



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JR MISC 5 OF 2011

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS BY:**

ABBA MINING COMPANY LIMITED.....APPLICANT

AGAINST

MINISTER OF ENVIRONMENT & NATURAL RESOURCES1ST RESPONDENT

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

RULING

The applicant approached the seat of justice by way of an application by way of Chamber Summons dated 14th February 2011 and filed on the 15th day of February 2011. It is an application presented under Order 53 Rule 1 (1) 2 and 4 of the Civil Procedure Rules and Section 8 of the Law Reform Act Cap 26 of the laws of Kenya and all other enabling provisions of the law. It is an application for Judicial Review, vide prayer 2, 3, and 4 thereof, the applicant sought orders of certiorari prohibition and mandamus in the manner sought against the named parties. Prayer 2, 3 and 4 were disposed of by way of consent of the parties on 24th February 2011 what was left for disposal was prayer 5 thereof. It reads:-

“ 5. The grant of leave to apply for the said orders of certiorari, prohibition and mandamus as prayed in prayer 2, 3, and 4 foregoing do operate as stay of the decision contained in the Gazette Notice Number 1067 dated 2nd February 2011, and of any further action by the Respondent and the interested party pursuant to or in execution or enjoyment of any rights arising from the said Gazette Notice number 1067 dated 2nd February 2011”.

Parties filed written submission followed by oral high lights in court. Those for the applicant are dated 2nd March 2011. The following have been highlighted:- That the grant of leave operating as stay is well earned because of the following reasons:-

- (i) There is no replying affidavit filed in opposition to the grant of leave to apply for those orders operating as stay which means that the applicant has a genuine complaint and for this reason the leave granted should operate as stay.**

- (ii) The applicant is already on the site vide special license no 287 covering 112KM**

- (iii) The interested party had license number 214 which allegedly expired and had purportedly been renewed vide Gazette Notice no sought to be quashed**

- (iv) That the two authorizations are overlapping and this overlapping has created a lot of tension on the ground**

- (v) Contend that the applicant will suffer substantial loss if stay is not granted because they have already expended substantial funds on the exercise.**

- (vi) That they have presented sufficient facts to warrant the grant of the relief sought.**

- (vii) The stay if granted will not aid the applicant in any way in its claim as it is meant to maintain the status quo pending the hearing and final determination of the substantive application.**

In his oral highlights, counsel simply reiterated the content of the written submissions and then stressed the following:-

- (i) The grant of leave is evidence that the applicant has an arguable case which should not be rendered nugatory**

- (ii) There are no compelling reasons to warrant the denial of leave granted operating as a stay**

- (iii) The content of the verifying affidavit is proof that substantial loss will be suffered if stay is not granted.**

- (iv) The documentation relied upon also supports their stand**

- (v) The interested party will suffer no prejudice as there is no proof that they have incurred any expenses.**

- (vi) The court is urged to be guided by case law on the subject**

The submission of the 1st and 2nd respondents were filed on 3rd March 2011. The following have been stressed.

(i) Contend that leave granted to apply for the prerogative orders should not be granted to operate as a stay because the applicant has not demonstrated that he will suffer irreparable damages which cannot be compensated for by way of damages. Neither have they demonstrated the existence of a prima facie case with a high probability of success.

(ii) Contend that granting of stay will ground the interested party who has also been granted rights over the same subject matter with the interested parties license number 214 covering only 15 KM while that of the applicant covering 112 KM

(iii) That there is fear that if the applicant is granted stay then he would ride rough shod n the interested parties area to his detriment

(iv) That its not true as alleged by the applicant that the interested party is a stranger as some of the directors of the interested party, were directors of the applicant when the applicant applied for the grant of license relied upon.

On case law the applicant referred the court to the case of Republic =vs= Commissioner of Lands exparte James Kimotho & 5 others and Ruth Wanjiru Shadrack Nakuru Misc Application 87 of 2001 decided by Kimaru J on the 14th day of July 2006. At page 3 of the Ruling the learned Judge quoted with approval the case of R =vs= Secretary of State Exparte Harbage [1978] 1 ALL ER 324 thus:-

(i) It cannot be denied that leave should be granted , if on the material available the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court to the judge who granted leave to set aside such leave see Halsburys law of England 4th Edition Vol. 1 (1) paragraph 167 at page 1776. Since there is an arguable case, leave is to be granted and the court at that stage is not called upon to go into the matter in depth.

The case of Republic =vs= Attorney General in the matter of an application by the directors of Jesus Care Orphanage Bungoma HCC MIS APP NO. 5 of 2010 decided by Muchemi J on the 24th day of March 2010. At page 4 of the Ruling the learned Judge quoted with approval the case of R =vs= Communication Commission of Kenya and others Exparte E. A. Television Network Ltd Civil Appeal No. 175 of 200 1EA 199 where the Court of Appeal held that:-

“Leave to apply for judicial review is granted where the court considers that the applicant has an arguable case”.

The case of Boniface Ndui and 9 others =vs= Franklin Maina and 3 others Nairobi MISC APP No. 148 of 2009 decided by Dulu J on the 18th day of June 2009 in which the learned trial judge granted “orders for leave granted to operate as stay because in failing to do so the applicant would suffer substantial loss”.

The case of Abdi Ahmed Abdulle =vs= Minister for Local Government Nairobi Misc App. No. 560

of 2008 also decided by **Dulu J** on the 17th day of October 2008, in which “**the leave granted was ordered to operate as stay because the applicant had demonstrated sufficient interest in the subject matter as well as a prima facie arguable case and further that since the applicant appeared to be the prima facie owner it was only proper that the vehicle be preserved pending the determination of the main substantive application**”.

The case of **Oil Com Kenya Ltd =vs= Permanent Secretary Ministry of Roads and Public Works, Attorney General Nairobi C A No. 10 of 2007** decided by the Court of Appeal on the 31st day of July 2008. At the last page of the Ruling the learned law lords of the Court of Appeal ruled that:-

“The grant of stay upon an order for leave to apply for judicial review is not automatic. The judge has to give specific direction on it. However, the learned Judge having found that the applicants had an arguable case they being the registered owners of the parcel in dispute, that the developments made run into several millions, and that the larger plot whose leave was granted by His Excellency the President to Makueni Holdings Limited who sold it to a security firm and as has been submitted by counsel, for the Respondent that the question of compensation does convinced that this is a proper case for leave granted to operate stay”.

The case of **Paul Nyongesa Otuoma & others =vs= The Attorney General Nairobi Misc App 993 of 2007** decided by **Nambuye J** on the 20th day of November 2007 wherein the court “**gave a conditional order for leave granted to operate as stay on condition. That the substantive application was prosecuted within a specified period**”.

The first and second Respondent referred the court to the case of **Giella =vs= Cassman Brown [1973] EA 358** dealing with ingredients to be satisfied before one can be entitled to an injunctive relief, whose ingredients, this court has judicial notice of the same.

The case of **East African Law Society, The Tanganyika Law Society, The Uganda Law Society and the Zanzibar Law Society =vs= The Attorney Generals of the Republic of Kenya, Tanzania, The Secretary General of the East African Community**. A Ruling of the East African Court of Justice on a day not indicated. What has been highlighted for this court to note is found at page 8 line 4 from the bottom and it goes:-

“What has been done so far, even if it were unlawful cannot be undone in these interlocutory proceedings, whatever remains to be done by way of operationalization can be rectified if the amendments are in the end declared illegal by this court.....”

Before moving on to consider the merit of the application, It is proper to reflect on the record the oral submissions of Onsongo for the interested party. These are:-

- **A case has not been made out justifying the leave granted being ordered to operate as a stay because as at now both parties, applicant and interested party beneficiaries of licenses given to them for prospecting by the respondent Each license is for a specific area.**
- **The two companies are in business and are therefore competing with each other and it will be unfair to stop the operations of the other.**
- **Also contend that there has been no demonstration that the applicant will suffer substantial**

loss if the order granted for leave does not operate as stay

This court has given due consideration of the rival arguments herein, and the same considered in the light of the principles of case law relied upon by both sides and in this court's opinion, the following are own framed questions for determination in the disposal of this matter:-

- (i) What relief is being sought by the applicant?**
- (ii) What principles of law are applicable to the granting of the said relief ?**
- (iii) What consideration are supposed to be made by the court in the disposal of this matter?**
- (iv) What ingredients is the applicant supposed to satisfy before he can earn the relief sought?**
- (v) Has the applicant brought itself within the ambit of those ingredients?**
- (vi) What are the final orders to be granted by the court herein?**

This court's responses to the said own framed questions are as follows:-

- (i) The relief being sought is one of leave granted to apply for Judicial review operating as a stay it is on record that leave to apply for Judicial review has already been granted by consent of the parties.**
- (ii) The principles of law applicably are those governing the granting and or refusal of an order for Judicial review. These have now been crystallized by case law originating from the Court of Appeal and dutifully followed by the superior court. Those from the superior courts are not binding on this court but since they simply restate the crystallization of those principles by the Court of Appeal, there is no justification for this court to depart from their stand.**
- (iii) The consideration that the court has to take into consideration are that;-**
 - (a) The applicant has to demonstrate that he has a prima facie arguable case.**
 - (b) That the court has to ensure that it does not trespass into the merits of the main application.**

- (c) There has to be a demonstration that substantial loss will be suffered if stay is not granted
- (d) Issue of adequate compensation by way of damages is more common in application for injunctions than in that Judicial review applications.
- (e) Peculiar to this case is the fact that these are competing interests. Both applicant and interested party have prospective licenses issued by the Respondent. The applicant argues that the area for which the interested party has been given a license falls within his marked area, in the process. Making the authority of the interested party to be an interference in this applicants activities, whereas the opinion of the interested party is that they are operating in a different area outside the mandated area of the applicants. It has to be noted that no sketch map has been exhibited by either party to demonstrate their respective areas. This means that all that this court has to balance the scales of justice between them is each others word as against that of the other
- (f) The court has jurisdiction to grant conditional stay
- (g) As for ingredients, all that the applicant is required to demonstrate is that they have an arguable case irrespective of its ultimate success on the one hand, and on the other hand that they will suffer substantial loss
- (h) Herein the applicant has an arguable case because of the presence of both licenses and admission that they are in place. Secondly, in the absence of a sketch map, it is not easy for the court to rule out overlapping of areas of mandate in favour of both parties. It is therefore proper to issue stay. But in issuing the order of stay care has to be taken to ensure that the same is not used as shield and sword at the same time. That mischief can be catered for by way of granting a conditional stay which in this courts opinion will be appropriate to the effect that the substantive application be readied for merit disposal within sixty (60) days from the date of its filing.

For the reason given in the assessment:-

- (1) Prayer 5 of the application dated 14th day of February 2011 and filed on 15th February 2011 be and is hereby allowed on condition that the applicant moves to ready the substantive application for disposal within six (60) days from the date of its being filed.
- (2) In default of number 1 above the stay order to stand lapsed.
- (3) Costs in the cause

Dated, signed and delivered at Kisumu this 28th day of March 2011.

R. N. NAMBUYE

JUDGE

RNN/aao