



**No.2979**  
**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**MISC. CIVIL APPLICATION NO.395 OF 2009**

**REPUBLIC ..... APPLICANT**  
**VERSUS**  
**THE DISTRICT COMMISSIONER MUTOMO DISTRICT..... 1<sup>ST</sup> RESPONDENT**  
**THE CHAIRMAN,COUNTY COUNCIL OF KITUI ..... 2<sup>ND</sup> RESPONDENT**  
**THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**EX-PARTE:**  
**WILFRED MUTUVA MWANGANGI**  
**JACOB KINYILI MWANGANGI**

**RULING**

The applicants **Wilfred Mutuva Mwangangi** and **Jacob Kinyili Mwangangi** have filed the instant application seeking the following prayers:

- 1. An order of certiorari do issue to remove into this Honourable Court and quash/set aside the Common Minerals Licence dated the 6<sup>th</sup> day of March, 2008 granted to Bamburi Cement Company Limited to take up to 1000 cubic feet of minerals from Kanziko and Mathima areas in the District of Mutomo in Kitui South land unit;**
- 2. An order of Mandamus do issue against the county council of Kitui ordering it to follow the right procedure as provided for in sections 117 and or 118 of the Constitution of Kenya and or the Trust Land Act, Cap 288 of the laws of Kenya in any future grant of mining licences with respect to Kanziko and Mathima areas in the District of Mutomo in Kitui South land unit;**
- 3. An order of prohibition do issue against the District Commissioner, Mutomo District and or the County Council of Kitui prohibiting both or either of them from granting any mining licence without consulting the respective inhabitants of Kanziko and Mathima areas in the District of Mutomo Kitui South land unit, and getting their consent as required by law and further following all the provisions of the law laid down in Sections 117 and/or 118 of the Constitution of Kenya and/or the Trust Land Act cap 288 of the Laws of Kenya.**
- 4. That the costs of this application be provided for.**

The background leading to this litigation is that the applicants own parcels of land in Kanziko location of Mutomo District. The said parcels of land have not been adjudicated and no titles for the same have been

issued. Accordingly, those parcels of land are held by the County Council of Kitui in trust for them and other community members. In the course of the year 2007 officials of **Bamburi Cement Company Limited**, “*the company*” came to Kanziko area with the equipment and informed the residents that limestone had been discovered in the area and that they were conducting preliminary investigations after which they would consult the residents if there were significant deposits. Soon thereafter, a baraza was held where the residents were informed that the said company wanted to drill investigative pits and had obtained a licence to prospect from the 2<sup>nd</sup> respondent. It offered to pay KShs.20,000/- per pit drilled and thereafter would negotiate with the residents on compensation for prospective mining.

To their surprise however, the company did not come back to the residents to consult them on compensation or the right to prospect on their parcels of land as required by law. They however, established the 1<sup>st</sup> respondent had granted a Common Mineral Licence dated 6<sup>th</sup> March, 2008 to the company to take upto 1000 cubic feet of minerals from Kanziko and Mathima areas of Mutomo. The applicant complained that they had not been compensated and had not consented to the issuance of the said Common Minerals Licence which affected their parcels of land. The company has since made it known that it would only deal with the 2<sup>nd</sup> Respondent who own the land and not the residents. As far as they were concerned the 1<sup>st</sup> Respondent had no power to grant a Common Minerals Licence pursuant to section 37 of the Trust Land Act. Such power is only vested in the county council and in this respect, the 2<sup>nd</sup> Respondent. Further, before such a licence is granted, the licensing authority is required to consult and take into account the interests of the inhabitants and to get their consent as well as ensure that the provision for compensation of the said inhabitants is agreed upon. Further, the issuance of the licence aforesaid was in defiance of section 117 and 118 of the Constitution of Kenya, read conjunctively with the Trust Land Act. They therefore believed strongly that the Common Minerals Licence issued in circumstances was invalid and illegal, hence the need to have it set aside. It was on the foregoing basis that the applicants moved the court by way of Judicial Review seeking orders of certiorari and mandamus. Pursuant to the leave granted by **Nyamu J** (as he then was) on 26<sup>th</sup> June, 2008, the applicants then filed the substantive motion, the subject of this ruling.

When the substantive motion was served on the respondents, the first to react was the 2<sup>nd</sup> Respondent. In a replying affidavit dated and filed in court on 4<sup>th</sup> December, 2008, **George Wambua**, the Town Clerk of the 2<sup>nd</sup> Respondent essentially supported the application. He confirmed that section 37(2) of the Trust Land Act bestowed on his Council in whom the Trust Land is vested, power to appoint in writing licensing officers for purpose of granting licences. The 1<sup>st</sup> Respondent did not have any powers to act as a licensing officer of the County Council of Kitui. The authorised licensing officer for the 2<sup>nd</sup> Respondent for the time being was **Robert Mbithi**, the treasurer of the 2<sup>nd</sup> Respondent. No application was made to the 2<sup>nd</sup> Respondent for issuance of the licence. The 2<sup>nd</sup> respondent did not issue the licence dated 6<sup>th</sup> March, 2008 to the Company and as such the licence purported to have been issued to the company was illegal in law and ought to be quashed.

For the company, which entered into this fray as an interested party, it was its contention that the application was misconceived and an abuse of the court process since the Common Minerals Licence was issued to it pursuant to an order of mandamus issued by this court in **MISC. Application No. JR/ELC 84 of 2007**. Accordingly, this court had no jurisdiction to review, set aside or quash the said order through the present proceedings.

For the 1<sup>st</sup> Respondent, he opposed the application through an affidavit he swore on 24<sup>th</sup> July, 2009. Where pertinent he deponed that he was the District Commissioner, Mutomo. On 29<sup>th</sup> November, 2007, the company filed a Judicial Review application No.84 of 2007 seeking an order of mandamus commanding him to issue a common minerals licence to it. It also sought an order of prohibition prohibiting him from granting a Common Minerals Licence or any other licence or right to any other party to deal with or in the limestone deposits located in Kanziko and Mathima areas of Mutomo District. The application was determined in favour of the company and on 6<sup>th</sup> March, 2008 he was served with an order commanding him to issue the licence to the company. In compliance with the requirements of the aforesaid order he issued to the company the licence. The orders of mandamus issued in favour of

the company have to date not been varied. Finally, he deponed that the applicants are making their claims through the 2<sup>nd</sup> Respondent who was a party to the **Misc. Appl.No.84 of 2007** and they are therefore not competent to challenge any decision made by any public authority or order of the court.

These proceedings were initially filed in the High Court of Kenya at Nairobi. However, by an order dated 12<sup>th</sup> November, 2009, **Gacheche J.** transferred the suit to this court for hearing and final determination. Earlier on whilst the file was still in Nairobi, **Nyamu J.** had directed that the application be canvassed by way of written submissions. By the time the file was transferred to this court as aforesaid all parties had filed and exchanged their respective written submissions. What was then left for the court to do was craft and deliver a ruling. However, the learned judge in her wisdom did not do so. Instead she opted to transfer the case to this court much as the hearing had been concluded and was pending ruling before her.

On 26<sup>th</sup> October, 2011 the matter came before me and parties agreed that I proceed to craft and deliver the ruling on the basis of the pleadings and written submissions on record. I have carefully read and considered the submissions and the numerous authorities cited. Parties also agreed that prayer 1 in the Notice of Motion had been overtaken by event. Accordingly, it should not fall for consideration in this ruling. The ruling should therefore be limited prayers of mandamus and prohibition.

However, the success or failure of this application will turn on the question of jurisdiction. It matters not that the prayer for certiorari has been abandoned. I notice that the issue of jurisdiction was raised by the company but neither the applicants nor respondents challenged and or countered the same seriously. Of course, the 1<sup>st</sup> respondent sided with the company on the issue. The applicants, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not even address it in their written submissions. There was however, a feeble attempt to counter the question of jurisdiction by the 2<sup>nd</sup> respondent. In its submissions, it has taken the position that the licence was not issued pursuant to the court order in Misc.Appl.No.84 of 2007. That the said licence does not state what minerals the company ought to take up. Accordingly, the licence aforesaid had no connection with the said proceedings. I do not think that the 2<sup>nd</sup> respondent is serious by such submissions. In any event, the issue of licence has since been abandoned.

The issue of jurisdiction arises this way. To the extent that the application seeks orders, inter alia of certiorari to remove into this court and quash the Common Minerals Licence dated 6<sup>th</sup> March, 2008 and granted to the company by the 1<sup>st</sup> respondent on behalf of the 2<sup>nd</sup> respondent, orders of mandamus and prohibition, it is misconceived and an abuse of the court process since the said licence was issued to the company pursuant to an order of mandamus directed at the 1<sup>st</sup> respondent issued by this court in **Misc.Civil Appl.No.JE/ELC.84 of 2007**. The applicants, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not disputed that indeed there were such proceedings. I have looked at the final order issued in the said Judicial Review proceedings and it is in these terms:

- 1. That an order of Mandamus be and is hereby issued commanding and directing the first respondent, District Commissioner of Mutomo District in his Legal capacity under the provisions of the Trust Land Act, Chapter 288 Laws of Kenya as the Licensing Officer of the 2<sup>nd</sup> Respondent, The County Council of Kitui to issue a Common Minerals Licence to the applicant to mine, take and process the limestone deposits in Kanziko and Mathima areas within the jurisdiction of the 2<sup>nd</sup> Respondent***
- 2. That an order of prohibition be and is hereby issued directed to the Respondents directing them from granting a Common Minerals Licence or any other licence or right to any party authorizing such party to deal with or in the limestone deposits located in Kanziko and Mathima areas of Mutomo District.***
- 3. That the Respondents and the interested party do pay the Applicant its costs of this matter.***
- 4. That the interested party be charged under Section 62 of the Trust Land Act, Chapter 288, Laws***

*of Kenya.*

**5. That contempt proceedings be taken out against the Respondent Interested party.**

It is instructive to note that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were parties to those proceedings. The 2<sup>nd</sup> respondent was aware of the outcome of the said proceedings but chose not to disclose the same in these proceedings. Only the 1<sup>st</sup> respondent was candid enough to disclose the same. By the 2<sup>nd</sup> respondent willfully refusing to disclose such material fact, it must of necessity deny itself of the exercise of discretion by this court in its favour. Having known the outcome of the previous Judicial Review proceedings it was duty bound to let the applicants know instead of going bed together.

A careful reading and appreciation of the order by **Ang'awa J.** leaves no doubt in any one's mind that, the 1<sup>st</sup> respondent was expressly and categorically directed to issue a Common Minerals Licence to the company. The respondents therein who include the District Commissioner Mutomo District, and the County Council of Kitui were also prohibited from granting such licence to any other party to deal with or in the limestone deposits, located in Kanziko and Mathima areas of Mutomo District. It is instructive that the areas covered by the said orders were Kanziko and Mathima, the same areas where the applicants come from. In the premises, the 2<sup>nd</sup> respondent's arguments to the contrary hold no water at all.

Those orders have never been vacated, varied and or set aside. What the applicants are seeking to achieve by this application is to go round those orders. The orders by **Ang'awa J.** were open ended. In the light of the fact that the 2<sup>nd</sup> respondent was barred by **Ang'awa J.** from granting the licence to anybody else, an order of Mandamus cannot again issue to compel the 2<sup>nd</sup> respondent to follow the right procedure, provided for in section 117 and 118 of the Constitution and or Trust Land Act, nor can prohibition issue as sought in prayer 3 of the Notice of Motion. As long as the orders of **Ang'awa J.** are not varied, the 2<sup>nd</sup> respondent cannot resile from them. It will look bad in the eyes of the public for the same high court to issue contradictory orders over the same or related matter. Yet this is what the applicants want this court to do. The issues of mandamus and prohibition having been canvassed before **Ang'awa J.** and determination thereon made, is it open to the applicants to canvass them afresh in these proceedings? I do not think so.

What the applicants are seeking to achieve in these proceedings is a review, setting aside or to quash the decision of this court aforesaid, which this court has no jurisdiction to do. In my view, the applicant's remedy lies in challenging **Ang'awa J.'s** decision and not pursuing these proceedings. In the circumstances the present proceedings are misconceived and ill advised. Accordingly, the application fails and is dismissed with costs to the company.

**Dated, signed and delivered at Machakos this 15<sup>th</sup> day of November, 2011.**

**ASIKE-MAKANDIA**  
**JUDGE**