REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUIONAL, JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO.51 OF 2016

(FORMERLY JR. NO. 272 OF 2016 NAIROBI)

IN THE MATTER OF: CONTRAVENTION OF THE PROVISION OF THE MINING ACT, 2016

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

BETWEEN

REPUBLIC……..……..…..APPLICANT

VERSUS

1. CABINET SECRETARY, MINISTRY OF MINING...RESPONDENT

2. THE HON. ATTORNEY-GENERAL…….…….....RESPONDENT

EX PARTE APPLICANT: TITUS MUSAU NDOME

RULING

1. On 14th July, 2016, this court granted the ex parte Applicant's application dated 12th July, 2016 for provision of Police Security to the Applicant's prospecting/mining location or site. Aggrieved with the court's said order, the Attorney-General, as Second Respondent, and acting for the Cabinet Secretary, Ministry of Mining filed on 25th July, 2016 a Notice of Motion of even date under a certificate of urgency and sought one substantive order -

1. that the court do review and/or vary its orders of 14thJuly, 2016 *ex debito justitiae*.

2. that costs of this application be provided for.

2. The Application was supported by the Affidavit of Shadrack M. Kimomo, the Director of Geological Surveys, sworn on 22nd July, 2016, and the grounds on the face of the Notice of Motion (the Application).

3. The basic ground for seeking a review and/or setting aside of the orders of this court are set out in paragraphs 5 – 12 of the Supporting Affidavit of Shadrack M. Kimomo aforesaid, and are these –

(1) That the ex parte Applicant failed to disclose to this Honourable Court that he has no valid permit and/or licence required to enable him search for and/or engage in mining activities.

(2) That pursuant to Section 202 of the Mining Act, 2016, it is a crime to search for and/or engage in mining and/or mining related activities without a valid permit and/or licence.

(3) That the ex parte Applicant failed to disclose to this Honourable Court that he was engaging in mining and mining related activities without a valid licence and/or permit.

(4) That the ex parte Applicant failed to disclose to this Honourable Court that he had not satisfied the Respondent that he had obtained consent of land owners on whose land he sought to carry out mining activities reason wherefore his mining licence was not renewed. (Annexed and marked SMK3 is a letter dated 26/4/2016).

(5) That a permit and/or licence for prospecting, searching for and/or carrying out mining and mining activities cannot be issued before consent of a land owner is obtained.

(6) That I am informed by counsel on record which information I verily believe to be true and correct that orders obtained by fraud, misrepresentation and/or material non-disclosure ought to be set aside **ex-debito justitiae.**

(7) That the ex parte Applicant is using this Honourable Court to further the commission of a crime as he is engaging in mining activities without the requisite permits and/or licences.

(8) That it is in the best interest of justice that the orders issued herein granting the ex parte Applicant permission to continue carrying out mining related activities without a valid permit and/or licence be set aside to avoid abetment of a crime.

4. These grounds and averments were reiterated by Mr. Makuto, learned State Counsel for the two Respondents in his submissions to the court on 28th July, 2016, which arguments I have considered.

5. The application was however strenuously opposed y Mr. Muli, learned counsel for the ex parte Applicant who reiterated the Applicant's case that there was no misrepresentation to the court, or non-disclosure of material facts to the court when the court granted orders for the Police to provide security for the Applicant's mining/prospecting operations.

6. I have considered the rival arguments by respective counsel. The question to be answered is whether there is a cause for review and setting aside of the orders this court made on 14th July, 2016.

7. The application is premised upon the provisions of Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap.21, Laws of Kenya).

8. Both sections 3A and 63(e) of the Civil Procedure Act invoke the court's inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, (S.3A) and for such purpose to make such interlocutory orders as may appear to the court to be just and convenient. On the other hand Sections 1A and 1B of the Civil Procedure Act are what are commonly referred to us the double oxygen (O_2) provisions, which set out the overriding objectives of the Civil

Procedure Act, and the Rules thereunder and duty of the court to handle all matters presented before it for the purposes of attaining inter alia the just determination of the proceedings (S. 1B(a))

9. While noting that these are general principles of law though contained in the Civil Procedure Act, it must always be remembered that judicial review now given constitutional and statutory under pinning under Articles 23(3)(f) (the reliefs which the court may grant) and Article 47(1), (every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair), and Fair Administrative Action Act 2016, is still a jurisdiction which is **sui generis**, with its own procedure (Order 53 of the Civil Procedure Rules made under Section 9 of the Law Reform Act, Cap 26, Laws of Kenya and not Section 81 of the Civil Procedure Act) and a caveat under Section 8(a) of the Law Reform Act that the court will not in its civil or criminal jurisdiction issue any of the prerogative or (judicial review) orders of certiorari, mandamus or prohibition.

10. In this regard therefore the Notice of Motion should have been brought under the court's inherent jurisdiction and not the Civil Procedure Act, or Rules, other than Order 53.

11. Article 47 of the Constitution makes provision for fair administrative action. Section 4(3)(b) of the Fair Administrative Action Act stipulates that where an administrative action is likely to adversely affect the rights or fundamental freedom of any person, the administrator shall give the person affected by the decision an opportunity to be heard and to make representations in that regard. These provisions are given effect by the Fair Administrative Action Act. Section 4(3)(g) of the Act requires the person affected to be given information, materials and evidence relied upon in making the decision or taking the administrative action.

12. The grounds advanced by the Respondents in this matter basically are that there was an error of law on the face of the record, namely –

"that it is in the best interest of justice that the order issued herein granting the ex parte applicant permission to continue carrying out mining related activities without a valid permit and/or licence be set aside to avoid abetment of crime."

13. This ground among others set out in the Affidavit of Shadrack M. Kimomo, is to put it both mildly and politely **"strange"** and utterly misplaced and misguided in relation to the orders this court made on 14th July, 2016. The order of 14th July, 2016 said –

> **"(1) That an order be and is hereby issued directing supervision for compliance and/or enforcement by the Officer Commanding Police Division Mwatate in Taita Taveta County of the order of stay issued by this court on 27th June, 2016."**

14. The order issued at Nairobi on 27th June, 2016 granted the ex parte Applicant leave to commence judicial review proceedings for orders of certiorari, mandamus and prohibition against the Cabinet Secretary and challenging the decision of the Cabinet Secretary, Ministry of Mining from revoking or purporting to revoke the ex parte Applicant's further mining or prospecting activities over the land in question. The court also ordered that the leave granted would operate as a stay of the orders/decision of the Cabinet Secretary.

15. In law, and according to its ordinary or common meaning, a "stay" means "the postponement or halting of a proceeding, a decision, or the like. A stay of a decision means preventing the implementation of an administrative decision under challenge. The order of this court was to enhance security for giving effect to the order of stay. Whether the decision of the Cabinet Secretary was lawful, or whether the order of stay was lawful is a subject of inquiry under the judicial review proceedings. What the First Respondent, the Cabinet Secretary cannot do, is to hide behind some provision of the Mining Act, 2016 to literally render meaningless the orders of stay, without process as to the legal efficacy of his decision.

16. The courts do not have a Police Service or "Force" of their own. They rely upon the Executive, which controls the regular Police to ensure that court orders are obeyed.

17. The citizens of Kenya enjoy constitutional rights of both security of the person as well as their property. That is what Articles 29 and 40 of the Constitution of Kenya 2010 provide. These rights cannot be taken away or derogated from by a decision of the Cabinet Secretary for Mining or other functionary of the Executive without due process of law.

18. The OCPD Mwatate is bound to give security to all, even without the orders of court. That is his duty on behalf of the people of Kenya. Where a court makes specific orders as to security measures, those orders must be obeyed. Disobedience has consequences, including citation for contempt of court.

19. For those reasons, I find and hold that the Respondent's Notice of Motion dated and filed on 25th July, 2016 is brought in extreme bad faith, it is misguided and abuse of the court process. It is dismissed with costs to the ex parte Applicant.

20. It is so ordered.

Dated, Signed and Delivered in Mombasa this 29th day of July, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Muli for ex parte Applicant

Mr. Makuto for Respondent/Applicant

Mr. Silas Court Assistant