



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 375 OF 2014

STEMA ALLOYS ENTERPRISES LIMITED.....PLAINTIFF

-Vs-

**COMMISSINER OF MINES AND GEOLOGY CABINET SECRETARY, MINISTRY OF
MINES**

HON. ATTORNEY GENERAL.....DEFENDANT

RULING

1. The application before the court is a Notice of Motion filed by the Plaintiff/Applicant on 29th August 2014. The application is filed under Section 3A of the Civil Procedure Act, Order 51(1) of the Civil Procedure Rules and all enabling Provisions of the law. The application seeks as the main prayer a mandatory injunction to issue directed at the Defendants/Respondents to release the Plaintiff's consignment now held at the port of Mombasa forthwith unconditionally for shipment.
2. The application is premised on grounds set out therein and is supported by Affidavit of **STEPHEN MAINA GICHUKI** dated 28th August 2014 with its attachments and a Further Affidavit of the same person dated 22nd September 2014.
3. The application is opposed vide a Replying Affidavit of **RAYMOND MUTIE MUTISO** dated and filed in court on 15th September 2014.
4. The brief history of the application appears to be that the Plaintiff, a registered holder of Mineral Dealer Licence No.44 of 2014 issued on 9th June 2014, purported to export certain minerals through the port of Mombasa vide its Mineral Export Permit Number M/2273/2014/VII/23 issued on 10th July 2014. The first Defendant impounded the said goods without giving any reasons for such action. In the meantime the goods are incurring demurrage charges and other costs associated with their storage while the Defendants have adamantly refused to release the same for the said export. The Plaintiffs goods are crushed Malachite Ores parked in 10 containers destined for Korea.
5. The 1st Defendant does not deny the factual situation surrounding the said goods. In the Replying Affidavit by **RAYMOND MUTIE MUTISO**, the first Defendant raises one main issue, and that is, that the Export Permit No. **M/2273/2014/VII/23** was issued to one **MARY AKINYI** on 14th July 2014 who was exporting Gemstones and that it was never issued to the Plaintiff/Applicant

- who is exporting Malachite. The said permit is annexed to the Affidavit of **RAYMOND MUTIE MUTISO** as annexure MFI (a). On this basis, the 1st Defendant submitted that the Applicant's export permit was not genuine and therefore must have been a forgery. If this is so, then the applicant must have been smuggling the consignment, it was submitted. It was further submitted for the 1st Defendant that export permits are processed for each individual consignment requiring export, and that a permit issued to one entity cannot be used by another entity.
6. On their part the Plaintiff/Applicant submitted that their export permit annexed to their application as annexure "SMG-2" was duly issued, and endorsed by the 1st Defendant to the Plaintiff on 10th July 2014. It was further submitted for the Applicant that the alleged export permit issued to **MARY AKINYI** is dated 14th July 2014, while the Applicant's export permit was issued 4 days earlier and therefore must be the valid one.
 7. What is to be noted, however, is that both permits have the same serial number that is **M/2273/2014/VII/23**, and this fact is what caused the 1st Defendant to impound the said goods fearing that the goods could be smuggled out of the country.
 8. I have carefully considered the application and opposition to it. After carefully analysing the documents in support of the application and the Replying Affidavit and its annexure, it is clear to me that the issue for determination by this court is on the validity of the export permit allegedly issued to the Applicant on 10th July, 2014.
 9. To determine the genuineness or otherwise of that export permit, it is important to note that the 1st Defendant is the entity entitled to issue export permits and exercises supervisory rights over the permits it issues. The 1st Defendant/Respondent strongly suspects that the Plaintiff/Applicant export permit dated 10th July 2014 is forged, and that the Plaintiff has fraudulently purported to use the export permit belonging to the said **MARY AKINYI**. In my view, that kind of suspicion is legitimate, for it is the duty of the 1st Defendant to ensure compliance with the Mining Act and the Rules regulating export of mines from Kenya. If the 1st Defendant suspects fraud or intention to smuggle mineral or goods out of the country it must take steps to stop the same, and impounding such goods pending the verification of the matter is perfectly within the law. What is not within their mandate is to impound such goods for indefinite time, and giving no reasons for the same.
 10. The Plaintiff/Applicant has suggested that if at all there is any impropriety, then the same can be cured by fines, which is a provision under the Mining Act. That submission may be correct. However, where, as in the instant case, a crime is suspected, which involves the possible use of forged documents and even possible intention to smuggle minerals out of the country, fines under the said Act do not apply because a criminal intention has been established which is only curable through a criminal process.
 11. In my view, there can be no export permit with same serial number. The parties should be given a chance to explain this anomaly. It is also possible that the anomaly is simply a mistake in the office of the 1st Defendant. On the other hand it is also possible that indeed the Plaintiff/Applicant has colluded with the said **MARY AKINYI** for the use of her permit. Whichever position is correct I am satisfied that the 1st Defendant had a valid reason to impound the said goods. I am therefore reluctant to grant the mandatory release Order prayed for in this application.
 12. The said goods have been impounded for over 40 days. It means that if this matter can be heard and determined on priority basis within 10 days there will be justice for all the parties.
 13. Pursuant to the foregoing, I dismiss the current application and direct that the matter shall be heard on priority basis on the dates agreed by the parties.
 14. Costs shall be in the cause.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 26th Day of September 2014.

E.K.O OGOLA

JUDGE

PRESENT:

Muriithi holding brief Akide for Plaintiff

Ayoo for Defendant

Teresia – Court clerk