



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

Misc. Appli. 1152 of 2007

REPUBLIC.....APPLICANT

V E R S U S

THE COMMISSIONER OF MINES & GEOLOGY..... 1ST RESPONDENT

THE NATIONS ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

AND

TILE & CARPET CENTRE LIMITED..... INTERESTED PARTY

EX-PARTE

CARBACID (CO2) LIMITED..... APPLICANT

R U L I N G

Before me is a Chamber Summons dated 22nd October, 2007 filed by M/s S. Musalia Mwenesi Advocates for the applicants, who are named as **CARBACID (C02) LIMITED**. The respondents are named as **THE COMMISSIONER OF MINES AND GEOLOGY (1st respondent)** and **THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (2nd respondent)**. There is also a named interested party in the name of **TILE & CARPET CENTRE LIMITED**.

The application was filed on 27th October, 2007. It was brought under Order 53 rules 1 and 2 of the Civil Procedure Rules, Cap. 21 subsidiary Legislation. The substantive prayers in the application are prayers 2 and 3 as follows-

2. *Leave is granted ex-parte to the Applicant to apply for judicial review and for the orders of –*
 - (i) *Certiorari to quash the proceedings of the Commissioner of Mines and Geology, the 1st Respondent, leading up to and including decisions to issue Gazette Notice No. 3815 of 2007 dated 4th April, 2007 and published in the Kenya Gazette on 27th April, 2007 and the letter Ref. No. EPL/692/(22) dated 22nd August, 2007 relating to an application for an exclusive prospecting licence in Kereita Forest by Tile and Carpet Centre Limited, the Interested Party;*
 - (ii) *Prohibition to prohibit the Commissioner of Mines and Geology, the 1st Respondent, from further considering, if an exclusive prospecting licence has not already been issued to Tile & Carpet*

Centre Limited for Kereita Forest, the application for the exclusive prospecting licence by Tile & Carpet Centre limited referred to in Gazette Notice No. 3815 of 2007.

(iii) ***Certiorari to quash the letter Reference No. NEMA/PR/5/2/2228 dated 18th July, 2007 and addressed to the Director, Tile and Carpet Centre Limited, the interested party, by the National Environment Management Authority, the 2nd Respondent being “Approval and Conditions for Approval of Environmental Impact Assessment Project Report for Proposed Kereita Forest Carbon Dioxide Exploration.”***

(iv) ***Mandamus directed at the Commissioner of Mines and Geology, the 1st Respondent, to revoke Gazette Notice No. 3815 of 2007, the Gazette Notice having been issued without proper or adequate basis or foundation in law and in fact.***

(v) ***Mandamus issued directing the Commissioner of Mines and Geology, 1st Respondent, to do the duty under common law and the mining Act, Chapter 306 of the Laws of Kenya and observe the law and the rules of natural justice affecting the Applicant, Carbacid (Co2) Limited, in considering applications for exploration and mining of carbon dioxide in the Kereita Forest, Kiambu District;***

(vi) ***Costs***

3. Leave granted to apply for the orders of certiorari and prohibition shall operate as a stay of

(i) ***the decisions and the proceedings of the Commissioner of Mines and Geology, the 1st Respondent, leading up to and including decisions to issue Gazette Notice No. 3815 of 2007 dated by the Commissioner on 4th April, 2007 published in the Kenya Gazette on the 27th April, 2007 and the letter Ref. No. EPL/692/(22) dated 22nd August, 2007 relating to an application for an exclusive prospecting licence in Kereita Forest by Tile and Carpet Centre Limited, the Interested Party;***

and

(ii) ***the decision of the Commissioner of Mines and Geology, the 1st Respondent, to further consider an exclusive prospecting licence for Tile & Carpet Centre Limited for Kereita Forest under the application for the exclusive prospecting licence by Tile & Carpet Centre Limited referred to in Gazette Notice No. 3815 of 2007.***

The application has grounds on the face of the Chamber Summons. The application was filed with a **STATEMENT**, which contains, *inter alia*, the grounds and reliefs sought. It was also filed with a **VERIFYING AFFIDAVIT** as required by law. The **VERIFYING AFFIDAVIT** was sworn by **SANDIP BHADURI**, described as the General Manager of the applicant, on 19th October, 2007.

Though this was an ex-parte application, the court on 24th October, 2007 ordered that it be served for inter partes hearing. As a consequence, appearances were entered and responses and objections filed.

At the hearing, Mr. Mwenesi, for the applicant submitted that the objections filed were with respect to form. The cases relied upon such as the case of ***FARMERS BUS SERVICE AND OTHERS -VS- THE TRANSPORT LICENSING APPEAL TRIBUNAL [1959] E.A. 779*** did not decide that a defect on the face of the Chamber Summons rendered the application fatally defective. Counsel submitted that it had been held by the court in cases such as the case of ***GITHUNGURI -VS- REPUBLIC Criminal Application No. 279 of 1985***, that matters of form are not paramount in judicial review proceedings.

Counsel submitted that they had highlighted, in the documents filed, the powers of the Commissioner of Mines under the Mining Act (**Cap. 306**). Counsel submitted that under Section 18 of the Act, the Commissioner's function was to receive applications for permits such as exclusive prospecting licences, for minerals. Counsel submitted that the application by M/s Tiles and Carpets Ltd. was considered *ultra*

vires the provisions of the Act. That was why the applicant had made this application for leave to file proceedings for the review of the proceedings and decision relating to the subject-Gazette Notice. Counsel emphasized that there was a need for the court to examine the whole matter. Counsel contended that the Commissioner appeared to have relied on section 17 (1) (d) of the Act, which does not exist.

Counsel contended that the applicant already had exclusive rights in the area where rights are purportedly being conferred on Tile and Carpet Centre Ltd. Counsel argued that the Commissioner could not purport to be attempting to get information from the interested party, on natural gas, as the Commissioner already had that information way back since 1957.

Counsel also submitted that the applicant was not consulted with regard to the Environmental Impact Assessment Report done by the second respondent. Counsel emphasized also that the interested party is not a prospective rights holder, and should therefore not be granted a special licence. Counsel relied on the documents filed, as well as its skeleton arguments.

Mr. Menge, for the 1st respondent, relied on the grounds of objection filed as well as skeleton arguments.

Counsel submitted that Order 53 of the Civil Procedure Rules had some mandatory provisions. Counsel argued that under the rules, decisions cannot be challenged through certiorari outside the mandatory period of 6 months from the date of the decisions or orders made. Counsel argued that the subject Gazette Notice was published on 4/4/2007, and this present application was filed on 22nd October, 2007, outside the mandatory period of 6 months. Counsel asked the court to peruse section 9(2) of the Law Reform Act (**Cap. 26**). Counsel also contended that several cases had dealt with the subject of the lapse of 6 months, including the case of **REPUBLIC -vs- COMMUNICATIONS COMMISSION OF KENYA – EX-PARTE EA TELEVISION NETWORK LTD – Civil Appeal, No. 175** of 2000 in which, the Court of Appeal decided that the 6 months period was mandatory.

Mr. Menge also argued that orders of prohibition were not available, as the acts complained of had already occurred. In addition, the applicant did not follow the due process of the law as provided for under section 93 of the Act, which allows an appeal to the Minister from Commissioner's decision. Counsel contended that in bringing of this application, the applicant was abusing the court process.

Mr. Ojiambo for the 2nd respondent, submitted that they had filed a notice of preliminary objection with regard to the form of the application. Counsel submitted that the **REPUBLIC** should not be listed as the applicant in the Chamber Summons for leave. Counsel sought to rely on the case of **FARMERS BUS SERVICE (supra)**. Counsel also sought to rely on the case of **SALATON OLE KOILEL -VS- DISTRICT LAND REGISTRAR NAKURU – HC Misc. Application NO. 844 of 2003 (unreported)**. Counsel also submitted that the said error could not be amended, and relied on the case of **NDETE –VS- THE CHAIRMAN LAND DISPUTES TRIBUNAL (2002) IKLR 392** for the contention that this court should not allow amendment of the error.

Counsel submitted further, that the application was opposed on the ground that the applicant had not established a *prima facie* case, in that the applicant had not shown the procedure that the 2nd respondent was required to follow and what factors were to be considered. Counsel submitted that the 2nd respondent had complied with the regulations made by the Minister. Counsel urged the court to dismiss the Chamber Summons.

Mr. Ohaga for the interested party, submitted that he would avoid repeating what counsel for respondents had stated. Counsel submitted that the burden was squarely on the applicant to satisfy the court that leave be granted.

Counsel argued firstly; that the format of the application has to conform with legal requirements. Secondly, the application for leave to apply for orders of certiorari has to be done within 6 months. Counsel contended that the date of Gazettement was not the date of decision, and the time should not be confused. Counsel contended that from the contents of the verifying affidavit, it was clear that the

applicant knew of the decision way back on 25/5/2007. In addition, the order for prohibition sought is for prohibition against further considering. Counsel contended that the Commissioner had already made a decision and was not in the process of considering anything. On the orders of mandamus, counsel contended that it was not Commissioner's legal duty to revoke the Gazettement. Counsel sought to rely on the case of ***REPUBLIC –VS- DISTRICT COMMISSIONER KIAMBU (1960) E.A. 109*** – that mandamus required the performance of a positive duty.

Counsel lastly, argued that the applicant wanted the Judicial Review court to consider the merits of a decision which affected the commercial interests of the applicant, not the process. Counsel emphasized that judicial review was concerned with the process rather than the merits.

In response, Mr. Mwenesi submitted that the date of publication of the Gazette Notice is the date which should be taken into account. The Gazette notice in fact had a time frame for challenging the decision. Therefore this application was filed within time allowed by law.

Counsel agreed that judicial review was concerned with the process, and that was why the applicant wanted to be granted leave to challenge the process adopted by the respondents. In any case, section 67 of the Mining Act, confers jurisdiction on this court to deal with the matter.

I have considered the application, documents filed, objections, written and verbal submissions, as well as the authorities cited to me.

Several authorities have been relied upon, and extensive submissions made before me. This being an application for leave to file judicial review proceedings, I am not at this stage required to go into the merits of the application. That is reserved for the hearing of the Notice of Motion, if leave is granted. This application, which ordinarily is an ex-parte application, has been argued strenuously because it was served and heard inter-partes.

The first objection is that the application does not conform to the format of the Chamber Summons for leave, in that the **REPUBLIC** is the applicant. An application for leave to file judicial review proceedings has to be brought by way of an ex-parte application, as provided for under Order 53 rule 1 (2) of the Civil Procedure Rules. Such an application has to be by way of Chamber Summons. Several court cases have dealt with the matter, and the most cited case is the case of **FARMERS COOPERATIVE SOCIETY (supra)**. It is also brought in the name of the applicant, not in the name of the **REPUBLIC**.

In our present case, the application was brought by way of a Chamber Summons. However, it was brought in the name of the **REPUBLIC** and not the applicant. The applicant's name is mentioned in the application, though, and is clearly named as **APPLICANT. THE REPUBLIC** is designated "**IN THE MATTER OF THE REPUBLIC.**"

In my view, the error in the format of the application was an error of form rather than substance. If the application was brought by way of a Notice of Motion, I would have no hesitation but to strike it out as incompetent. If the applicant was not named therein as **APPLICANT**, I would also not hesitate to strike it out as defective. In the case of **FARMERS COOPERATIVE SOCIETY (supra)** the format of the application for leave and the main motion were clearly spelt out. However, since the present application was filed by way of Chamber Summons, and the applicant is clearly listed therein as the "**APPLICANT.**" I am of the view that the inclusion of "**THE REPUBLIC**" was an error of form; which could be cured in the interests of justice. In my view it was not fatal to the application. I overrule that objection.

The second objection is that the applicant did not file the application for leave within 6 months as required by law. I will also overrule this objection. Firstly, the date of a decision to any party has to be the date when he can be taken to know that decision. If a decision is made in secret, in my view, the time does not begin to run. Secondly, for anything that is published in the Kenya Gazette, the date of such publication is the date of presumed knowledge to the public. It is not in dispute that the publication was on 27th April, 2007. The Chamber Summons was on the other hand filed on 22nd October, 2007. This

was in my view, within 6 months. In addition, Order 53 rule 2, in my view applies only to judgments, orders, decrees, convictions or other proceedings, not decisions made outside proceedings. It is not clear to me at this stage whether there were proceedings in the form of activities with a set procedure, or the settlement of a dispute. It is instructive to note that rule 2 above arises from section 9(2) and (3) of the law Reform Act (**Cap. 26**), which puts a limitation of 6 months in specified situations only. Therefore, I dismiss the objection on statute time bar of the Chamber Summons.

The other arguments in opposition to the application appear to go to the merits of the application, rather than whether the applicant has a sufficient interest and whether he has a *prima facie* arguable case. These later two are the considerations to be taken in an application for leave to file judicial review proceedings. It is not in dispute that the Commissioner of Mines and the National Environment Management Authority were exercising statutory functions, and that it is the exercise of those functions that are sought to be challenged. In view of this, I will grant leave to file judicial review proceedings.

The applicant has also asked for stay orders. This matter appears to be a complex matter in which decisions made and correspondences have been exhibited in documents filed. Having considered the surrounding circumstances of this matter, I am of the view that if stay orders are not granted the applicant will suffer great prejudice.

Consequently and for the above reasons, I order as follows-

1. ***I find that the application is not fatally defective.***
2. ***Leave is granted for the applicant to file judicial review proceedings for certiorari, prohibition and mandamus as requested in prayer 2 of the application. The main motion will be filed and served within ten (10) days from today, and in default the leave herein granted will automatically lapse.***
3. ***The leave above granted will operate as a stay of the decision of the 1st respondent contained in Gazette Notice No. 3815 of 2007 dated by the Commissioner on 4th April, 2007 and published in the Kenya Gazette on 27th April, 2007 and the letter Ref. No. EPL/692/ (22) dated 22nd August, 2007 relating to an application for an exclusive prospecting licence in Kereita Forest by Tile and Carpet Centre Limited, the interested party; and a stay of any further consideration by the 1st respondent of an exclusive prospecting licence for Tile & Carpet Centre Limited for Kereita Forest under the application for the exclusive prospecting licence by Tile & Carpet Centre Limited referred to in Gazette Notice No. 3815 of 2007, pending the hearing and determination of the judicial proceedings herein. Provided that the main motion is filed and served within ten (10) days from today, in default the stay hereby granted will automatically lapse.***
4. ***Costs will follow the decision in the main motion.***

Dated and delivered at Nairobi this 28th day of October, 2008.

George Dulu

Judge.

In the presence of-

Mr. Mwenesi for Applicant.

Mr. Menge for 1st respondent.

Mr. Ojiambo for 2nd respondent.

Mr. Ohaga for interested party- absent.