/10/2016 in JR No. 40 of 2016 all the application by the Respondent and interested party were directed to be heard together with the substantive Notice of Motion and in opposition thereto.

Facts pleaded by the Respondent

14. On behalf of the Respondent beside the application dated 11/10/2016, filed in JR No. 40 of 2016, there were also two Replying Affidavits by one Shadrack Maithya Kimomo sworn before Elizabeth Wanjeru on 5/7/2016 and on 3/10/2017 respectively. That deponent says he was, upto the 27/5/2016, the Acting Commissioner of Mines and Geology and subsequent to that date, todate, the Acting director of Geology Survey. He gives the history of the special licenses given to the *ex parte* applicant to date back to 1997. That license was given on the strength of a consent given by the Chairman of the now defunct County Council of Taita Taveta dated 27/4/1995. That initial license was terminated by gazette notice no. 2424 dated 19/4/2002 due to non-performance and non-compliance with the license conditions. Upon appeal the license was re-issued as No. 211 with effect from 1/12/2012 for a period of 5 years which was once again terminated for non-compliance with license conditions.

15. In the year 2007 after an appeal and submission of a lease from the County Council of Taita Taveta the *ex parte* applicant was then granted special license no. 251 for a period of 2 years with effect from 1/10/2017 renewable, and was last renewed on 14/11/2014 to take effect from 1/9/2013 over an area of 40 square kilometres. That reduction was based on advice of the National Land Commission based on land ownership in the area.

16. Sometimes on 24/8/2015 the interested party was registered as proprietor of the land known as TITLE NO. C.R. 65748. Based on that registration, the interested party made a complaint to the Respondent that

the *ex parte* applicant had not obtained their consent to carry out mining activities on their land. Based on that complainant, the deponent as the Acting commission of mines and Geology wrote to the *ex parte* applicant and advised that they regularize land owners' consent within 21 days and on default the status of their mining rights would be reviewed.

17. To the respondent, the *ex parte* applicant did not take the advice but choose not to procure the land owners' consent hence the Ministerial Licensing Advisory Committee in its deliberation of 4/5/2016 advised the variation of the special license no. 251 to confirm with the mining Act on the issue of land ownership. That the license as granted was due to expire and did expire on the 31/8/2016 and the *ex parte* applicant did not make any application for renewal.

18. To the deponent of the Respondents' Replying affidavits, under section 225 of Mining Act, 2016, any license subsisting as at the date of commencement was to continue in place till the date of expiry. However, in the affidavit same on 5/7/2016 the deponent says the assertion of proprietary rights by Kishushe did not arise in 2015 but had been raised as far back as 27/6/2005 when the *ex parte* applicant lodged a complaint that the interested party was laying a claim to the land on which the *ex parte* applicant had mining rights and further that a formal complaint by the interested party was received by the Respondent on 19/8/2010 and arbitration process ensued.

19. The interested party seem not to have relented until it got his way when the license was varied to exclude the rights by the *ex parte* over the property owned and registered in the name of the interested party. The Respondent contend that it did act according to law and in particular section 7(m) of the Mining Act in varying the special license.

Facts by the interested party

20. On behalf of the interested party, there were filed two applications as said before and a Replying Affidavit of ELISTONE MBELA. That affidavit incorporates the matters deponed to in the affidavit in support of the applications by the interested party dated 30/5/2016 and isolates the grounds founding the application by the *ex parte* applicant to be four;

i) That the review was whimsical and capricious without basis.

ii) That the review failed to take into account and turned a blind eye to the findings of a task force appointed by the ministry to unravel the dispute.

iii) That the review ignored the fact that there was a pending dispute over the matter before the Environment and Land Court and constitute an act in contempt of orders so issued in that court.

iv) The review of the license was intended to defeat and circumvent JR No. 28 of 2016.

21. In summary the interested party submits and contend that none of the grounds is merited because the same are unfounded and in particular:-

i) The title issued to the interested party remain unrevoked or cancelled and it cannot be ignored by the ministerial body since the law says that interest must be taken into account in grant of a license.

ii) The finding by the task force is skewed to serve partisan interests and flies on the face of the law. In any event the report exhibited is not signed and has not been formally presented.

iii) The pending suit ELC No. 260 of 2014 was not challenging the issue of title to the interested party but sought that when issued, the *ex parte* applicants rights be noted therein. On HCC 340 of 2008 the interested party contends that the dispute therein has been unravelled by a letter from County Government of Taita Taveta dated 10/6/2015.

iv) On the accusation that the review was intended to defeat JR No. 28 of 2016 the interested party has pointed out lack of evidence and proof of any bad faith on the part of the respondent nor demonstration of bias.

22. Parties also filed written submissions and cited to court decisions they viewed to support their respective positions.

23. I have had the benefit to read the file, the cited authorities submissions and did listen to counsel on three occasions on very lengthy oral submissions. I have therefore benefitted immensely from the material availed to court which I think is of great help in making this determination.

Analysis and sphere of the dispute

24. Whether or not to grant to an applicant, an order for judicial review in the nature of certiorari or prohibition are well beaten paths deserving no citation of any decision laying the applicable principles. The decisions are abandoned and are as old as the remedies from the days they were writs. For purposes of this determination however, it is enough to make reference to the decision by the Court of Appeal in ***Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji [1997] eLRR*** where the court laid out in details the efficacies and limitations of the three orders of Judicial Review. The decision surmises the purpose and object of certiorari to be the quashing of an already made decision on the basis that, it was made without or in excess of jurisdiction or where the law in a statute or rules of natural justice are not complied with or for such like related reasons.

25. On the other side a prohibition addresses the future and seeks to stop continuance or a threatened action sought to be pursued without or in excess of jurisdiction, or in breach of a statute or the rules of natural justice by an inferior tribunal or body. However, both are not designed to question and interrogate wrong decision made on the merits of the proceedings. In other words judicial review is a supervisory jurisdiction intended to keep inferior tribunals within the confines of their mandate and to ensure fidelity and compliance with the law in the process of decision making but is not an appellate remedy interrogating the correctness of a decision on the merits. Those are the principles I will seek to guide me in interrogating the dispute before this court.

26. However, in this country we have coded the procedure in seeking judicial review under the Law Reform Act Order 53 Civil Procedure Act. One of the dictates of the law is that one gets leave to apply and the substantive motion is then confirmed only to those facts as are disclosed in the application for leave and no more. It is therefore of importance note that it is the leave to apply that grounds an application for judicial review.

27. From their prayers, the two applications; Notices of motion dated 9/5/2016 and 8/6/2016, if not for the dearth of the date and evidence of the decision that is sought to be quashed, in pray 1 in JR No. 28 of 2016, Prayer 1 in the earlier application is well taken care of in the later application. That prayer can be subsumed into the prayer No. 1 in the Notice of Motion dated 8/6/2017 in JR No.40 of 2016.

28. The only issue that isolates itself for determination by the court is therefore as follows:-

- **Has there been demonstrated as against the Respondents, or any of them, any act without or in excess of jurisdiction or in violation of the law under Mining Act or the Rules of Natural Justice?**

Determination

29. The special licence granted to the *ex parte* applicant was so granted pursuant to section 17(2)b of Act and would always be subject to the province of the Act.

30. It is not denied or deniable that where the license is to be operated on a parcel of land registered in the name of a person other than the license then the consent of such land owner is mandatory. This provision

cannot be by any means be considered *ottiose* or idle. To the court this provision underscores and conforms with the constitutional right to property under Article 40 of the Constitution. Even before the definition assigned to land under the Land Act, the Constitution gave one of the definition of land to mean the surface of the earth and the subsurface rock.

31. I have looked at the title said to have been issued to the interested party and dated the 24th August 2015 and considered it on the face of the letter containing the decision to vary the license.

32. From the two documents it is clear to me that the Respondent merely limited the *exparte* applicants rights from being exercised upon the land owned by the interested party on the basis that there was need for a consent by the interested party which had not been obtained. Before that was done, there is ample evidence that the *experte applicant* was duly advised to approach the interested party with a view to getting its consent.

33. In my judgment, the *exparte* applicant was given a notice that his mining rights had been challenged by the interested party and a chance was given to it to address the complaint. That to me qualifies as a right to be heard. In effect the letter of 15.2.2016 to the *exparte* applicant was telling it that there was a complainant that was aimed at having his mining rights reviewed and it was called upon to address the complainant. To me the decision to review was not done behind it. May be it was at that juncture that the *exparte* applicant could have approached the court and sought a prohibition to forestall such an action. It did not. It was content with the fact that there were civil litigation going on in court on which it had interim orders and he was comfortable that there was enough to stop the Respondent from ever undertaking its regulatory duties of the mining activities as a statutory duty.

34. What should not be lost sight of is the fact that these orders were never issued against the Respondents here who were never parties to those suits. Secondly and equally pertinent is the fact that as pleaded, in the claim in No. 260 of 2015, the *exparte* applicant as the plaintiff, did not contest the interested party's right to be registered as the proprietor of the land. It only sought that its mining rights be noted on the title should the title be issued.

35. The foregoing would be sufficient to dispose of the matter however for clarity and completeness it is important to interrogate each complaint by the *exparte* applicant.

Was the title given in Contempt of Court Orders in ELC 260 OF 2014

36. In pressing this point Mr. Khagram cited to the court the decision in ***Ochieng & Another vs Ochieng & Others [1995-1998]2 EA, 260*** for the proposition that a sale which is void does not entitle a purchaser at such a sale to obtain proprietorship or title to the land so sold. To this court that decision by the court of appeal is distinguishable from our present case on the basis that in that matter the Appellant was disputing a sale conducted pursuant to a statutory power of sale and to which the appellant contended and succeeded on the basis that it was conducted without compliance with the law. In the present case, it has been said that the *exparte* applicant obtained an order of injunction in ELC No. 260 of 2014 on 24/10/2014. That Order besides being an interim one and thus limited in time also did not forbid the Registration of the title in the interested parties favour wholesome but only without noting the *exparte* applicant's interests.

37. Additionally that order remains interim and an attempt to push for contempt on its existence came before the trial Judge and by a decision dated 1/2/2017 it was found and held that no contempt had committed as no proof had been availed of service of the order. Most critical however is that the dispute in that suit is not about title but whether or not the *exparte* applicant's *jura in re alieno solo* should be recognized and noted in the register against the land.

Was the *exparte* applicant denied the right to be heard?

38. It must be noted that by the time the complaint by the Interested Party was lodge with the Respondent, the *exparte* applicant was already on site. It has been shown by the Replying affidavit of Mr. Kimomo

that atleast two letters were written to the *exparte* applicant.

39. I have picked letters dated 15/2/2016 and that of 18/3/2016 written before the review was undertaken. The letter of 15/2/2016 is of importance for this determination because it says:-

“In light of the above and after careful consideration, the Ministry requires your company to regularize the land owners’ consent with Kishushe Cooperative Society Ltd, within twenty one (21) days from the date of this letter failure to which the status of your mining rights over the land will be reviewed”. (emphasis provided)

40. That was a call to the *exparte* applicant, with a piece of advice, to comply with section 7 (m). The letter was duly served and met a swift and terse response from the *exparte* applicants lawyers threatening not only action for damages but also contempt of court. On receipt of the letter the Respondent did write to acknowledge receipt and promise to revert after consultations. There was yet another letter dated 18/3/2016 by which the Respondent informed the expert applicant that having ignored the advice the ministry was left with no option but to start the process of varying the license area to exclude and free parts falling on the interested party’s land. That process culminated in a meeting of 4/5/2016 whose decision was contained in the letter of 10/5/2016.

41. I have narrated the events and correspondence exchanged to show that there was a process undertaken by the respondents which gave to the applicant an opportunity to regularize the requirement of landowners’ consent. It notified the *exparte* applicant of the intended action, possible consequences and advised remedial steps to avert the intended action.

42. There is no attempt exhibited by the *exparte* applicant at getting the consent or asserting that indeed one had been sought and obtained. To this court that was all the Respondent was expected to do but it choose, as was its right, not to address the matter. The right to be heard is upon the individual to exercise which a party can choose to exercise but never an obligation on the right holder.

43. I take the view that with some diligence and knowing their rights the *exparte* ought to have moved with haste when informed that the process to vary the license had commence. It did not and by the time JR No. 28 of 2016 was filed and orders issued on the 10/5/2016, a decision had been made on 4/5/2016. That decision having been made as narrated above cannot be faulted so as to merit being quashed.

Did the review of mining rights overlook the finding by the task force?

44. To this court, the decision made by the Respondent was a statutory mandate that is delegated to it by the people of Kenya. Only them had the duty and right to make it. Unless the statute permit, a delegated duty is not capable of delegation by the delegate. It thus would follow that if the Respondents had to peg and solely found their decision on the finding by the Task Force, it would be itself an abdication of duty and ultra vires.

45. More importantly the Report of the task force as exhibited to court is not signed a fact which leave the court to ask how credible it is and whether it has been owned by the persons known to have been appointed to the task force. In addition nothing was placed before the court to show that the report was ever presented to the appointing authority and whether the appointing authority has taken steps to implement its decision.

46. I would say no more on the report other than that the Respondents had no duty in law to rely upon or depend on the Report by the task force.

Was the review of the licence intended to defeat or circumvent the orders and litigation in JR No. 28 No. 28 of 2016?

47. It is common ground taken by all the parties in this matter that the decision was made on the 4/5/2016 and communicated by the letter of 10/5/2016. The Application for leave in JR No. 28 of 2016 was filed

and placed before a Judge under Certificate of Urgency on the 10/5/2017 although the date stamp reads 17/5/2017. It is plain and not arguable that by the time the application was filed the decision had been made and therefore it cannot be honestly contended and maintained that the decision was aimed and designed at defeating the litigation filed after it was made. In any event, the Orders and Pleadings in the matter were never served upon the Respondents till the 17/5/2017. This complaint and ground to support the application for certiorari is to the court unfounded and must fail.

Is prohibition available for grant in this matter?

48. On the request for prohibition to stop the Respondents from reviewing the licence and from issuing mining rights over the suit property, I do find that prohibition can issue to stop a past event. The decision was made on 4/5/2017 and it is no longer anticipated but executed.

49. Whether to prohibit issuance of other mining rights to other persons other than the *experte applicant* and from interfering with the mined ore currently on the land, I do find that to make such orders would be to overlook the mandate of the Respondents given under statute and to take for granted the interested parties proprietary rights over the said in question.

50. Let the Respondents exercise their statutory mandate without uncalled for direction or superintendence by third parties including the court.

51. I make this finding with clear mind and understanding that now that we have registered rights over the land, it would be a harsh to allow the *experte* applicant to have the say on the use and control of the interested party's property without a valid ground. Upto this point in time no ground has been laid before the court to justify that the *experte* applicant needs to have a right to exercise mining rights over the land.

52. The upshot is that, I have not found any impropriety or irrationality or indeed breach of any law to warrant granting the orders sought.

53. For those reason, I dismiss the two application as consolidated and award costs thereto to the Respondents and the interested party.

Dated and delivered at **Mombasa** this **28th** day of **June 2017**.

HON. P. J. O. OTIENO

JUDGE