



Wanjira v Copper Hill Exploration & Mining Resources Company Limited (Environment and Land Appeal 7 of 2022) [2022] KEELC 13652 (KLR) (19 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 7 OF 2022
MN KULLOW, J
SEPTEMBER 19, 2022**

BETWEEN

MICHAEL OKWETO WANJIRA APPLICANT

AND

**COPPER HILL EXPLORATION & MINING RESOURCES COMPANY
LIMITED RESPONDENT**

RULING

1. By notice of motion dated March 22, 2022, the appellant/ applicant sought for the following orders: -
 - a. Spent.
 - b. There be an interim stay of execution of the ruling and order of the subordinate court in Migori CMC ELC No 95 of 2021 – Copper Hill Exploration and Mining Resources Co Limited v Michael Okweto Wanjira, dated and delivered on March 3, 2022, pending the hearing and determination of this motion, on such conditions as would be proportionate.
 - c. There be stay of execution of the ruling and order of the subordinate court in Migori CMC ELC No 95 of 2021 - Copper Hill Exploration and Mining Resources Co Limited v Michael Okweto Wanjira, dated and delivered on March 3, 2022, pending the hearing and determination of this appeal, on such conditions as would be proportionate and just.
 - d. The costs of this application be provided for.
2. The application is premised on the 15 grounds thereof and on the applicant’s supporting affidavit sworn on March 22, 2022 with annexures marked “MOW” 1 - 6. The applicant avers that vide a ruling dated and delivered on March 3, 2022; the subordinate court granted an order of temporary injunction restraining him or any person acting on his behalf from trespassing onto or carrying away any mineral ores from the area indicated on the plaintiff’s mining permit dated March 19, 2021. The



trial court further directed the OCS Macalder police station to ensure compliance with the said order. Aggrieved by the said order, the applicant filed a memorandum of appeal dated March 16, 2022 which he maintains is arguable and raises critical issues of fact and law and may be rendered nugatory if stay of execution is not issued.

3. It is his contention that he stands to suffer substantial loss in the nature of loss of business and lawful income unless the orders sought are granted as he is in the lawful business of buying copper, gold and precious stones from artisanal miners and selling such minerals to lawful persons; for and on behalf of a lawful body Nyatike Minerals Marketing Cooperative Society Ltd and therefore the impugned injunctive orders are depriving him of the income. He is apprehensive that the enforcement of the said orders is imminent.
4. He further averred that the application had been made promptly without any undue delay and that he is ready and willing to provide security for the due performance and abide by any conditions that the court may place in granting the stay of execution pending appeal. It is his position that the respondent shall suffer no prejudice and urged the court to allow the application.
5. The application was opposed; the respondent filed a replying affidavit sworn on April 28, 2022 by Felix Okwanyo, with the authority of the Board of Directors to swear the Affidavit on behalf of the together with annexures marked “FO” 1- 5. The respondent avers that the company was granted exclusive right to mine Copper, Gold and Silver within an area measuring approx. 0.3347Km delineated on Macalder Sheet 129/2 and therefore, having been granted exclusive rights over the said mining area, no other person has any right whatsoever to mining right over the same mining area.
6. He also contends that the applicant has over time trespassed into the respondent Company’s mining area on the pretext that he holds a license allowing him to carry out mining activities in the respondent’s mining area. It is his claim that the said license held by the applicant only grants the holder the right to ‘buy and sell including export precious metal group’ and does not confer the holder the right to trespass into and carry out mining activities in the respondent’s mining area.
7. He maintained that the temporary injunction was granted to bar the applicant from trespassing into and carrying out mining activities on the respondent’s mining area and thus urged the court to dismiss the application.
8. The application was canvassed by way of written submissions. Both parties filed their respective submissions which I have read and taken into account in arriving at my decision.
9. It is my considered opinion that the issues for determination arising include;
 - i. Whether an order for stay of execution can issue against the ruling and order dated March 3, 2022.
10. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of *Consolidated Marine v Nampijja & another*, Civil App No 93 of 1989 (Nairobi), the Court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
11. Order 42 rule 6(1) of the [Civil Procedure Rules, 2010](#) empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. Order 42 rule 6(2) sets out the grounds to be considered and provides as follows: -



- (2) 2) No order for stay of execution shall be made under sub- rule (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.
12. Order 42 rule (2) above outlines the three prerequisite conditions for the grant of an order for stay pending appeal. The said conditions are couched in mandatory terms and must all be satisfied before an applicant succeeds on an application for stay pending appeal.
13. The first ground is whether substantial loss may result to the applicant unless stay of execution is granted. What amounts to substantial loss has been expressed as that which has to be prevented by preserving the status quo. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, substantial loss was defined as follows: -
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
14. An applicant has a duty to demonstrate the loss he is likely to suffer in the event that the order for stay of execution sought is not granted. The applicant must give sufficient cause to the court to enable it exercise its discretion in granting the orders sought in his favor. It is not sufficient to merely state that substantial loss may occasion without any explanation and demonstration of the said substantial loss.
15. The applicant contends that he is in the lawful business of buying copper, gold and precious stones from artisanal miners and selling such minerals to lawful persons; for and on behalf of a lawful body Nyatike Minerals Marketing Cooperative Society Ltd and he therefore stands to suffer substantial loss in the nature of loss of business and lawful income unless stay orders are issued.
16. The respondent on the other hand maintained that it was granted exclusive right to mine Copper, Gold and Silver within the disputed land measuring approx. 0.3347Km and therefore, no other person has any right whatsoever to mining over the same mining area. It is further their contention that the license held by the applicant only grants the holder the right to ‘buy and sell including export precious metal group’ and does not confer the holder the right to trespass into and carry out mining activities in the disputed area. He therefore urged the court to dismiss the application as allowing the same would be tantamount to sanctioning the applicant’s illegal activities while maintaining that it stands to suffer irreparable loss and damage.
17. I have critically considered the rival positions taken by both parties in respect to the issue of substantial loss. I am alive to the fact that this is still an active matter at the subordinate court and I am therefore careful not to comment on the merits of the substantive matters of the claim at an interlocutory stage such as this one.



18. It is evident that both parties herein hold respective licenses; the applicant holds a Mineral Dealers License which grants him the right to buy and sell including export of Precious Metal Group while the respondent company holds a Mining License. The applicant's license in my considered view, is a license that vests the applicant herein with the right to buy, sell and export the final product of the precious metal group. It does not in any way grant the applicant any right to mine or engage in either of the processing stages involved in arriving at the final product.
19. From a perusal of the lower court record and the impugned ruling which the applicant has since appealed against; it is clear that the respondent's claim against the applicant was that of trespassing into the respondent's mining jurisdiction and carrying away mineral ores from the disputed area. The respondent produced a copy of a mining license which grants it exclusive mining rights within the stipulated area within old macalder mines within nyatike sub location.
20. Consequently, the court vide its ruling dated and delivered on the March 3, 2022, issued a temporary injunction, restraining the applicant or any other person claiming through him from trespassing into the plaintiff's mining jurisdiction or in any way taking away any amount of mineral ores from the plaintiff's mining jurisdiction and interfering with the plaintiff's peaceful possession and enjoyment of the leased area pending the hearing and determination of the suit.
21. My understanding of the impugned order is that the applicant has been restrained from interfering and trespassing into the respondent's lawful mining jurisdiction. The applicant has not disputed the respondent's license neither has he adduced any contrary license. He has also maintained and proven that he only holds a license which grants him the right to buy, sell and export precious metals group and not mining. This as earlier indicated is only limited to the final refined product and does not grant the applicant the right of processing the mineral ores howsoever. The applicant's actions in my opinion is akin to poaching, that whereas he does not hold the requisite license for his actions he maintains that he is buying the same from the artisanal miners, which in my view is unacceptable.
22. In view of the foregoing, I find and hold that the applicants have not satisfactorily demonstrated the substantial loss that they are likely to suffer. On the flip side, the respondent has demonstrated the irreparable loss and damage it is likely to suffer and which may not be adequately compensated by an award of damages in the event the orders sought are granted. It is their position that quantifying the value of the said mineral ores is not possible unless the same is at a refined stage. I therefore see no reason to disturb the lower court ruling delivered on March 3, 2022.
23. Even though the application has been filed without undue delay and further that the applicant has indicated his readiness and willingness to deposit any security and/or abide by the conditions set by the court; having held that the applicant has failed to prove the substantial loss that he is likely to suffer to the required threshold, I find that it would be an academic exercise to discuss the issue of security to be deposited if any. As earlier stated, substantial loss is the corner stone for the award of stay of execution and all the 3 prerequisite conditions must be met for an applicant to succeed.
24. In the upshot, I accordingly find that the application dated March 22, 2022 is not merited and is hereby dismissed with costs to the respondent. The appellant is directed to file his record of appeal within 30 days from the date of this Ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 19TH DAY OF SEPTEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE



Ruling delivered in the presence of: -

Mr. Odero for the Appellant/ Applicant

Non-appearance for the Respondent

Court Assistant- Tom Maurice

