



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW. NO. 20 OF 2011

B & M MINING COMPANY LTD APPLICANT

-VERSUS-

MINISTER OF ENVIRONMENT &
MINERAL RESOURCES
COMMISSIONER OF MINES & GEOLOGY RESPONDENTS

RULING

The application before me is by **B & M Mining Company Limited** the *ex parte* applicant herein, brought pursuant to Sections 1A, 1B & 3A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Code. The application seeks for the following:-

1. That this Honourable court be pleased to consolidate the instant suit with Kisumu Judicial Review Miscellaneous Civil Application No. 5 of 2011, being Republic versus Minister of Environment and Mineral Resources and Commissioner of Mines & Geology, *Ex Parte* ABBA Mining Limited.
2. That the costs of this application be provided for.

This application is supported by the affidavit of one **ABDI WAHID BIRIQ** and the grounds on the face of the application as follows; that some or similar questions of law and fact are involved in the two suits, that parties in both suits are the same, the matters in both are directly or substantially similar, the effects of the prayers sought in the two suits can be effectively attained by consolidation of the two suits, these are matters of public interest and policy, involved are issues, which may conveniently and effectively be dealt with in the same suit and forum, consolidation will save the court's time and avoid conflicting and/or embarrassing decisions being made by different courts of concurrent jurisdiction on the same issue and matters and that all parties should be present to enable the court effectively and completely adjudicate and settle all questions involved.

The application was vehemently objected to by **ABBA Mining Company Limited** on the following grounds; the application is misconceived, and constitutes an abuse of the court process, the application does not lie in proceedings of this nature, the application is inappropriate in the specific circumstances of this matter and finally, the application lacks merit.

I have considered the submissions by counsel for the parties, **Mr. Sagana** for the applicant and **Mr. D. Otieno** for the interested party. **Miss Langat** for the respondent did not oppose the application she made no submissions therefore. The issue herein is whether or not to consolidate the 2 suits.

I will consider the background to the 2 matters briefly as this shall inform the directions by this court both in the current application and subsequent dealings in the 2 matters post this application. **B & M Mining Company Limited (B & M)** the *ex parte* applicant herein was granted by the Commissioner of Mines & Geology the 2nd respondent (**Commissioner**) a special licence No. 214 over an area of 15 kms vide Gazette Notice No. 5972 dated 29th August, 2003, the Commissioner subsequently issued special licence no. 287 to Abba Mining Company Limited (**ABBA**) through gazette notice No. 13518 dated 18th December, 2009 and in a gazette notice no. 14192 of 31st December, 2009 the Commissioner opened up the area to the general public.

B & M argued that there is an overlap in the 2 licences and in the directorship of **B & M** and **ABBA** a situation not envisaged by the Mining Act as its licence 214 is still in force. **B & M** in Judicial Review No. 20 of 2010 seeks for orders of Certiorari to remove to the High Court and quash special licence No. 287 in favour of **ABBA**, an order of Mandamus directed to the Minister of Environment and Mineral Resources (**Minister**) and for the Commissioner to grant **B & M's** application of 3rd June, 2003 for an extension of the area of special licence No. 214 from 15 kms to 96 km and to publish it in the official gazette.

On its part **ABBA** in Judicial Review in seeking **Miscellaneous Application No. 5 of 2011** for order of Certiorari to remove to the High Court and quash the decision of the Minister in gazette notice No. 1067 dated 2nd February, 2011 published on 4th February, 2011, an order of Prohibition against the Commissioner from taking any adverse action on special licence 287 pursuant or in execution of the Minister's gazette notice no. 1067, an order of Mandamus directing the Commissioner to sent a copy of its ruling and order of 1st February, 2011 to the Chief Magistrate's court in Kisii or Kisumu for enforcement.

What comes out of the pleadings is that both companies have at least one common director. **Bishop Washington Ngede**, the mining area common to both is Rongo, both cases revolve around issuance of special licences no. 214 and 287 in the same area, the parties are the same. Both parties seek for judicial review remedies which in one way will affect the operations of both applicants. The question therefore is whether the court can consolidate the 2 suits.

It is now settled law that Judicial Review proceedings courts exercise jurisdiction *suis jeneris*. The only applicable part of the civil procedure to such proceedings is order 53 of the Civil Procedure Rules. The said order is silent on the issue of consolidation of matters. Needless to say that the Sections relied upon in this application are not applicable to Judicial

Review proceedings.

In the case of **Welamondi versus The Chairman, Electoral Commission of Kenya (2002)** KLRat 486 the Court held in part:-

“1. ----

2. Judicial Review proceedings Order 53 of the Civil Procedure Rules are a special procedure, which are invoked whenever orders of Certiorari, Mandamus or Prohibition are sought in either Criminal or Civil proceedings.

3. In exercising powers under Order 53, the court is exercising neither Civil nor Criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *suis generis*. It therefore follows that it is incompetent to invoke the provisions of section 3A and Order 1 rule 8 of the Civil Procedure Act and rules and Sections 42, 79 and 80 of the Constitution of Kenya.

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I am persuaded by the above sentiments of the court, the same position pertains to the circumstances of this case that sections of the Civil procedure are not applicable and proceedings of this nature. It follows therefore in the absence of any provisions of consolidation under Order 53 the other provisions allowing consolidation are inapplicable, the court cannot therefore consolidate the 2 suits as prayed and the application fails.

However I take note of the similarities of the parties and issues raised in the 2 suits. The first suit in time is Judicial Review Miscellaneous application No. 5 of 2011 for the better organization and delivery of judicial service and for the integrity of the 2 processes and the court itself. I will stay Judicial Review Miscellaneous Application No. 20 of 2011 pending hearing and determination of Judicial Review Misc. Application No. 5 of 2011.

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER, 2011.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for Appellant

.....present for Respondent