



1. REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 84 of 2007

1. Land and Environment Law Division

2. Subject:- a) Judicial Review

b) Common minerals license

c) Trust Land Act Cap 288 Laws of Kenya

d) The Local Government Act Cap 265 Laws of Kenya

i) Exparte applicant – Bamburi Cement Limited

aa) Applies to prospect for lime stone in the District of Mutomo
in the Kanziko & Mathima areas.

bb) Single business license issued

cc) District Commissioner, only authority to issue a common mineral license **BUT**
does not

dd) Local Authority county council of Kitui (2nd Respondent) Issues authority to the interested party,
Athi River Mining Limited

ii) Application 16.11.07

a) Exparte application applies for leave to commence Judicial Review Proceedings for
orders of MANDAMUS directing the District Commissioner of Mutomo District under the provision of
the Trust Land Act Cap.288 Laws of Kenya to issue a common minerals license by application 16.11.07
granted on 23.11.07, Visram,J.

iii) Notice of motion 29.11.07

aa) Exparte applicant prays the 1st defendant District Commission of Mutomo District to issue
common license in this with the County Council of Kitui resolution.

bb) First respondent failed to issue the said license. He is now

compelled by orders of Mandamus to do so.

iv) Interested Party

aa) Enjoined to this Judicial Review on grounds that they too have a right to a license and that they have bought land from the local person.

v) Application dated 17.12.07 by exparte applicant

aa) Contempt proceedings.

bb) The interested party has no locus. No board resolution has been made to allow them into such ventures

cc) Have deponed to false declarations

i) Interested party never applied for a license
No valid license issued.

ii) Interested Party irregularly acquired a lease without the Divisional Land Board being constituted, not notified nor setting land apart, 2nd respondent not publishing a notice in the Kenya Gazette. Mandate of 2nd respondent is for extraction of minerals only.

iii) Compensation of the land occupants contrary.

iv) No resolution passed on 9.10.07 to grant license

v) False declaration is same as a false affidavit.

Contempt of court.

That the interested party should not be heard

vi) By consent of 17.12.07, application of 17.12.07 be heard on 4.2.08 and application of 29.11.07 be heard on 6.02.08

vii) By further consent on 4.2.08 and 6.2.08 both

applications consolidated.

3. Arguments by defendant/respondent No 1 District Commissioner - NIL

4. Arguments by respondent No.2

a) Parties are involved in a “fighting trade wars” and dragging respondent No.2 unfairly.

i) The 2nd respondent has already allocated

Land. Issue of prohibition over taken by events

ii) Decision made by 2nd respondent based on

public policy

iii) The 2nd respondent has followed procedure.

5. Arguments by interested party

a) To main application

i) Rightfully applied for license and was granted

ii) Non were awarded the common mineral license

iii) Issue is of competition between the two companies

iv) Issues of public policy to promote competition instead

of monopoly

v) No disclosure of illegality, no recognized ground for

Judicial Review

vi) Parties went to arbitration by mention and listed

considered to be required to show each portion.

6. In reply

a) The issue is the role of the District Officer as the Licensing Officer.

His mandate was to issue the required license.

7. Held

a) A decision had been made by the County Council of Kitui to issue the exparte applicant with a license to prospect know as the Common Minerals License under the Trust Lands Act regulations Cap 288 Laws of Kenya.

b) The task of the District Commission was to issue a license once he

obtains official Communications that approval has been given .

c) That a license do issue. Orders of Mandamus accordingly do issue to compel and or command the District Commission to issue the said license.

d) Prohibition to stop the court issuing licenses to other prospectors

e) Note procedure of land acquisition irregular

f) That the Interested Party are in contempt of court on issuing a false declaration. They ought to be accordingly charged.

8. Case law

By applicant

a) Associated Provincial Picture Houses Ltd V Wednesbury Corporation (1947) 2 ALL ER 680.

b) Chase International V Laxman Keshua
(1978) KLR 143

c) Re V Weizs & Another (1951) ALL ERI

d) Myers v Elaman (1939) 4 ALL ER 484

e) Total Kenya Ltd V The Permanent Secretary, Ministry Of Energy
Hccc1638/2004

By 2nd respondent

f) RE: Kenya National Federation of Cooperatives Ltd & Others
(2004) 2EA 128

g) Ndungu wa Wambui V R & Others (1945-1998) 2 EA 254

h) Commission of Land V Kensite Hotel Ltd (1995-1998) I EAI
National Assembly V Karume (1980-1994) EA 549

i) Kenya National Examinational Council V Republic Exparte SS Njoroge

j) Amirji Singh v the Board of Post graduate students of Kenyatta University

By Interest Party

i) Kenya National Examination Council v Republic Exparte SS Njoroge

ii) Council of Civil Service Union & Others v Minister for the Civil Service (1984) 3 ALL ER 935

iii) Chief Constable of North Wales Police v Evans (1982) 3 ALL ER 141 at pg 154

iv) Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2 ALL ER 680

9. Statute Law

- a) The Constitution of Kenya
- b) The Trust Land Act Chapter 288 of the Law of Kenya
- c) The Trust Land (Removal of Common Minerals) Rules
- d) The Local government act Cap.265 Laws of Kenya
- e) The Restrictive Trade Practices, Monopolies and Price Control Act
Chapter 504 Laws of Kenya
- f) Law Reform act Cap.26 Laws of Kenya

10. Advocates:

- a). D. Oyatsi instructed by Shapley Barret & Co. Advocates for the applicant.
- b). J.A. Atanda instructed by the Attorney General for the 1st respondent, the district Commissioner
- c) G. Kithii instructed by M/s Madzayo Mrima & Co. Advocates for the defendant/respondent No.2 County Council of Kitui
- d) M. Nyaoga instructed by M/s Mohammed Muigai & Co. Advocates for the Interested Party.

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE TRUST LAND ACT CAP.288 AND THE LOCAL GOVERNMENT ACT CAP.265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR A COMMON MINERALS LICENCE

BETWEEN

REPUBLICAPPLICANT

AND

THE DISTRICT COMMISSIONER MUTOMO DISTRICT AS THE LICENSING OFFICER

OF THE COUNTY COUNCIL OF KITUI 1ST RESPONDENT

THE COUNTY COUCNIL OF KITUI 2ND RESONDENT

EXPARTEBAMBURI CEMENT LIMITED

AND

ATHI RIVER MINING LIMITEDINTERESTED PARTY

RULING

1. PROCEDURE

1. The parties herein are M/s Bamburi Cement Ltd the - exparte applicant, a public company listed under the stock exchange and the oldest and largest cement manufactures in Kenya. (Herein referred to as the exparte applicant)

They are represented by M/s Shapley Barret & Co D Oyatsi

B) The District Commissioner Mutomo District as the licensing officer of the County Council of Kitui (herein referred to as the 1st Respondents represented by the Attorney General of Kenya). J.A Atanda state counsel.

C) The County Council of Kitui (herein referred to as the 2nd Respondent).

They are represented by M/s Madzayo Mrima & Co Advocate. G. Kithi

D) Athi River Mining Ltd Interested party

a limited liability company dealing inter alia with mining. (herein referred to as the interested party). They are represented by M/s Mohamed Muigai Advocate.

N. Nyaoga.

II: Background of Application

2. On the 16 November 2007 the exparte applicant filed an application before this court under certificate of urgency to commence Judicial Review Proceedings against the 1st & 2nd respondents.

3. This being for an:-

3.1 Order of Mandamus commanding a directing the first respondent District Commissioner of Mutomo District in is legal capacity under the provision of the Trust Land Act Cap. 288 Laws of Kenya a licensing offer of the second respondent. The County Council of Kitui to issue a Common Minerals License to the applicant to move take and process the limestone deposits in Kanziko and Mathima areas within the jurisdiction of the second respondent.

3.2) An order of prohibition restraining the respondents from granting a common minerals license or any other licenses or right to any other party authorizing such party to deal with or in the limestone deports located in Kanziko and Mathima arears Mutomo District.

3.3) That costs of the application be provided for.

4. Leave to commence judicial proceedings was granted (visram J.) (duty judge) (23.11.07) and this

judicial Review file was referred to the Land & Environmental Division on the 17.12.07. Parties agreed to maintain a status quo on the dealings in this matter and do exchange and file their various papers.

5. On the said date of 17.12.07 the exparte applicant filed an application of the same date for contempt proceedings against the interested party. This was basically that they came into this case without the approval of the Board of Directors appointing advocate and without their said Board of Directors approving them to enter into the ventures they are now in.

6. The parties agreed to hear the two application separately. The one on the Judicial Review of 29.11.07 on the 6.2.08 and the contempt proceedings on 4.2.08 that is dated the 17.12.07. It so happened that the parties decided to hear both application at once and the same were duly consolidated.

7. The dates of hearing of this matter took place on the 6.02.08, 12.02.08 and 13.02.08. The ruling was reserved for 25.02.08.

III Application notice of motion 29.11.07 for Judicial Review and notice of motion 17.12.07 for contempt against the interested party

AA: Background facts

8. The exparte applicant was aware that since 1955 the Mutomo District Area had a considerable amount of limestone. No one had exploited the said limestone for one fifty years. Though the limestone area was known, the quality for such limestone was not. limestone was important to the exparte applicant for purpose of exploiting it for cement manufacture.

9. The limestone was situated in an area that fell under the Trusts Lands Act Cap 288 Law of Kenya. The 2nd respondent was therefore responsible in administering the said area. The exparte applicant applied to be given a license to prospect the said limestone in the Mutomo District. They never issued with an approval from the second respondent to prospect for the said limestone. The exparte's application was dated

18 September 2006. They were requested to pay Ksh 32,000/- and were issued with a Single Business Permit on November, 1st 2006. When this permit expired on December 31st 2006, it was renewed up to December 31st 2007.

10. The exparte applicant did two things. They organized meetings with the residence to explain their proposed activity which was mainly to obtain the residence consent to carry out dwelling activities on the land and secondly to engage experts who had specialized and duly trained in geology to analyze the limestone. This specialization was to come from the International Experts together with specialized equipment. A budget of Ksh 100 million was set aside.

11. The experts notified the exparte applicant after visiting the site in August 31,2007 and earlier in April 2006 that the quality of the limestone was good. They nonetheless required to resume the limestone and take them to international liabilities for analysis. The law in Kenya did not permit the renewal of the limestone from the area unless it was so authorized by way of a holder of a common minerals license. It was in September 21,2007 that the exparte applicant submitted to the 2nd respondent for a common minerals license. By a special meeting of October 9, 2007, the 2nd respondent passed a resolution and granted the said common minerals license for limestone deports Kanziko and Mathima Area.

12. A request to the granted the license was made to the 1st respondent. He failed to issue the license nor did he respond to the request.

13. This would have been a matter of formality; as huge investment was at stake the exparte applicant filed for leave to commence Judicial Proceedings. Once granted the exparte applicant filed a notice of motion whereby they sought the said orders for Mandamus as described above for the leave which inter

alia sought this court to command and direct the first respondent to issue the case to the exparte applicant. They also sought prohibitory order restraining the 2nd respondent from issuing a license to any one else on the Kanziko and Mathima areas.

BB Agreements by the Ex-part Applicant

ii) Application 29.11.07

14. The exparte applicant argued on the principle of law that a decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial Review Proceedings where the court concluded that the decision in such that no authority properly directing itself on the relevant law and acting reasonably could be reached[1]. The exparte applicant further relied on the said principle as outlined in the case law of :-

Associated Provincial Picture Houses Ltd Versus Wednesbry Corporation [2] (1947) all ER 680

Inter alia that the court is

“entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account . . .”

The courts has a right to interfere.

15. In this case, the 2nd respondent was to issue the exparte with a license known as common mineral license. Instead they only issued the single Business Permit. This error was not noted until September 19, 2007. On requesting the 2nd respondent to issue the said license, failure to would mean the prospect would not be complete, the exparte applicant came to court and stated the action by both respondents was “drastic” “oppressor”. This is more so on the amount of funds and investments already expended.

16. Further arguments was that this refusal would amount to unjust enrichment in the case of :-

Chase International V Laxman Kesha[3] (1978) KLR 143

The principle of unjust enrichment was outlined to three basic concept

- i) The defendant has been enriched by the receipt of a benefit.
- ii) The defendant has been enriched by the plaintiff expenses
- III) It would be unjust to allow the defendant to allow him to retain the Benefits”.

17. The exparte applicant prays that the 2nd respondent should not be permitted to unjustly enriched at the expense of the applicant.

18. The reasons behind the no issuance of the license is that the 2nd respondent favours to give the license to the interested party. This said interested party had:-

- i) Submitted no license to prospect or mire the Limestone
 - ii) The actual prospecting within the disputed area was never carried out by the interested party.
- ii) A different license was applied for being a license to

the Commissioner of mines and Geology under the Mining Act Cap 306 Laws of Kenya to mine non –

precious minerals in the disputed area. The said act specifically excluded limestone and did not fall under the said license.

vi) The interested party was suspect as their application came 10 months after the exparte applicant had been granted theirs.

19. To complicate matters although a meeting was convened on October, 9, 2007 to consider the matter the exparte applicant had already obtained a license. The second respondent passed a license to be granted to the interested party when there was no license in existence.

20. The respondent should therefore issue the correct license.

ii) **Application 17 December 2007**

21. The exparte applicant stated that they were share holders of the interested party. At no time did the interested party pass a resolution authorizing the "interested party" to take part in the present proceedings; to acquire or lay claim on the limestone deposits in the area that amounts to the subject matter of the common minerals license.

22. There was no resolution passed to appoint M/s Mohamed Mungai & Co Advocate to represent the Interested Party in the proceedings.

CC) **Reply by Respondent No 1**

23. The Attorney General representing the 1st respondent did not make any reply nor participate in the deliberations of this Judicial Review.

DD) **Arguments by the 2nd respondent**

24. The second respondent saw this whole matter as a "fighting trade war" between the applicant and the interested party with the result of dragging the respondent into this matter unfairly.

25. The second respondent stated that the decision taken by them was one of public policy. There must be a policy of fair trade and not monopoly. All the procedure in giving the license to the parties was followed. The 2nd respondent has already allocated land and as such prohibition to restrain them from so doing has been overtaken by event. Proper procedure had been issued.

EE) **Arguments by the interested party**

26. Both the interested party and the applicant had applied to be granted licenses to enable them to extract and or exploit the limestone deposit. Each were duly granted with licenses but now were granted the Common Mineral License. Both spent enormous amount of investment and the issue herein is that of competition between the parties for manufacture, sale and distribution of cement in Kenya and the neighboring countries.

27. The Minister of Local Government (as he then was) had directed on October 1, 2007 that parties be encouraged to exploit the areas and not to have a monopoly situation.

28. This Judicial Review is available to the exparte applicant on good grounds. He went on to rely on the case of:-

Council of Civil Service Union and Others V Minister for the Civil Service (1984) 3 all ER 935 at 937

Where the Judicial Review controls administrative action under 3 heads being illegality, irrationality and

procedural impropriety

28. This Judicial Review does not disclose these three heads. No where does it show that the respondents had been guilty of an error of law, nor where does it show that the decision making authority acted so

unreasonable that no reasonable authority could make the decision. No where have the exparte applicant show that the respondents failed in its duty to act fairly.

29. All that the exparte applicant did was to bring the allegations of statements of facts. They in fact participated in the arbitral meeting with the Minister of Local Government who solved the issue. Each party was allocated their portion of areas.

30. The exparte applicant, if they were not satisfied with the decision, should have appealed. They were not to come to court by way of Judicial Review. By doing so it is an attempt to usurp the powers of the Local Authority. This court like the Minister for Local Government order an equal share of the land in question.

31. If this court gives the orders it would offend the constitution of Kenya. Neither can prayers for prohibition and mandamus issue as it can only be sought for an illegal act and in this case the spirit of competition would be stopped if the application is allowed.

FF) **In reply to the respondents interested party**

33. The exparte applicant maintains that the interested party had not made any application for a license under the Trust Land Act. That the lease of land cannot be given by the second respondent to mine limestone without not only the application for the license but that lease is null and void.

34. The minutes proposed to issue a license to the interested party of October 9 2007 is a deceit and invalid.

33. The exparte applicant was the first to be issued with the license.

35. They went to deny that the arbitral proceeding before the Minister had any effect. In the case law of:-

Total Kenya Ltd V The Permanent Secretary Ministry of Energy[4]

Hcc1638/2004 Emukule J.

36. A permanent Secretary conducted arbitral proceedings. These proceedings were granted by the court on grounds that the Permanent Secretary was exercising his administrative powers.

IV) Opinion

37. I would agree to some extent with the second respondents remarks that the parties, exparte applicant and the interested party, are in involved in a commercial fight on the rights to prospect.

38. From the facts before me I am satisfied that the exparte applicant was the first to apply for a license known as "the common minerals license". They applied for this in 2006 but were issued with the Business License. When they tried to correct this with the 2nd respondent, the interested party had come on board and claimed the same rights of a license.

39. The said 2nd respondents task was to approve or decline a license to be issued to prospect limestone. From the facts before me, the license was not approved. The question was that it had yet to be issued. This had not been so done for over a year. It was only at the stage when the license was to be

removed from the area for further testing that it was realized that the 1st respondent had not issued the license.

40. I agree that the 1st respondent is the correct authorized person to issue the license. He failed to do so and his so failing to do so was unreasonable.

41. I do not think that the 2nd respondent was correct in issuing a subsequent license to the interested party. If they did, which is denied, as the minutes of October 9, 2007 with reference to them is suspect, the license that was applied for was not with the Trust Lands Act Cap. 288 Laws of Kenya. This therefore means there was never any license in the first place before the 2nd respondent to consider.

42. There is the issue of the Minister involved in arbitral and public policy on the aspect of competition. It is noted that the Minister was infact exercising his administrative power and the arbitral matters was not, in effect, that of having the force of law.

43. The procedure from the time the interested party began the process of mining was illegal. They applied for a license without the approval of their board. This argument by them that they need not have the boards approval does not stand. The investments they were putting in the prospect amounted to Kshs 3 Billion. Such a large investments requires the boards approval and that of the share holders to protect their interest.

44. Further the interested party proceeded to purchase land with the approval of the 2nd respondent. They were in an area of 800 acres later reduced to a little over 500 acres due to this dispute. The procedure of such purchase was illegal and did not follow the laid down rule as required. I do not therefore believe that the interested party had held a lawful lease and would agree with the exparte applicant that this procedure as required had not been followed.

45. To compound matters, some of those they acquired, the land from, have filled court cases to challenge such sale. The Trust Land as acquired by the interested party is in effect null and, void and an illegality. This court has a right to intervene in the process between the 2nd respondent and the interested party.

46. I have been asked to compel the 1st respondent to issue a license. I do so herein and give the two prayers sought in this Judicial Review as per the Notice of Motion of 29.11.07 with costs to the exparte applicant to be paid by the interested party the 1 & 2nd respondent.

47. As to the court contempt herein I have been informed through the submissions that the interested party had deponed and made false declaration. 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.

48. The interested party denied on oath the validity of compensation agreements, later being the basis of the land sale agreements and that they had compensated the owners of the land. This was not a true declaration.

49. The declaration herein clearly indicates that the interested party are in contempt and I hereby find that they be held criminally liable under section 62 of the Trust Lands Act Cap 288.

50. I would order that they be accordingly charged with the said criminal misconduct under the said act.

In conclusions

51. I hereby grant the prayers as prayed in the Judicial Review to the exparte applicant with costs.

52 That contempt proceedings be taken out against the respondent interested party.

Dated this 25th day of February 2008 at Nairobi

M.A. ANG'AWA

JUDGE

- a). D. Oyatsi instructed by Shapley Barret & Co. Advocates for the applicant.
- b). J.A. Atadna instructed by the Attorney General for the 1st respondent, the district Commissioner
- c) G. Kithii instructed by M/s Madzayo Mrima & Co. Advocates for the defendant/respondent No.2 County Council of Kitui
- d) M. Nyaoga instructed by M/s Mohammed Muigai & Co. Advocates for the Interested Party.

[1] Supreme Court Practice Rules 1988 Ed Vol Page 797 Para 4

[2] [1947) 2 ALL ER680

[3] (1978) KLR 143

[4] Hccc1638/2004 Emukule J