



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KWALE

ELC APPEAL NO. 4 OF 2021

(FORMERLY ELC CIVIL APPEAL NO.32 OF 2021)

BASE TITANIUM LIMITED.....APPELLANT/APPLICANT

VERSUS

MOHAMED YUSUF IQBAL JIN RESPONDENT

RULING

1. The Applicant herein was sued in CMELC No.1 of 2021 for alleged trespass among others. The dispute arose from mining operations. Carried out by the Applicant herein. The Applicant challenged the jurisdiction of the Chief Magistrates court to hear and determine the dispute vide a Preliminary Objection dated 16th February 2021. According to the dispute arose from the Appellants mining operations and its licensed mining area. As such it was governed by the provisions of the Mining Act Chapter.....of the laws of Kenya. The Act conferred jurisdiction to determine such disputes at first instance on the Cabinet Secretary. The Preliminary Objection was dismissed on 5th May 2021.

2. The Appellant being aggrieved by the entire ruling dated and delivered on 5th May 2021 filed this appeal. The Appellant also filed a Notice of Motion application dated 22nd June 2022 which is the subject of this ruling. The application is brought under the provisions of Order 51 Rule 1 and Order 42 Rule 6(1) of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A & 63(e) of the Civil Procedure Act. The application seeks for unconditional orders of stay of proceedings in Kwale CMELC No.1 of 2021. The application is based on the grounds on the face of it, the supporting Affidavit of Colin Andrew Forbes sworn on 22nd June 2021 and further affidavit sworn on 2nd August 2021.

3. The Application was opposed by the Respondent vide a replying affidavit dated 15th July 2021.

4. The application was disposed of by way of written submissions. The Applicants submission are dated 4th August 2021 and filed on 5th August 2021. The Respondent filed theirs on 1st September dated 23rd August 2021.

The Applicants Submissions

5. It was submitted on the part of the Applicant that the court drew its jurisdiction to determine the application for stay from Order 42 Rule 6(1) since it was the court before which the appeal was lodged. Further that under this order the court could make any order to make ends of justice meet.

6. Counsel based on the case of **Kenya Power & Lightning Limited Vs. Esther Wanjiru Wokabi (2014) eKLR** identified three principles that must guide the court in deciding whether or not to grant stay of proceedings. These were 1) Whether the Applicant has established that he or she has a prima facie arguable case 2) Whether the application was filed expeditiously and 3) whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Whether the Applicant has established that he or she has a prima facie arguable case

7. It was submitted that the Preliminary Objection that was dismissed by the learned Magistrate had been based on the ELC decision in **Peter Nzeki and 14 Others Vs. Base Titanium Ltd and 4 Others (2019) eKLR**. The court in the case held that under the Mining Act disputes are referred to the Cabinet Secretary in the first instance. Further that any party aggrieved by the decision of the Cabinet Secretary was to appeal to the ELC Court. In counsel's view both the High Court and the Chief Magistrate court lacked jurisdiction to hear the dispute in the first instance. Further that the lower court was bound by the decision in Peter Nzeki and 14 Others Vs. Base Titanium Ltd and 4 Others being a decision of the superior court. Counsel urged that this was one of the grounds of Appeal and thus the appeal raised a prima facie arguable case with high probability of success.

Whether the application was filed expeditiously

8. Counsel contended that the Appeal was duly filed within the period of 30 days as required under Section 79G of the Civil Procedure Act Chapter 21 of the Laws of Kenya. The Appeal was filed on 3rd June 2021. The application for stay was filed expeditiously on 22nd June 2021 to ensure that the proceedings in CMELC No.1 of 2021 were stayed pending determination of the Appeal since the court had no jurisdiction to hear and determine the dispute.

Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

9. Citing the case of **Owners of Motor Vessel 'Lillian S' Vs. Caltex Oil (Kenya) Ltd (1989) eKLR** it was emphasized that jurisdiction is everything without which the court should not take any further step. Jurisdiction was the main basis upon which the stay of the proceedings was being sought. Counsel urged that the lower courts proceedings and attendant orders would be a nullity should this court find that the lower court lacked jurisdiction. According to Counsel it was not in the interest of justice to spend time, witness expenses and resources by proceeding with the case in the lower court before the issue of jurisdiction was first determined in this appeal.

10. In addition, this court was urged that the filing of the Appeal was not intended to delay the proceedings in the lower court. It was a pursuit of justice; an appeal was a matter of right. The Court was urged to find that the Applicant had met all three principles and grant the orders sought.

Respondents Submissions

11. The Respondents in opposition to the application stated that the Applicant had failed to demonstrate to this court that it was mining within the gazetted area and there was possibility that it was mining outside the area leased to it by the Government.

12. Counsel for the Respondent submitted that the Application was defective as it was premised on the affidavits of the Applicants General Manager in the absence of a Resolution authorizing him to swear the same on behalf of the Applicant company.

13. The court's jurisdiction to hear and determine the application and the appeal was admitted by the Respondent as well as the fact that the appeal was filed expeditiously.

14. With regard to whether there was a prima facie arguable appeal, the respondent submitted that the Applicant had deliberately failed to consider the provisions of Section 154 of the Mining Act by choosing to dwell on section 155 only. That the word 'May' used in both sections connoted discretion and that one could not be interpreted to connote discretion and the other to be mandatory. The word 'may' therefore provided an alternative forum for resolving disputes and had the drafters intended to oust the jurisdiction of the of the Magistrates court it would have expressly provided for it and Section 154 would not be in the Act. Additionally, if the matter was filed in the first instance at the High Court then the right of appeal to the High would be lost. That CMELC No.1 of 2021 at Kwale was at the lowest level of the court hierarchy. The Applicants silence on Section 154 should be construed to mean they agreed with its provisions.

15. On the lower court jurisdiction Counsel emphasized that the case had previously been filed as ELC Mombasa No. 230 of 2020 and the trial judge on noting the purchase price of Kshs. 1,000,000/= suo motto transferred the matter to Kwale while duly informed it involved a mining dispute.

16. Further it was contended that a superior courts decision is not necessarily binding on the lower courts. That the facts in the Peter Nzeki and 14 Others Vs. Base Titanium Ltd case were distinguishable. The words 'through a court of competent jurisdiction' in Section 154 (c) do not exclude the 'magistrate court.

17. According to Counsel the Respondent in CMELC No.1 of 2021 at Kwale has sought reliefs that are injunctive in nature which reliefs cannot be given by a Cabinet Secretary. The Cabinet Secretary cannot sit as a court of competent jurisdiction. Only the Courts can do so as envisaged under Article 10 of the Constitution of Kenya 2010.

18. It further contended that the Applicant had not complied with the provisions of Order 42 as to security by failing to state that they were ready and willing to furnish the same. The Respondent implored the court to dismiss the Application for stay with costs.

19. In a brief response to the foregoing submissions the Applicant pointed that the mining area was specified and or delineated in the Special Mining Lease No.23 and the present affidavit sworn by the Applicants Manager was a continuation of CMELC No.1 of 2021 at Kwale. In the lower court the Applicant Managers affidavits were not questioned and were utilized in coming up with the ruling. The Respondent was therefore estopped from impugning them. Furthermore, validity of affidavits were governed by the provisions of Order 19 Rules 3 and 7 which have been complied with by the Applicant. Moreover, the technicality raised should not impede justice. On security Counsel submitted that the same was to be ordered by the Court and it is for the performance of the decree or order. There was no decree to be performed and this court did not make an order for security. The submission that the trial judge in ELC Mombasa No. 230 of 2020 had recognized the jurisdiction of the Magistrate court at Kwale was misplaced. The issue was not considered on merit as the orders were made suo motto.

ANALYSIS AND DETERMINATION

20. I have considered the Notice of Motion Application, the grounds and the prayers sought. I have also considered the Respondents responses and the submissions filed. The issue for determination is mainly whether the proceedings in CMELC No.1 of 2021 at Kwale should be stayed pending the hearing and determination of the Appeal herein on the issue of jurisdiction. I have noted that in the submissions

made herein counsels were already arguing the merits of the Appeal filed in this court. I will therefore keep this ruling brief and simple bearing in mind that it is not the forum for arguing the appeal.

21. The main ground of the Appeal filed before this court is that the lower court lacks jurisdiction to hear and determine the CMELC No.1 of 2021 at Kwale and therefore the said proceedings should be stayed. Whether the lower court has jurisdiction is a matter for determination by this court in the appeal herein. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd** already cited by the Applicant where the late **Justice Nyarangi** of the Court of Appeal held as follows:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

22. Indeed I cannot agree more with the court in the above authority that without jurisdiction a court has no power to make one more step. For me there would be no point to deny the orders sought for stay, which would effectively be allowing the lower court at Kwale to proceed with the case. Assuming thereafter this court finds that the court at Kwale lacked jurisdiction to hear and determine the matter. I cannot begin to fathom where this would leave the parties in CMELC No.1 of 2021 at Kwale especially the Plaintiffs. Moreover, the Courts valuable scarce time would have been spent as well as expenses incurred by the parties only to awaken to the news that the court lacked jurisdiction. This court has been urged by the Respondents to find that the application is a waste of time. I then pose the question, which would be the lesser evil to stay the proceedings and determine the appeal herein or spend time in a matter where the court may not have jurisdiction?

23. To allow the proceedings in the lower court would be to me equivalent to gambling and throwing the opportunity to have the matter of jurisdiction laid to rest once and for all and provide clarity of direction to both the parties in this dispute. This would be more efficient in my view. On the basis that the lower court jurisdiction has been brought into question, I find that this appeal is arguable. Let the trial Magistrate first down his tools pending the hearing and determination of this appeal lest this appeal is rendered nugatory.

24. I have also considered the Respondents submission on security and the need for Counsel for the Applicant to have undertaken to provide for the same in its pleadings. I have also looked at the provisions of Order 42 as they relate to security. The security in my view is to protect the interests of the successful party should the appeal not succeed. The above provisions envisage existence of a decree or order to be enforced by the successful party. In this case there is no decree to be enforced because there has been no final judgment of the court on the reliefs sought in CMELC No.1 of 2021 at Kwale. Clearly security does not apply.

25. The upshot of the foregoing is that the Application dated 2nd of June 2021 is merited and the following orders be and hereby issue.

1. The Notice of Motion application dated 22nd June 2021 is allowed in terms of prayer 3.
2. Costs shall follow the outcome of this Appeal.

DELIVERED AND DATED AT KWALE THIS 31ST DAY OF JANUARY, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Oketch for the Appellant

Bundia holding brief for Obara for the Respondent

Mr. Denis Mwakina- Court Assistant.