



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 109 of 2012

MARY WANJIKU MBUGUA 1ST PLAINTIFF

DAVID MUTHUI KARIUKI 2ND PLAINTIFF

V E R S U S

ELIZABETH WANGECHI NGOLORIT 1ST DEFENDANT

WILLIAM LENANA OLONGIDA 2ND DEFENDANT

ALLAN LEMPAPA OLONGIDA 3RD DEFENDANT

RULING

1. This litigation revolves around an agreement dated 11th May 2001 (**the Agreement**) in respect to a joint venture to mine, work and exploit some minerals. The parties to that agreement were the two Plaintiffs of the one part and Olongida Ngilorit Medukenya (now Dead) on the other part. The Defendants are sued both in their individual capacities and as personal representatives of the Deceased.

2. What falls for trial and determination before the trial Court is whether or not the agreement has lapsed. For now, the Court is asked to grant the following prayers in the application of 11th May 2012-

(1) Spent

(2) Spent

(3) **A temporary injunction restraining the Defendants by themselves, their servants or agents from preventing, denying, stopping, estimating or in any way interfering with the Plaintiffs in the use or access to the mining machineries, equipments and buildings or structures at the mining Location Nos. 819/1-2, 820/1-10, 1455/1-5, 1458/1-10, 1456/1-5, 1325/1-10, 1167/1-10, 819/1-2 and 820/1-10 situated in Kasigau, Wundanyi, Taita-Taveta District, Coast Province in the Republic of Kenya pending the hearing and determination of this application and/or this suit.**

(4) **A temporary injunction restraining the Defendants by themselves, their servants or agents howsoever from alienating, wasting, damaging, removing or interfering with any property or equipment on the mining locations pending the hearing and determination of this application and/or this suit.”**

(5) **The costs of this application be provided for.**

3. This litigation and application was triggered by the Notice dated 23rd June 2011 to the Plaintiffs. That notice, authored by J. M. Muthami & Co. Advocates, is a notice of an intention not to renew the agreement. The notice was said to be given on behalf of the beneficiaries of the estate of the Deceased. In it, was communicated that the Plaintiffs should vacate the mining site on or before 11th May 2012.

4. The position taken by the Plaintiffs is that the notice is invalid for several reasons. First, that the Plaintiffs had on 10th September 2010 and in exercise of the option granted to them by terms of the agreement given notice of renewal of the agreement for a further 10 years. In which event the notice by the Defendants had come late. It is also said that the notice was given by persons who did not have capacity to do so.

5. The Defendants, on their part, insist that their Notice was valid and that the purported notice of the Plaintiffs dated 10th September 2010 was a forgery and was never issued. That the notice was backdated to defeat the Defendants notice of 23rd June 2011.

6. Before Court is an application for injunction and the first order of business for me is to assess the viability of the Plaintiffs claim. The Notice relied on by the Plaintiffs is that dated 10th September 2010 which reads-

“10th September, 2010

**Olongida & Sons Mining Company,
P.O. Box 145,
NGAMBWA**

RE: MINING AGREEMENT – OLONGIDA & SONS MINING COMPANY

In accordance with Article 14 of the above agreement dated 11th May 2001, we, the miners therein do hereby exercise our right of option to renew the term of said agreement for a further 10 years with a further option to renew.

Yours faithfully,

MARY W. MBUGUA

CC: WILLIAM LENANA OLONGIDA

DAVID MUTHUI KARIUKI

G.E.O OLUOCH & CO. ADVOCATES

P.O. BOX 47672-00100

NAIROBI”

This Notice is said to be issued pursuant to the provisions of Article 14 of the agreement. That Article provides-

“This said joint venture or undertaking shall be for a term of Ten (10) years commencing from the

date of this agreement with the Miners reserving the option to renew for a further term of Ten (10) years provided that Notice of such renewal shall have been given at least six (6) months to the expiry of the said first term.”

7. The Notice of 23rd June 2011 issued by the Defendants was pursuant to Clause 20 of the agreement. This provides-

“It is further agreed that this agreement shall be irrevocable for the said first term of Ten (10) years which shall commence from the date of this agreement. However, upon expiry of the said first term either of the parties hereto may determine this agreement by giving at least one (1) year Notice. In the latter event the remaining parties herein or their said substitutes may decide to continue the operations or to terminate the same without the outgoing party.”

8. There is strong contention by the Defendants that the Notice by the Plaintiffs is a Notice that was never was. That it was created and backdated specifically so as to give the Plaintiff a basis for continuing with the mining works. That contention by the Defendants can only be settled after the Court receives evidence which is subjected to cross-examination. That will be the function of the trial Court.

9. But let the Court for a moment grant some probity to the said Notice. What would be its effect? Clause 14 gives the Plaintiffs a right to renew the agreement for a further term of ten years provided the Notice of such renewal shall have been at least six months to the expiry. Failing to give the Notice as contemplated would render the agreement at an end by effluxion of time. From a common sense point of view the Notice was to be given to the owner.

10. The owner died on 29th August 2001 but continuity of agreement was saved by Clause 16 which reads-

“The demise of any of the parties hereto shall not automatically determine this agreement. In the event of death of either party or any of them in the case of the owner his son William Lenana Olongida shall have and assume all rights and interests herein created. Similarly Wanjiku’s interest and rights shall also pass to her duly appointed son and Muthui’s appointed son shall also do the same.”(my emphasis)

So the 2nd Defendant stepped into the shoes of the Deceased. The Notice was issued to Olongida & Sons Mining Company **AND NOT** to the 2nd Defendant. Of course it would not be lost to any one that the Notice was copied to the 2nd Defendant but not addressed to him. Secondly the Notice was issued by the 2nd Defendant only although it purports to be issued by both miners (1st and 2nd Defendants).

11. I point these out to show that quite apart from proving that the Notice of 10th September 2010 is indeed genuine and timeously, the Plaintiff will have to persuade the trial Court that it is a proper Notice to sustain renewal of the agreement. On my part, and this far, I cannot say with certainty that the Plaintiff has established a prima facie case with a probability of success.

12. I turn to apply the second principle in **Giella –Vs- Cassman Brown & Co. Ltd [1973]EA 358**. That is, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The agreement between the Plaintiffs and the Deceased is commercial in nature. It is an arrangement to mine, work and exploit minerals. Any loss that either party would suffer as a result of breach of the agreement would be a monetary loss. That no doubt is a loss that can be compensated in damages. There is no allegation that the Defendants will be unable to pay those damages if eventually required. On this test the application fails.

13. There is one other reason why I would decline to grant the prayer for injunction. The implementation of the notice which the Plaintiffs seek to injunct was given on 23rd June 2011. It was to be effective from

11th May 2012. No reason has been given by the Plaintiffs for the wait until 4th June 2012, a year later, to commence these proceedings and to apply for an injunction. Equity aids the agile. The delay of about 11 months, which is unexplained, does not endear itself to a Court of equity.

14. The result is that the application dated 11th May 2012 is dismissed with costs.

Dated and delivered at Mombasa this 7th day of December, 2012.

**F. TUIYOTT
JUDGE**

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Dated and delivered in open court in the presence of:-

Oduor for Plaintiffs

No appearance for Defendants

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**