



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

JUDICIAL REVIEW NO. 30 OF 2010.

(FORMERLY ELD JR. NO. 18 OF 2010.)

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI, MANDAMUS & PROHIBITION.**

AND

**IN THE MATTER OF THE LAW REFORM ACT CAP 26; CIVIL PROCEDURE RULES CAP
21 LAWS OF KENYA PLUS THE**

RULES OF PRACTICE AND PROCEDURE THEREIN.

AND

IN THE MATTER OF THE PETROLEUM (EXPLORATION & PRODUCTION) ACT CAP 208.

AND

**IN THE MATTER OF AN EXPLORATION PERMIT GRANTED TO CENTRIC IMAGING INC.
DISCLOSURES IN THE**

DAILY NEWSPAPER ON TUESDAY 11TH DAY OF MAY, 2010

BETWEEN

REPUBLIC.....APPLICANT.

VERSUS

PERMANENT SECRETARY MINISTRY FOR ENERGYRESPONDENT.

AND

TURKANA DRILLING COMPANY OF KENYA.....1ST INT. PARTY.
LUNDIN KENYA LIMITED.....2ND INT. PARTY.
AFRICA OIL CORPORATION.....3RD INTERESTED PARTY.
PLATFORM RESOURCES INC.....4TH INT. PARTY.
CENTRIC IMAGING INC.....5TH INT. PARTY.

INTERSTATE PETROLEUM LIMITED.....EX PARTE.

AND

EDWARD KINGS ONYANCHA.....AFFECTED PARTY.

R U L I N G.

1. The chamber summons dated 11th February, 2011 and filed on 14th February, 2011 seeks for orders that one **Edward Kings Onyancha Maina** (herein after referred to as the “**affected party**”) be enjoined in these proceedings. Secondly, there be a stay of the ruling of this court delivered on 16th December, 2010. This application is supported by the grounds that the interested parties in this suit have filed individual bills of costs. Secondly, the affected party has lodged an appeal through a notice of appeal dated 16th December, 2010 and filed it in the Court of Appeal. According to the **affected party**, the appeal which he filed has great prospects of success and unless the proceedings are stayed, the applicant will suffer irreparable harm.
2. The **affected party** submitted that he is a share holder in the exparte applicant’s company. The exparte applicant has a secret regarding discovery of crude oil mining in Turkana, and that secret was contravened by the State when exploration licenses were issued to the interested parties. He contended that if the interested parties, who he claims were irregularly issued with exploration licenses are not stayed, the applicant’s site where they have discovered oil will be threatened and the appeal shall be prejudiced. He further argued that he should not be ordered to pay security which will not be in the interest of justice although the provisions of Order 42 rule 6(1) requires that a party seeking for an order of stay should provide security. He urged the court to exempt him from providing security. The affected party also urged the court to strike out the grounds of objection and the list of authorities that was signed by **Mr. Omondi** because there was no evidence that he was authorized to appear for the Firm of **Daly & Figgis Advocates**.
3. This application was opposed by counsel for the 1st, 2nd 3rd and 5th interested parties. Preliminary points of law were raised challenging, inter alia the **loci standi** of the affected party was raised. It was submitted that the affected party was not a party to the judicial review proceedings. The affected party has not shown sufficient interests in this matter which in any event was adjudicated upon. Although the affected party claims to be a shareholder of the exparte applicant company, there is no evidence before court to show that he is a director or even a share holder. This application goes against the well settled principle of law that a limited liability company is a separate legal entity from its share holders. The exparte applicant has a separate legal existence separate from that of the affected shareholder.
4. This suit was instituted by the exparte applicant who alleged that their rights were being infringed upon. It is outlandish for the affected party who is claiming to be a shareholder to appear from nowhere and apply for joinder and a stay of execution after the suit was determined. Any application for stay can only be made by the by the exparte applicant through its advocates. Counsel drew this court’s attention to

a notice filed on 27th December, 2010 in which the exparte applicant indicated that it would be acting in person. Since the suit had been determined such notice could only have been filed with the consent of the interested parties. No such consent was sought from the interested parties or leave of the court which is a mandatory requirement under the provisions of order 9 (9) of the Civil Procedure Rules. Moreover a company cannot act in person because it has no mind or soul of its own.

5. It was further submitted that this court is *functus official* as far as the hearing and determination of the judicial review application is concerned. If the affected party wished to be enjoined as an interested party in the judicial review proceedings, he should have done so before the application was heard and determined because there is nothing left for this court to determine after the ruling of 16th December, 2010. The only issue remaining is costs which are governed by a different procedure under the Advocates Remuneration Order. This court has no jurisdiction to stay an order of taxation.

6. As regards the submission by the affected party that the interested parties' pleadings which were signed by Mr. Omondi should be expunged from record, counsel submitted that a partner in a law firm is allowed to prepare documents and endorse them with his name. Since **Mr. Omondi** is a partner in a law firm of **Daly & Figgis**, the documents were properly on record. This application was also opposed by the 1st, 2nd and 3rd interested parties, who relied on their grounds of objection filed on 28th February, 2011. Counsel reiterated the submissions made by counsel for the interested party. I need not repeat those grounds urged by **Mr. Ludengo**.

7. The matter was determined by this court on 16th December, 2010, it was a judicial review matter that was brought by **Interstate Petroleum Company Ltd.**, the exparte applicant herein. The court heard all the parties who were desirous of being heard and delivered a court's opinion on 16th December, 2010. If the affected party herein was desirous of being heard, he should have sought to be heard during the hearing of the judicial review application in accordance with the provisions of Order 53 rule 6 of the C. Procedure Rules which provides:-

“On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the high court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice of summons, and shall be liable to costs in the discretion of the court if the order should be made.”

8. The affected party has come to court so late seeking to be joined as a party after the matter was heard and concluded. This application, as I understand it, seeks for an order that the affected party be enjoined in these proceedings as a party. He contends that he has filed a notice of appeal against the decision of this court as an affected party being a shareholder of the exparte applicant and intends to pursue his rights as an investor who has an interest in oil exploration. Whatever the affected parties interests in the exparte applicant may be, the issue is whether he can be enjoined in a suit that was already determined and a notice of appeal has been filed. This court having determined the judicial review application is now *functus official*.

9. The applicant states that he has lodged an appeal and perhaps that is the appropriate forum for him to make any application(s). It is not within my province to add a party after judgment and when the matter is already in the Court of Appeal. Regarding the prayer for stay of execution, the elements to bring into consideration on whether or not to grant a stay of execution are set out under Order 42 6 (2) of the Civil Procedure Rules:-

“No order for stay of execution shall be made under subrule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

10. The applicant was categorical that he should not be ordered to provide security although he did not give any reasons. In my own understanding of this matter I do not see the consequences of the order I made on 16th December, 2010. I only dismissed the application by the ex parte applicant with costs to the interested parties. The only order capable of being implemented against the ex parte applicant is the order for costs. It should be noted that this application is not made by the ex parte applicant but by the affected party who claims to be a shareholder. I am afraid the affected party lacks capacity to bring this application on behalf of the company which was the ex parte applicant and it has its own distinct legal entity separate from that of its shareholders.

11. Moreover, the taxation of costs is governed by a separate procedure under the Advocates Remuneration Act. The Advocates Remuneration Order especially rules 11 prescribe the procedure to be followed if a party objects to the bill of costs. In the circumstances, this court cannot make an order to stay the costs in this judicial review matter but in the miscellaneous suit where the bills were taxed. Before I complete this ruling, the applicant objected to the grounds of objection which were filed by the 5th interested party on the grounds that the pleadings were signed by **Mr. Omondi** and not **Daly & Figgis Advocates** who are on record. I am however not able to identify the merit of this objection because **Mr. Omondi** stated that he is a partner in the law firm of **Daly and Figgis** who are on record for the 5th interested party and he duly endorsed the grounds of objection in accordance of provisions of section 35 of the Advocates Act.

12. for the aforesaid reasons I find no merit whatsoever in the application by the affected party which was filed on 14th February, 2011 which is hereby dismissed with costs to the respondents.

Ruling read and signed this 20th day of May, 2011.

M. KOOME.

JUDGE.