



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 17 OF 2011**

**IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES**

**IN THE MATTER OF: AN APPLICATION BY KAZUNGU KAINGU BAYA, DICKSON  
MANGI, MWERI KITHUNGA, CHARO BAYA KITHUNGA AND  
THE ESTATE OF CHARO BAYA YAA FOR LEAVE TO APPLY FOR ORDERS OF  
CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF: THE MINING ACT CHAPTER 306, LAWS OF KENYA**

BEING

**REPUBLIC**

VERSUS

**THE COMMISSIONER OF MINES AND GEOLOGY ....1ST RESPONDENT**

**THE ATTORNEY GENERAL .....2ND RESPONDENT**

AND

**DEEPAK PATEL**

**MAHENDRA PATEL**

**PRAANAV ENTERPRISES LIMITED**

**ZEN INTERNATIONAL LIMITED ...INTERESTED PARTIES**

**EX-PARTE APPLICANT: KAZUNGU KAINGU BAYA**

**JUDGMENT**

1. On 22nd June, 2011, Kazungu Kaingu Baya, describing himself as the “lawful attorney and agent of the registered proprietors of all that parcel of land known as title Number Sokoke/Magogoni/1237/30, 1236/30 and 1240/30” (hereinafter the suit property) obtained leave of this court to apply for orders of mandamus or alternatively certiorari and prohibition directed at the 1st respondent, the Commissioner of Mines and Geology. Pursuant to the said leave the exparte applicant filed the Notice of Motion on 12th July, 2011.

2. The Notice of Motion contains four key prayers, namely:

***“1. THAT this honourable Court be pleased to issue an order of certiorari to remove into this court and to quash forthwith the decision(s) made by the Commissioner of Mines and Geology purporting to issue the Exclusive Prospecting Licence Number 296, to Deepak Patel, the 1st Interested***

***2. THAT this honourable Court be pleased to issue an order or prohibition directed to the Commissioner of Mines & Geology prohibiting him from entertaining and/or adjudicating any application for grant of Exclusive Prospecting Licence over all those parcels of land known as Sokoke Magogoni Adjudication Land Parcel Numbers 1237/30, 1236/30 and 1240/30 (the “suit premises”) as may be brought by the respondents, Interested Parties and/or any other party(ies) without any and or any proper written consent duly procured from the registered proprietors; And***

***3. THAT this honourable court be pleased to issue an Order of mandamus compelling the commissioner of Mines and Geology to act on:***

***a) The memorandum of complaint lodged by the applicants and dated the 13th day of January, 2011, by cancellation forthwith the Exclusive Prospecting Licence Number 296 issued to the 1st respondent herein for having been issued without proper written consent of the proprietors; And***

***b) The letter dated the 13th day of January, 2011 lodged by the applicants inquiring on the issue of illegal mining that was being undertaken by the Interested Parties.***

***4. THAT costs of this application be provided for.”***

3. The second respondent is the Hon. Attorney General while the interested Parties are Deepak Patel, Mahendra Patel, Praanav Enterprises Ltd and Zen International Ltd. The Notice of Motion is supported by several affidavits sworn by the ex parte applicant and filed, on 8th December, 2011, 3rd July, 2012 and 1st October, 2012, in addition to his initial affidavit and statutory statement.

4. The respondents filed grounds of opposition through the Hon. Attorney General. The Interested parties relied on replying affidavits sworn by Deepak Patel on 8th February and 21st August, 2012

5. The ex parte applicant was initially represented by Messrs Steve Kithi & Co. Advocates and thereafter by Messrs Njoroge. Regeru & Co. Advocates. Mr. Ole Kina represented the Interested Parties. The parties agreed to dispose of the application by way of written and oral submissions.

6. Briefly, the ex parte applicants contend that they are the proprietors of the suit property and that on 13th June, 2009 they entered into an agreement with 1st Interest Party on behalf of the 3rd Interested Party, granting the said interested Parties permission to prospect within an agreed area of the suit property. Thereafter in April, 2010 one of the proprietors, MWERI MANGI KITHUNGA purported to grant “full prospecting rights” to the 4th Interested Party.

7. This was allegedly done without the authority of other proprietors and resulted in friction in the ex parte applicants' family. Eventually the family allegedly resolved to revoke all previous consents, and to issue a fresh consent to Geofirm East African Ltd. That in mid 2010 the applicants wrote to the 1st respondent communicating their decision to revoke the consent granted to the 1st and 3rd Interested Parties. That despite the communication the 1st Respondent proceeded to grant an Exclusive Prospecting Licence (EPL) to the 1st and 3rd Respondent in November 2010.

8. The ex parte applicants complain that their subsequent inquiries with and memorandum of complaint to the 1st respondent went unanswered. However, the said respondent allegedly

- purported to intervene in favor of the 1st and 3rd Interested Parties when they complained about the activities of Geofirm on the suit property. The exparte applicants assert that the 1st Respondent has denied them the right to fair administrative action in contravention of Article 47 of the Constitution. And further, that he acted ultra vires the Mining Act in granting an EPL to the 1st respondent party without the consent of the land owners.
9. They further contend that in arriving at the decision the 1st respondent ignored pertinent and material facts, and that his decision was irrational and unreasonable. They cited two authorities in support of their submissions – **Eric Cheruiyot Kotu v S. Bosire & 2 Others (2008) eKLR** and **Kuria Greens Limited v Registrar of Titles (2011) eKLR**.
10. The respondents in the replies and submissions took position that the necessary consent was granted in April, 2009 by one Jackson Mangi and following gazettelement of the 1st Interested Party's application, the EPL request was granted to the 1st Interested Party in September, 2010 as no objection had been received. The respondents argue that the 1st Respondent had the necessary jurisdiction to issue an EPL and become fuctus officio upon issuing the licence. He therefore could not revoke the same on the basis of the withdrawal of consent by a party. Especially where the issue at the heart of the withdrawal of the consent is a disagreement between the land owners themselves.
11. The respondents cited the case of **Kenya National Examinations Council v R** ex parte **Geoffrey Gathenji Njoroge & 9 others Civil App. No. 266 of 1996** to support their assertion that an order of certiorari can only issue where a decision is made without or in excess of jurisdiction, or where principles of natural justice have been violated. They further contend that neither prohibition nor mandamus is available as the licence has already issued, and the dispute among land owners does not concern the commissioner of mines (1st respondent).
12. For their part, the Interested parties through Mr. Ole Kina took issue with the Power of Attorney used in the institution of the Judicial review proceedings. He submitted it was void for want of attestation and registration. That this forum is not appropriate for the inquiry as to the validity of consents given and the competing claims of ownership in the family of the exparte applicants. That since the EPL was properly issued on 10th November, 2010 was set to expire on 10th November, 2012, the prayer for certiorari is academic. Besides these proceedings were instituted outside the six months period and are time barred.
13. I have now considered the material canvassed by the parties in the proceedings. I take the following view of the matter. There is no dispute that the impugned decision that prompted the applicants to institute the present proceedings was made on 7th September, 2010, when the respondent decided to grant a licence to the 1st interested party. This was formalized through payment on 8th September, 2010 and the EPL issued on 11th November, 2010. These proceedings were however not commenced until 22nd June, 2011.
14. Whatever date is taken to be the effectual date of the impugned decision, the proceedings were brought outside the six month period allowed. In their oral arguments, the exparte applicants raised no answer to this objection. The prayers sought in these proceedings are therefore not available to the applicants. In addition the prayer for prohibition is ineffectual where a decision has already been made. In the case of **Kenya National Examination Council.....** the Court of Appeal had this to say:

***“The point we are making is that an order or prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding is the efficacy and scope of an order of prohibition.”***

15. In many ways the prayer for mandamus in prayer 3(a) and (b) of the Notice of Motion is a restatement of prayer 1 for certiorari. In that, while the latter seeks quashing of impugned

decision granting the EPL to 1st Interested Party, prayer 3(a) seeks to have the respondent compelled to cancel the EPL granted to the said Interested Party, and to answer the inquiry by the ex parte applicants. The basis of two prayers 1 and 3 is the same as in prayer 2 – the alleged grant of the mining rights (EPL) without the consent of the land owners. This is the core issue in these proceedings.

16. The applicants admittedly gave consent initially to the 1st and 3rd Interested Parties but later purported to withdraw it, partly due to family squabbles based on ownership of the land, and the emergence of a third prospector Messrs Geofirm E.A. Ltd, preferred by the applicants over the 1st Interested Party. Hence, strictly speaking this is not a case where consent was never given. It was given and later the applicants sought to revoke it. While I do not agree with the Interested party's argument that the 1st Respondent became functus officio once consent was given (he issued licence several months later), there is merit in the submission that the question of the validity of the consent and effect of the purported revocation is a matter that can only be determined through adduction of evidence.
17. And Judicial review proceedings are not suited for such an inquiry. Besides, the applicants have asserted that they are contemplating a suit for damages and that therefore the prayer for certiorari is not academic as argued by the Interested Parties. The EPL was due to expire on 11th November, 2012, merely ten days after the hearing of this Notice of Motion. I agree that in light of the timing the said prayer is patently academic.
18. As to the question of damages, the procedure that lends itself to such a claim is a proper civil suit rather than Judicial review proceedings. In **Speaker of the National Assembly v Karume (2008)1 KLR** and **Narok County Council vs Transmara County Council (200)1 EA 161** the Court of Appeal held that where there exists a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be followed strictly.
19. Admittedly, the applicants failed to respond to the gazette Notice No. 1230 of 5th February, 2010 by the 1st Respondent inviting objections in respect of the proposed licence issue to the Interested Parties. It is late in the day for them to attempt to stop the process. The horse has already bolted out of the stable. If indeed the motivation behind these proceedings was the pursuit of damages, then a civil suit should have been filed rather than a judicial review application. For these and other reasons given, I find that the Notice of Motion is untenable and dismiss it with costs.

Delivered and signed at Malindi this **14th** day of **June, 2013** in the presence of Mr. Shujaa holding brief for Regero for the applicants, Interested Parties – No appearance, Respondents – No appearance.

Court clerk – Evans.

**C. W. Meoli**

**JUDGE**