



IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 748 OF 2013 (FORMERLY PETITION NO. 16 OF 2013)

EXCLUSIVE MINES LIMITED
PETITIONER

VERSUS

MINISTRY OF MINING 1ST
RESPONDENT

COMMISSIONER OF MINES AND GEOLOGY..... 2ND
RESPONDENT

ATTORNEY GENERAL 3RD
RESPONDENT

JAMES KOORO MUGWUKU INTERESTED
PARTY

JUDGMENT

By its petition filed in this Court on 27th September, 2013, the Petitioner sought judgment against the Respondents and the Interested party in the following terms:-

1. ***A conservatory order be issued restraining the 1st and 2nd Respondents either on their own, their agents, servants or employees from in any way granting either an Exclusive Prospecting Licence or Mining lease to any other company/person other than the Petitioner to the area covering 400 Km (squared) South of Ishiara within Embu County including the area around Kirigo Hill.***
2. ***A Declaration that the Petitioner is entitled to an Exclusive Prospecting Licence for an area covering 400 Km (squared) South of Ishiara within Embu County in terms of its application of 20th February, 2007***
3. ***An order compelling the 1st and 2nd Respondents to take such steps as are necessary to confer title upon the Petitioner as Exclusive Prospective Licence and/or Mining Lease for the area covering 400 Km (squared) South of Ishiara within Embu County including the area around Kirigo Hill.***
4. ***A Declaration that the Interested party has no right to conduct mining activities within the area covering 400 Km (squared) South of Ishiara within Embu County allocated to and occupied by the Petitioner***
5. ***Costs of this petition.***

The brief facts giving rise to this petition may be summarized as follows:-

On 20th February 2007 the Petitioner through its agent Geoffrey Mutisya applied for an Exclusive Prospecting Licence from the 2nd defendant to prospect for Base Metals in the area covering 400 Km (squared) South of Ishiara within Embu County including the area around Kirigo Hill within the then Mbeere District, Eastern Province (now Embu County) and upon confirmation that the area was available and that no other party had made an application for the same, the Petitioner commenced prospective activity and in July 2011 discovered rare earth metal within Kirigo Hills which lies within the permitted area of prospecting. By a letter dated 8th August 2011 and in compliance with the **Mining Act Cap 306 laws of Kenya**, the Petitioner notified the 2nd Respondent of that discovery and proceeded to apply for an enhancement of its area by a further 200 Km (squared) and by letter dated 1st December 2011, the 2nd Respondent notified the Petitioner that the only available area was 490 Km (squared). Upon satisfying the 2nd Respondent that it had met all the requirements under the Mining Act, by a Gazette Notice No. 16216 dated 9th November, 2012, the 2nd Defendant issued a Notice of Intention to grant Exclusive Prospecting Licence to the Petitioner. However, the 2nd Respondent only gazetted 371.5 Km (squared) curving out 28.5 Km (squared) out of the original application which included the area covering Kirigo Hill where the Petitioner had reported discovery of the rare earth minerals. Under **Regulations 21 of the Mining Regulations**, the Petitioner had priority in title over any other subsequent applicant and so in January, 2013, the Petitioner undertook the process of obtaining feasibility report and pursuing consents/approvals from the relevant authorities only to discover that in November, 2011, the Interested party had made an application and had been granted an Exclusive Prospecting Licence over an area of approximately 200 Km (squared) in Mbeere District. The Petitioner further discovered that the Interested party's licence covered an area already covered by it together with the area covering Kirigo Hill. The Petitioner therefore lodged a complaint with the Minister of the 1st Respondent leading to the revocation of the Interested Party's Licence through Gazette Notice No. 19489 of 24th December, 2012. The Interested party lodged an appeal against the revocation and vide a letter dated 18th February 2013, the 2nd Respondent purported to write to the Interested party informing him that his appeal had been considered and his licence reinstated yet under **Section 93 of the Mining Act**, only the Minister of the 1st Respondent has power to hear and determine an appeal lodged by any aggrieved party.

It is therefore the Petitioner's case that no decision has even been made regarding the Interested party's appeal and that therefore the letter of 18th February 2013 resulted from an illegal and unprocedural collusion between the 2nd Respondent and the Interested party and has no force of law. The Petitioner therefore pleads that having done a viability study, calculated the prospective economic gains from the area bearing the rare earth metals procuring written consents from land owners and the County Council and obtaining the Environment Impact Assessment Report from the National Environment Authority, it is apprehensive that it will suffer irreparable loss unless the Respondents are stopped from allocating the area to a third party and interfering with the Petitioner's mining activities. Further, it is the Petitioner's case that its right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as enshrined in **Article 47 of the Constitution** has been infringed upon by the Respondents and its officers.

The petition was opposed by both the Respondents and the Interested party who in answer to the petition also filed a cross petition seeking the dismissal of the petition.

In their replying affidavit sworn by MOSES NJIRU NJERU the Acting Commissioner of Mines and Geology, it was deposed, inter alia, that the Petitioner lodged an application for an Exclusive Prospective Licence over an area of 400 Km in Mbeere Embu County but it was deferred because it lacked vital documents including land owners consent, consent from the County Council Mbeere, work programme financial statement etc including a receipt for Ksh.2000 mining deposit from the then Eastern Province. So on 6th March 2008, the Petitioner was advised to provide the missing documents otherwise the application would be deemed as abandoned if the same were not provided within two (2) months. The Petitioner did not comply and so the application was deemed as abandoned and so the area subject of the application became free for other Interested applicants and on 24th June, 2011, the Interested party JAMES KOORO MUGWUKU lodged an application for an Exclusive Prospecting Licence over an area

of 208 Km (squared) in Mbeere Embu which was approved and he was informed to pay for the publication of the same in the Kenya Gazette within 21 days from 4th November, 2011. The Interested party did comply and on 23rd December, 2011 the application was published vide Gazette Notice No. 16450 which also invited objections to the grant and since no objections were received from any party including the Petitioner, the Interested party paid the requisite fees of Ksh.52,100 and was granted the licence on 14th February, 2012 being No. 264 to prospect for iron or copper, lead and precious metals over an area of 200 Km (squared) in Mbeere County. That on 21st September, 2011 when the Petitioner applied to extend the area of its former application from 400 Km (squared) to 600 Km (squared), other Interested parties including JAMES KOORO MUGWUKU had applied for mining concessions within the areas over which the Petitioner had applied. The Petitioner was therefore advised by letter dated 6th October, 2011 to make a fresh application as their application made in 2007 had been considered abandoned. However, the Petitioner objected to that advice and following the Petitioner's objection, it was advised that the area available to it was approximately 490 Km (squared) and that it should submit consents from land owners within 21 days. That in calculating the area available using the computerized Mining Cadastre System, the actual free area was found to be 371.5 Km (squared) and the Petitioner was advised to pay for the licence for the 371.7 Km (squared) which was published in the Kenya Gazette on 9th November, 2012 and since there was no objection, the Petitioner paid for and was granted licence No. 272 over an area of 317 Km (squared) in Mbeere County to prospect for base metal on 4th January 2013. The holder of such licence is required to submit detailed progress reports on the prospecting activities but this was not done by the Petitioner and since the Petitioner was only granted a licence on 4th January 2013, it is not true that he discovered rare earth metals and notified the 2nd Respondent on 8th August 2011 as he had no authority to do so. The 2nd Respondent's action of revoking the licence of the Interested party was therefore in accordance with the law and the Interested party's appeal against revocation of his licence was positively considered. That subsequently on 28th December, 2012, the then Minister for Environment and Mineral Resource revoked among other licences, the licence held by the Interested party herein for non-performance but following an appeal to the Minister the Interested party's licence was re-granted and he paid the fees of Ksh.52,100 but the Petitioner lodged a complaint alleging that although its original application of 2007 was for 400 Km (squared) which was later extended by 200 Km (squared) in 2011, they were only granted licence for 371.5 Km (squared) with the rest of the area illegally curved off. That it is not true that the Petitioner was denied part of the area of its earlier application by curving it off illegally but instead, the Petitioner's failure to submit requirements to support their 2007 application resulted in treating the same as abandoned and opened to other Interested parties and therefore the Petitioner was treated fairly.

In his replying affidavit, the Interested party deposed that he lodged an application on 24th June 2011 for an exclusive Prospecting Licence over an area of 200 Km (squared) in Mbeere and received a letter that the same had overlapped an earlier application by 6.8 Km (squared) and that the area that was available was approximately 200.2 Km (squared) which he accepted and paid the requisite gazettment charges and as no objection was received, he paid the licence fee of Ksh.52.100 and was issued with licence No. 264 on 16th February, 2012 which was however revoked on 28th December, 2012 by the Minister of Environment and Mineral Resources. He appealed vide his letter dated 17th January 2013 which appeal was successful and he was granted his licence and has not encroached on anyone's area and is surprised how the Petitioner is in possession of his correspondences with the Respondent. Further, that the Petitioner's licence No. 272 covers a totally different area and does not overlap his area and this petition should therefore be dismissed with costs.

In his answer to petition and in his cross-petition, the Interested party denied the Petitioner's allegations and sought the dismissal of this petition as his licence has not encroached the Petitioner's area and that the licences issued to the Petitioner and the Interested party cover totally different areas.

The Petitioner did, with leave, file a supplementary affidavit through its Director FRANCIS MBURU MUNGAI and in response to the affidavit of MOSES NJIRU NJERU stated that when the Petitioner applied for an Exclusive Prospecting Licence, it was allowed to explore the area while its licence was being processed and on 1st December, 2011, the 2nd Respondent informed the Petitioner that the available

area was 490 Km (squared) and on 5th January, 2012 the Petitioner forwarded to the 1st and 2nd Respondents all the requisite documents for processing the mining lease and that the Petitioner's application for an Exclusive Prospecting Licence made on 20th February, 2007 was never responded to until 6th October, 2011 and there are no minutes that such application was deferred. Further, there are no notices exhibited to show that the area applied and reserved for by the Petitioner has been abandoned. Further, there are no applications by other Interested parties exhibited and this is an attempt by the 1st and 2nd Respondents to hive off part of the Petitioner's mining area. The allegation that the Petitioner was not submitting reports was denied and copies were annexed and with regard to the cancellation of the Interested party's licence, only the Minister/Cabinet Secretary can reconsider or vary such cancellation and that duty cannot be delegated under **Section 93 of the Mining Act.**

Counsels for all the parties herein did file their submissions as directed.

I have considered those submissions together with the petition, answer to petition and cross-petition, the rival affidavits and relevant annexures thereto as well as the relevant law.

It is not in dispute that the Petitioner applied for an Exclusive Prospecting Licence from the 2nd Respondent on 20th February 2007 seeking to be allowed to prospect for Base metals in area covering 400 Km (squared) South of Ishiara within Embu County and upon getting confirmation that the area was free for allocation, it commenced prospecting activities and discovered rare Earth metals within Kirigo Hill. It is however the case of 1st, 2nd and 3rd Respondents that infact that application was deferred since it did not have other vital documents including consents from the land owners and the County Council of Mbeere, detailed work programmes etc. There is however a letter ref SPL/75419) dated 1st December, 2011 from the Commissioner of Mines and signed by MOSES N. NJERU referring to the Petitioner's application and informing it that the area available to it is approximately 490 Km but that it will need to submit written consent from the land owners. That was not done and so the application was deferred and it was informed accordingly by a letter dated 6th March 2008 and informed to provide the necessary documents within two (2) months. Since the Petitioner did not respond as required within two (2) months, the application was deemed abandoned and on 13th October, 2011, the application of the Interested party was allowed and it is clear from the replying affidavit of MOSES N. NJERU that, that application was ***“mostly within the area earlier applied by the Petitioner and which had been opened to other Interested parties for by then, the application by the Petitioner had been considered abandoned”*** – see paragraph 10 of the said replying affidavit. That averment is in sharp contrast to the replying affidavit of the Interested party herein who at paragraph 19 depones as follows:-

“That the exclusive Prospecting Licence No. 272 that has been issued to the Applicant covers a totally different area from that covered by my Exclusive Prospecting Licence No. 264”

That contradiction can only be resolved in favour of the Petitioner who has deponed in paragraphs 12 and 14 of the supporting affidavit of FRANCIS MBURU MUNGAI that in November, 2011, it discovered that the Interested party had infact made an application and had been granted an Exclusive Prospecting Licence over an area covering 200 Km which overlapped the Petitioner's area of jurisdiction contrary to the provisions of the Mining Act. That explains why, following the Petitioner's complaint, the Interested party's licence was revoked vide Gazette Notice No. 19489 published on 24th December, 2012.

It is clear from the Gazette Notice No. 19489 that the cancellation of the Interested party's licence was done by the then Minister for Environment and Mineral Resources. It is the case of the Interested party and the Respondents herein that that revocation was reviewed by the 2nd Respondent. The letter conveying that decision to the Interested party is dated 18th February, 2013 and is signed by the Commissioner of Mines and Geology. The letter reads as follows:-

“James Kooro Mugwuku

P.O. BOX 241

KIRITIRI, MBEERE

Dear Sir

APPEAL AGAINST REVOCATION OF YOUR EPL NO. 264

This is in reference to your appeal to the Honourable Minister for Environment and Mineral Resources against the revocation of your exclusive prospecting licence No. 264 in Embu County, a copy of which was received in the Department on 17th January, 2013.

We wish to advise you that the appeal has been considered. It has been decided that you will be regranted an EPL over the area.

Consequently, please arrange to pay the following prescribed fees:-

(200Km x 250) + 2,100 registration fee = Ksh.52,100

Please let us have a bankers cheque for the above amount payable to the Permanent Secretary, Ministry of Environment and Mineral Resources as soon as possible.

Yours faithfully

MOSES N. MASIBO

COMMISSIONER OF MINES AND GEOLOGY”

The revocation of the Interested party’s licence could only be re-considered by the Minister responsible for mining under **Section 93 of the Mining Act** which, as far as is relevant for this judgment, reads as follows:-

“Any person aggrieved by any decision or determination of the Commissioner:-

- a.
- b.
- c.
- d.
- e.
- f.
- g.
- h.
- i.
- j.
- k.

may appeal against such decisions or determination to the Minister whose decision shall be final and shall not be subject to any appeal or review in any Court”

The letter dated 18th February, 2013 from Mr. Masibo advising the Interested party that his appeal had been considered and allowed does not indicate who heard and considered the appeal. Indeed it does not state that the appeal was heard and considered by the Minister as required under **Section 93 of the Mining Act. Section 38 (1) of the Interpretation and General Provisions Act (Chapter 2 Laws of Kenya)** provides as follows:-

“Where by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the Attorney General or a Minister, the President, the Attorney General or the Minister may, unless by law expressly prohibited from so doing, delegate, by notice in the Gazette, to a person by name or to the persons for the time being holding an office specified in the notice, the exercise of that power or the performance of that duty, subject to such conditions, exceptions or qualifications as the President, the Attorney General or the Minister may specify in the Notice”

Sub Section 38 (2) (b) of the same Act states that nothing in **Sub-section (1)** shall authorize the persons therein mentioned to delegate

“a power to issue warrants or to make proclamations or to hear an appeal”

emphasis added.

It is clear from the legal positions above and the documentary evidence herein that not only was the Interested party’s appeal not heard by the Minister as mandated by law and also that even if such power to hear the appeal had been delegated to the Commissioner of Mines and Geology who communicated the decision to the Interested party, that decision was ultra vires as there is no Gazette Notice exhibited showing that powers to hear the appeal were delegated to the said Commissioner. It is also clear from the **Sub-section (2) (b) of Section 38 of the Mining Act** that this being an appeal, powers to hear it could only be by the Minister himself and could not be delegated. Indeed if there was any such delegation, the Commissioner would have indicated as much in his letter by the use of such words as ***“I am directed by the Minister”***. Clearly however, in the absence of any Gazette Notice authorizing the Commissioner of Mines and Geology to do what he purported to do, it is obvious that the reinstatement of the Interested party’s licence was made by an unauthorized person and was therefore illegal. It also demonstrates that the Petitioner was justified in his letter to the Minister dated 28th March 2012 in which he complained that part of his area had been ***“hived off”*** and had ***“been illegally allocated to a Mr. James Kooro Mugwuku”*** – see annexure ***FMM 12*** of the Petitioner’s supporting affidavit. If indeed it was true that the Petitioner’s application had been treated as abandoned, as deponed in paragraph 43 of the replying affidavit of MOSES NJIRU NJERU, and therefore that the area was available for other Interested parties, there would have been no need for the 2nd Respondent to act on the Petitioner’s complaint and revoke the Interested party’s licence as it did. This is because the Petitioner would then have had no locus to complain as he did and the 2nd Respondent would similarly have had no duty to act on that complaint. The Petitioner’s right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided under **Article 47 of the Constitution** was therefore infringed by the actions of the 2nd Respondent.

It is also clear from the record that when the Petitioner made its application in February, 2007, it was in respect of an area covering 400 Km (squared) and the response it received on 1st December, 2011 was that the area available was approximately 490 Km (squared) and acting on that letter, the Petitioner obtained the necessary consents and made the necessary payments. However, when the 2nd Respondent advertised the application in the Kenya Gazette, the area described was only 371.5 Km (squared). The decision to reduce the area from 490 Km (squared) to 371.5 Km (squared) was arrived at surreptitiously in order to defeat the Petitioner’s rights. That was also clearly in violation of the Petitioner’s rights enshrined under **Article 47 (1) of the Constitution** and which requires the Intervention of this Court.

In paragraph 6 and 7 of the replying affidavit of MOSES NJIRU NJERU on behalf of the 2nd Respondent, it is alleged that the Petitioner’s application was deemed abandoned and so on 24th June, 2011 when the Interested party lodged his application, it was approved. However, that cannot be the correct position because on 1st December, 2011, the 2nd Respondent wrote to the Petitioner in the following terms:-

“Exclusive Mines Ltd

P.O. BOX 46817-00100

NAIROBI

Dear Sir

Application for Exclusive Prospecting Licence in Mbeere District

This is in reference to your letter received in this Department on 21st November and your application for an exclusive prospecting licence received in this Department on 20th February, 2007. I wish to inform you that the area which could be available for you is approximately 490 Km. However, you will need to submit to this office written consent from the land owners/and occupiers of the area you have applied over and from Mbeere County Council. Please take the necessary action within twenty one (21) days to enable us expedite on this issue failure to which your application will be treated as abandoned.

Yours faithfully

MOSES N. NJERU

For COMMISSIONER OF MINES AND GEOLGOY”

If indeed the Petitioner’s application of February, 2007 had been treated as abandoned, then the 2nd Respondent would not even have referred to it in the above letter. On 5th January, 2012 the Petitioner wrote to the 2nd Respondent in reply to that letter and enclosed the consent required from the land owners. There is evidence on the record that the 2nd Respondent continued engaging the Petitioner over this matter including writing to the Petitioner on 13th December, 2012 not only notifying it of the publication of its application in the Kenya Gazette of 9th November, 2012 vide Notice No. 16216 but also requesting the Petitioner to pay Ksh.94,975.00 being the prescribed fees. The Respondents cannot therefore be heard to say that the Petitioner’s application had been abandoned. The Respondents cannot approbate and reprobate at the same time. This can only be evidence of mala fides on the part of the 2nd Respondent.

Ultimately therefore, upon considering all the matters in this petition, I am satisfied that the Petitioner is entitled to the orders sought therein and I enter judgment for the Petitioner as prayed. The Respondents shall meet the Petitioner’s costs as I see no reason to condemn the Interested party with an order for costs.

It is so ordered.

JUDGE

B.N OLAO

14/11/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Anzala for Petitioner – present

No appearance for Respondents

COURT: Judgment delivered in open Court this 14th day of November, 2014

Mr. Anzala for Petitioner present

No appearance by the Respondents

Right of appeal explained.