



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. NO.298 OF 2013

BETWEEN

CORTEC MINING KENYA LIMITED APPLICANT

AND

THE CABINET SECRETARY,

MINISTRY OF MINING1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

Introduction

1. By the Chamber Summons dated 15th August 2013, the *ex-parte* applicant (“CORTEC”) moved the court seeking leave to commence judicial review proceedings to quash and prohibit the decision of the 1st and 2nd respondents made on 5th August 2013 purporting to revoke the applicant’s Special (Mining) Licence No. 351 issued on 7th March 2013 and appointing a task force to undertake a review of the applicant’s licence. In addition, the applicant applied that the grant of leave do operate as a stay of the implementation of the entire decision.
2. On 15th August 2013, Korir J., certified the application as urgent and directed that it be heard inter-parties on 20th August 2013. At the hearing, three parties appeared and applied to be joined to the proceedings in order to be heard on the application for leave and stay.

Arguments

3. The National Environment Management Authority (“NEMA”) filed a Notice of Motion dated 19th August 2013 seeking to be joined to the proceedings. The basis of its application is that NEMA is a statutory corporation established under the *Environmental Management and Coordination Act, Act 8 of 1991 (“EMCA”)*. The object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the

environment. As mining involves the environment, Mr Gitonga, counsel for NEMA, submitted that it was an essential party and that since it was mentioned as having given approval of the mining licence, it was a necessary party to these proceedings.

4. Basu Mining Limited (“BASU”) moved the court by Notice of Motion dated 19th August 2013 seeking to be joined as a party to this matter. The basis of its application is that it has a lease issued to it by the County Council over the land which is the subject of the Special Mining Licence issued to CORTEC hence it has the right to be heard in this matter. Its contention is that CORTEC was irregularly and unlawfully issued with a licence on property which it owns and therefore the matter cannot be heard in its absence without occasioning injustice.
5. The Kenya Forestry Service (“KFS”) also seeks to be joined as an interested party on the basis that the area which is contested is a gazetted forest. Under the **Forests Act (Act No. 7 of 2005)**, the Kenya Forestry Service is the custodian of all the forests in Kenya and in the circumstances, it is a proper and necessary party to these proceedings.
6. The position of the proposed interested parties was supported by the respondents. Mr Issa, counsel for the 1st respondent, submitted that they all have interests in the subject matter of the case and it would be in the interests of justice that they all be heard. Mr Bitta, counsel for the Attorney General, submitted that the prayer for stay would affect all the parties and in so far as **Order 53** of the **Civil Procedure Rules** contemplates that the application for stay be heard *inter-parties*, it follows that the proposed interested parties can be heard on the matter which affects them.
7. The application was opposed by the ex-parte applicant. Mr Havi, counsel for CORTEC, founded his objection on **Order 53** which he submitted does not admit the participation of interested parties before leave is granted and in any case, no suit can be said to exist until leave is granted to institute proceedings. He further submitted that **Order 53(6)** contemplates that interested parties shall be heard at the hearing of the Motion itself and therefore the proposed interested parties should wait for their chance at the appropriate stage of the proceedings. Counsel relied on **Anthony Chinedu Efedigbo v Hon. Otieno Kajwang’ and Others Nairobi HCCC No. 352 of 2008 (Unreported)** where Maraga J., held that parties could not join proceedings at the ex-parte stage and that such an application was premature.
8. Mr Havi further submitted that **Article 159(2)** cannot be called in aid to assist the proposed interested parties as the rules were clear and that the provision did not come to supplant procedural requirements. Counsel cited the case of **Raila Odinga v Independent Electoral and Boundaries Commission SCK Petition No. 5 of 2013 [2013]eKLR** to support his argument.
9. Mr Havi also noted that on the substance, the proposed applicants had not established a basis for being joined to the proceedings. As regards NEMA, he submitted that the decision being challenged was an administrative decision which did not concern or involve NEMA. Similarly, BASU cannot be a proper party as the issue of the lease does not bear on the decision that is being challenged. Counsel also submitted that KFS has no interest in the decision being challenged. In the circumstances, counsel urged that all the applications should be dismissed and that counsel be ordered to pay costs personally as the applications were not well grounded and are frivolous.
10. In response Mr Gitonga urged the court to consider the substance of the case and to be guided by the principle in **Article 159(2)** of the Constitution. He also noted that the ex-parte applicant had not demonstrated any prejudice that would result from the proposed interested parties being joined to these proceedings at this stage. Mr Githinji, counsel for BASU, accused the ex-parte applicant of relying on technicalities and urged the court to be guided by the substance of the case.

Resolution

11. I agree with Maraga J., in **Anthony Chinedu Efedigbo v Hon. Otieno Kajwang’ and Others** that, “*Rule 6 of Order 53 of the Civil Procedure Rules read together with the preceding Rules makes it*

quite clear that the application to be opposed by any interested party is the substantive Notice of Motion filed after leave has been granted and not the application for leave.”

12. But I do not think the position stated by Maraga J., is necessarily decisive of the issue for determination. I think **Article 159(2)(d)** of the Constitution may be called in aid where circumstances permit. The Supreme Court in ***Raila Odinga v Independent Electoral and Boundaries Commission SCK Petition No. 5 of 2013 [2013]eKLR*** stated that, *“The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.”* [Emphasis mine]
13. The imposition by **Article 159(2)(d)** is not to throw out rules that ensure that litigation is carried out fairly but to enhance justice and it in this light that **Order 53** must be applied. While I agree with the dictum of Maraga J., which I have cited. **Order 53** does not prohibit the court from hearing interested parties at the *ex-parte* stage particularly where the parties are directly affected by any orders of stay that may be issued at that interlocutory stage.
14. **Article 159(2)(b)** also provides that justice shall not be delayed and I believe that the joinder of the interested parties in this matter would enable the court decide the matter efficiently by hearing all the parties on the matter. Furthermore, the *ex-parte* applicant will not suffer any prejudice in proceeding in the manner suggested by the proposed interested parties.
15. Finally, it must be recalled that the rule of law is one of the values articulated in the Constitution and whose centerpiece is the principle of legality. Legality of any action is now tested through proceedings of judicial review whose origins can be traced back to medieval England. Adherence to strict procedure would undermine the purposes for which the proceedings are intended and in my view, undermine the very principle that is the cornerstone of the legal system.

Disposition

16. Justice would be best served by hearing the proposed interested parties on the application for leave and stay and as such I decline to strike out their depositions and admit the three applicants; the National Environment Management Authority, Basu Mining Limited and Kenya Forestry Service as the 1st, 2nd and 3rd interested parties respectively.

DATED and DELIVERED at NAIROBI this 21st day of August 2013.

D.S. MAJANJA

JUDGE

Mr Havi instructed by Havi and Company Advocates for the *ex-parte* applicant.

Mr Issa instructed by Ngatia and Associates for the 1st respondent.

Mr Bitta, Senior Litigation Counsel, instructed by the State Law Office for the 2nd respondent.

Mr Gitonga, Advocate, instructed by the National Environment Management Authority.

Mr Githinji instructed by Taib and Taib Advocates for Basu Mining Limited.

Ms Keige, Advocate, instructed by the Kenya Forestry Service.