



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Appeal 61 of 2004

From Original Busia SRM Civil suit no.333 of 2004

AET MINERALS LTD.....1ST APPELLANT

STATION JAMBO SAFARIS.....2ND APPELLANT

DOMINIC OTIENO alias KABILA.....3RD APPELLANT

VS

KENNEDY LUMBUKU T/A WAMBUKA FREIGHTERS.....RESPONDENT

RULING

By an application dated 17th January 2006, the applicant seeks orders that:

1 That the application be certified as urgent

2 That the Honourable Court do extend time within which the 2nd appellant may deposit security in terms of the order issued by the Hon. Justice J. K. Serگون on 3rd November 2004.

3 That the order of Hon. Mr. Justice J. K. Serگون staying execution of the orders in Busia SRMCC no.333 of 2004 by the Resident magistrate Hon. J. Ndururi pending the hearing and determination of the appeal be reinstated upon deposit of security by the 2nd appellant.

4 That there be a stay of proceedings in Busia SRMCC no.333 of 2004 pending the interpartes hearing of the application.

The application is predicated upon the annexed affidavit of SETH OJIENDA and on the grounds:

(a) That the order issued by the Hon. Mr. Justice J. K. Serگون has since lapsed.

(b) That the Principal Director of the 2nd Appellant who is a resident of the Democratic Republic of Congo and the instructing client has been out of the jurisdiction of his Hon. Court for the last 10 months.

(c) That the lower Court file from which this current appeal arose being Busia SRMCC no.333 of 2004 has since been active to-date and it is coming up for hearing on 24th February 2006.

(d) That the second appellant is now willing to deposit the security as ordered by Hon. Mr. Justice J. K. Serгон.

(e) That it would be fair and just that the said security be deposited and the stay orders of Hon. Mr. Justice J. K. Sergon be reinstated to enable the 2nd appellant to execute his appeal.

(f) That the 2nd appellant is willing and ready to abide by the conditions of the Honourable Court.

The application was certified as urgent on 19th January 2006. It was then fixed for hearing inter-partes on 26th January 2006.

According to the affidavit of service sworn by Hudson Chongo, a process server of the Honourable Court, on 28th day of January 2006, service was duly effected on the firm of Oye Ashioya & Co. advocates in Busia on 23rd January 2006.

On the face of the application, there is an endorsement that reads:

“Received under protest. Date not suitable.

1) *Our Mr. Ashioya shall be engaged before the Judge at Kakamega in HCCA 26/00.*

2) *Notice to short to contact our client.”*

Notwithstanding the protest M/S Oye Ashioya and Co. advocates put in grounds of opposition dated 26th January 2006 and thereby waived their protest.

In addition thereto this court takes judicial notice of the fact that as at 26th January 2006 the Resident Judge at Kakamega had not reported to the station hence there could be no hearings proceeding in Kakamega High court that would hold Ashioya & Co. advocates. I therefore read mischief on the part of the said advocates.

In the light of the waiver as aforesaid and lack of representation on the part of the firm of Oye Ashioya & Co. Advocates, I granted the applicant leave to proceed ex-parte.

The applicant, through counsel, relied on the affidavit sworn on 17th January 2006 annexed to the application and emphasized paragraphs 2 – 8 thereof.

I have carefully analysed the said affidavit. In the absence of evidence to controvert that of the applicants, I am constrained to accept the evidence in support of the application in its entirety.

Accordingly, the application is granted in terms of prayer 2, 3 and 4 thereof. The security to be deposited within seven (7) days from the date hereof.

Dated at Busia this 30th day of January 2006.

N. R. O. OMBIJA

JUDGE