



Kiswili (on own behalf and on behalf of 65 others) v Base Titanium Limited & 3 others (Petition 3 of 2021) [2022] KEELC 14558 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
PETITION 3 OF 2021
AE DENA, J
OCTOBER 27, 2022**

BETWEEN

MICHAEL KISWILI (ON OWN BEHALF AND ON BEHALF OF 65 OTHERS) PLAINTIFF

AND

**BASE TITANIUM LIMITED 1ST RESPONDENT
NEMA 2ND RESPONDENT
COMMISSIONER FOR MINES AND GEOLOGY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The application subject of this ruling is for review of this court’s ruling delivered on 4/5/2022 and for directions that this matter do proceed to full hearing on such dates as are convenient to the court. The application is premised upon grounds set on its face reiterated in the affidavit sworn on 17/6/2022 by Michael Kiswili.
2. It is the applicants case that the petition herein was filed on 22/3/2021 and hearing of the same had been set for 11th and 12th May 2022. That on 4/5/2022 this court stayed any further proceedings pending the determination of an appeal filed by the 1st respondent. The applicants aver that apart from filing the notice of appeal, the 1st respondent has not taken any action to proceed with the appeal. That the petition remains undetermined and the petitioners remain unprotected by the court while the respondents are protected by the stay orders. The court is asked to issue a specified time within which the 1st respondent should finalize their appeal. That the appeal touches on the applicant’s health and their constitutional right to a clean environment and which needs to be addressed on priority. The court is urged to review its orders as issued in the ruling delivered on 4/5/2022.



3. The 1st respondent filed a replying affidavit sworn by Melba Wasunna its Manager External Affairs. It is the 1st respondent's case that they were aggrieved with the court's ruling delivered on 10/2/2022 and hence filed a notice of appeal against the ruling on 15/2/2022. That in preparation of the record of appeal the 1st respondent requested the court to provide it with typed proceedings and a certified copy of the order. That the 1st respondent applied for stay of proceedings pending the hearing and determination of the appeal. That in its ruling delivered on 4/5/2022 the court allowed the said application and granted the stay of proceedings pending appeal.
4. The 1st respondent claims that they have not been supplied with the typed proceedings despite paying the requisite court charges. That it is impossible to proceed with the appeal until the said proceedings are availed. That based on the said facts the instant application has no merit.
5. The 2nd, 3rd and 4th respondents filed grounds of opposition to the application wherein they inter alia contended that: -
 - a. It is trite law that the 60-day rule of filing record of appeal is extended where request for typed proceedings from the court has been submitted in court and served upon the appellant.
 - b. Since the 1st respondent served parties with the letter requesting for typed proceedings, the notice of appeal was still in force. The court is functus officio until the court of appeal makes its final determination.
 - c. The applicant does not meet the grounds for review; there is no error or mistake apparent on the face of the record or discovery of new evidence and no sufficient reason have been presented to merit a review.
 - d. That this court's jurisdiction to review a judgement or order arises on the discovery of new and important matter or evidence, in the instant suit the said jurisdiction is nonexistent and cannot be invoked in the absence of new evidence.
 - e. The court is urged to dismiss the application dated 17/6/2022.
6. The application was argued by way of written submissions. The petitioners submissions are filed on 6/9/2022 and the 1st Respondents are filed on 19/9/2022 and which I have considered in my determination herein.

Analysis and Determination

7. The applicable law for review is section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#). Section 80 provides as follows:

“Any person who considers himself aggrieved: (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
8. Order 45 rule 1 sets out the grounds for review as follows:
 - a. “(1) Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could



not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

9. The 1st respondent vide an application dated 28/4/2021 sought for dismissal of the petition for want of jurisdiction. It was urged that pursuant to the provisions of Section 155[b] of the *Mining Act*, it is the Cabinet Secretary that has the powers to resolve the issues raised in the petition. The court in its ruling delivered on 10/2/2022 dismissed the application and ordered that the petition should proceed before this court. The 1st respondent filed a notice of appeal and by yet another Notice of Motion application dated 24/01/22 the 1st Respondent applied for stay of further proceedings in this case pending hearing and determination of an intended appeal against the said ruling and order of this court made on 10/02/2022. This court allowed the application in its ruling delivered on 4/05/2022.

10. The present application by the Petitioners seeks review of the said orders which stayed the proceedings in the petition and states that the appeal has not been prosecuted to date at the Court of Appeal and the court should therefore review the orders of stay earlier granted. The rules for grant of review orders as set out under order 45 of the *Civil Procedure Rules* are clear, the same have been aptly stated in *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR thus; -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

11. In comparison to the application and issues raised therein, it is clear that the applicants have not met the threshold for grant of the review orders sought. No new material and evidence has been presented before court for consideration. It is also noted that the applicants have not demonstrated any error apparent that the court may have made in grant of the orders of 4/5/2022. The main ground cited is that the 1st respondent has not set the appeal filed for hearing and was enjoying the protection of the stay orders when the petitioners were continuing to be exposed by the 1st respondents’ activities which calls for an expedited hearing of this petition. The 1st respondent on its part has stated that the appeal is pending before court due to the typed proceeding that are yet to be availed by this court.

12. I will concede at this juncture that indeed the proceedings have not been availed. This notwithstanding, my understanding is, the issue of typed proceedings is administrative to be handled by the court. The 1st respondent has played their part by applying and paying the requisite fees for the same. It is trite that the appeal cannot be set for hearing without the typed proceedings. This issue has been dealt with severally by the courts, the court has previously extended time and held that such a delay is not on the part of the party but the court and that this issue consists of facts beyond a party’s reach. In *Hassan Nyanje Charo v Khatib Mwashetani and 3 Others*, eKLR [2014] the court stated thus;-

“Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail. Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in



pursuit of his cause, but is impeded by the slow-turning wheels of the court's administrative machinery? We think not".

13. In the circumstances I find that the application dated 17/6/2022 has not satisfied the threshold for grant of orders for review and therefore lacks merit. I dismiss it with costs. I hereby make further orders that the proceedings be supplied without further delay but not later than 31st October 2021.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 27TH DAY OF OCTOBER, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Gathuku for the Petitioners/Applicant

Ms. Akello H/B for Mr. Oyatsi for the 1st Respondent.

Mr. Waga for the 3rd and 4th Respondents

Mr. Denis Mwakina- Court Assistant.

