



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS Civil Case 6 of 2009

BAMBURI CEMENT LIMITED PLAINTIFF/APPLICANT

VERSUS

ATHI-RIVER MINING LIMITED DEFENDANT/RESPONDENT

RULING

Introduction

1. By its Complaint filed on 16/1/2009, the Plaintiff, Bamburi Cement Ltd seeks certain orders against the Defendant with regard to a lease agreement dated 18/10/2007 between it and the County Council of Kitui. Specifically orders are sought that the lease be declared null and void and other resultant orders are also sought.
2. Before the suit could be determined, the Plaintiff, by its Chamber Summons dated 26/2/2009 and filed on 2/3/2009 sought orders under Order VI Rule 13 (1) (b) and 16 of the Civil Procedure Rules that paragraphs 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the Defence dated 4/2/2009 and filed on 5/2/2009 be struck off and judgment be entered for the Plaintiff against the Defendant as prayed in the Complaint.
3. The grounds in support of the Application are that:
 - a. **“The grounds of defence pleaded in the above paragraphs of the Defence are unsustainable.**
 - b. **There is no denial of the fact that the lease relates to trust land and that the County Council of Kitui has no powers or jurisdiction to grant a lease of any portion of the said trust land in contravention of the Constitution of Kenya and/or Trust Land Act, Chapter 288 Laws of Kenya.**
 - c. **There is no challenge to the fact that at all material times the County Council of Kitui did not comply with the provisions of the Constitution of Kenya and the provisions of the Trust Land Act when purporting to grant the said lease is a nullity.**
 - d. **The Defence is scandalous, frivolous or vexatious.”**

Applicant’s Case

4. The case for the Applicant is that the land to which the lease dated 18/10/2007 relates to is trust land held by the County Council of Kitui as trustee. That the lease was however obtained contrary to the provisions of the Constitution and the Trust Land Act in that setting apart was not done as is the requirement of the law. That being the case, the lease is null and void and the orders sought in the Complaint

should be granted.

5. The Supporting Affidavit sworn on 26/2/2009 by one Betty Kanyagia brings out the above issues and in elaborate submissions, the advocate for the Plaintiff has made the point that although the lease was purportedly made pursuant to section 37 of the Trust Land Act, that section confers no such rights as were purportedly conferred by the lease. That the lease is therefore predicated on no known legal process, is void *ab initio* and is bad, faulty and must collapse.

6. I have perused the annexures to the Supporting Affidavit and the Plaintiff's interest in the land is based on a single business permit issued on 1/11/2006 and the business that the Plaintiff was to engage in is stated to be "**prospecting mining**" for the period 1/1/2006 to 31/12/2006. The fee paid was Kshs.32,000/=. However, I should pause here and note that the specific area where the "**business**" was to be conducted is missing from the permit and the permit was backdated to 1/1/2006 when it was only issued on 1/11/2006. The permit for the year 2007 has the same anomalies save that the permit was issued on 5/4/2007 and the business period was to commence on 1/1/2007. In its Application for an exclusive prospecting licence received on 1/3/2007 by the Commissioner of Mines and Geology, the specific area in which the Plaintiff intended to prospect is identified as the Kanziko locality of the Mutomo District and the same measurers 26 sq. km. The Commissioner of Mines and Geology granted the licence on 2/5/2007 upon payment of Kshs.8,205/= as gazette ment fee. By a letter dated 9/7/2007 addressed to the Defendant, the Commissioner of Geology and Mines ordered the Defendant to cease all and any activities in the area in view of the license already granted to the Plaintiff. It is unclear what happened thereafter in that regard but it is certain that the lease in issue was executed some months afterwards. That is the basis of the present complaint by the Plaintiff hence the orders sought in the Plaintiff and its further case therefore is that the Defence is premised on an illegality and should be struck off.

Respondent's Case

7. The Defendant/Respondent's case is that the Application for striking out is misguided and incompetent because the issues in contest are pending before the Court of Appeal in **C.A. 17/2009** and also in related proceedings viz **Civil Application No. NAI 27/2008** where the Plaintiff has obtained stay orders from the decision of Ang'awa J in **H.C.Misc. ECL/JR 84/2007** where the issues are the same as in this suit and the present Application. That in fact it is the suit herein that should be struck out hence the Application to do so dated 6/4/2009 pending before this court.

8. The Respondent also argues through the Supporting Affidavit of Surendra Bhatia sworn on 20/4/2009 that the lease agreement was entered into in a procedural manner and that its validity or otherwise cannot in any event be determined through a summary procedure as the Plaintiff purports to do.

9. In similarly detailed submissions, the advocate for the Defendant reiterated the above issues and also argued that the court has no jurisdiction to determine the Application and the suit in view of the decision in No. **48/2007** aforesaid and that Section 6 and Section 7 of the Civil Procedure Act can be properly invoked to stay the present proceedings until **C.A 17/2009** is heard and determined. Further, that there are triable issues raised in the Defence and it would be fair and just that all the issues be placed before the court for a sound decision to be made on the merits.

10. The Defendant's final point is that the Application be dismissed and its Application dated 6/4/2009 be allowed as prayed.

Interested Party's Case

11. On 22/4/2009, parties agreed that it would be in the interests of justice that the County Council of Kitui be joined as an Interested party to the suit and in response to the Application dated 26/2/2009, its case is that the Defence raises triable issues and it is neither scandalous nor vexatious as claimed. That the issues raised in the pleadings are serious and ought to be determined at the full trial.

Evaluation and Determination of Issues Arising

12. It is clear to me that in getting to the bottom of the matter before me, I should decide whether this court has jurisdiction to hear and determine the suit and the Application in view of the proceedings in the Court of Appeal which I have referred to above.

13. From the record, **H.C. Misc. 48/2007** was instituted by the Plaintiff and the Respondents were the District Commissioner, Mutomo, and the County Council of Kitui. The present Defendant was enjoined as an Interested Party and having read the Notice of Motion dated 29/11/2007 and filed on the same day, the orders sought were;

i. an order of mandamus to compel the D.C. Mutomo to **“issue a common Minerals Licence to the Applicant to mine, take and process limestone deposits in Kanziko and Mathima areas within the jurisdiction of the second Respondent”** i.e. County Council of Kitui.

ii. an order of prohibition directed to the Respondents **“from granting a Common Minerals License or any other license or right to any other party, authorizing such party to deal with or in limestone deposits located in Kanziko and Mathima areas of Mutomo District”**.

14. In a Supplementary Affidavit sworn on 14/1/2008 by David Njoroge, Project Director of the Plaintiff Company, at paragraphs 23 – 26 and paragraphs 39 – 43, the Defendant’s interest in the dispute is highlighted and termed illegal and unprocedural and at paragraph 41, specifically, the validity of its leasehold interest is challenged in the same language as in the present suit and Application. In fact the lease is termed a contravention of Section 13 of the Trust Land Act since no setting apart of the land was made. That argument is also made in paragraphs 11 and 12 of the Plaintiff in this suit.

15. In her Ruling dated 25/2/2008, Ang’awa J at pages 13 and 14 thereof addressed the issue of the lease granted to the Defendant and concluded as follows:-

“I do not therefore believe that the Interested Party had held a lawful lease and would agree with the ex parte applicant that this procedure as required had not been followed.”

16. The Interested Party was the present Defendant and the lease referred to is the subject of the proceedings before me. The learned judge went further to state as follows:-

“I have been informed through the submissions that the interested party had deposed and made false declarations. These are that the interested party said that they had been granted a lease when in fact they had not been granted a lease as required. They had not been granted a license to deal with limestone simply because they the interested party applied under the wrong law.”

17. The learned judge then proceeded to make orders that the Defendant was in contempt and should be held criminally liable under Section 62 of the Trust Lands Act Cap 288 and also granted orders of mandamus and prohibition as prayed. The Defendant then filed an application for stay of those orders in **C.A. Civil Application No. NAI 27/2008** and the orders of Ang’awa J were stayed. The Plaintiff then instituted this suit during the pendency of the substantive appeal against the orders of Ang’awa J.

18. I have no doubt in mind that the central issue in the suit before me is the validity and legality of the leasehold interest held by the Defendant. I have shown above that Ang’awa J was seized of the matter and made firm findings and went on to penalize the Defendant, criminally, and *inter-alia* held that.

“The Trust Land as acquired by the Interested Party is in effect null, void and a illegality (sic).”

19. That finding is in effect what the Plaintiff wants this court to make in its favour and this is clear from prayers (a) and (b) of the Plaintiff dated 16/1/2009. As I understand it, the applicable law in such a situation is Section 6 and Section 7 of the Civil Procedure Act which provide as follows:-

S.6. “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the

same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation. –the pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

S.7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)-The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)-For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)-the matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)-any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)-any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)-where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

20. I have also been referred to the case of Jadra Karsan vs Aanam Singh Bhogal (1953) 20 LRK 74 where it was stated by Sir Newnham Worley v-p *inter-alia* that:

“The authorities are clear that the ‘matter in issue’ in Section 6 of the Ordinance (which corresponds with Section 10 of the Indian Civil Procedure Code) does not mean any matter in issue

in the suit but has reference to the entire subject in controversy; it is not sufficient that one or some issues are in common. The subject matter of the suit must be covered by the previously instituted suit and not vice-versa...” (Emphasis added).

21. The only issue in this suit, I repeat, is the lease and I have said that Ang’awa J dealt substantively with it and it would be erroneous and unprocedural if this court, with concurrent jurisdiction, waddled into the matter with a view to either agreeing or disagreeing with her decision. My views on the subject, and I obviously have something to say, are mine to keep for those reasons.

22. In submissions, the advocate for the Defendant asked me to either stay the present proceedings until the Court of Appeal matter is heard and determined or fix its Application dated 6/4/2009 for hearing.

23. My approach in the interests of justice would be this; I see no reason to hear the Application dated 6/4/2009 because I have indirectly said that there may be merit in some of the issues it raises. Further, I have said that I have no jurisdiction to reopen issues already determined and that is why I will firmly hold that I will not delve into the issues raised in the present Application because to do so would be unfair to parties and may prejudice the pending appeal. In the end therefore, without striking out the suit, the final orders to be made are that;

i. the Application dated 26/2/2009 is incompetent and is struck out with costs to the Defendant and the Interested Party;

ii. the suit herein is stayed pending the hearing and determination of **C.A. 17/2009**.

24. Parties at liberty to apply.

25. Orders accordingly.

Dated and delivered at Machakos this **9th** day of **October** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mutia h/b for Mr Oyatsi for Applicant**

N/A for Respondent

ISAAC LENAOLA

JUDGE

