



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Suit 990 of 1999

KUTIMA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

MUTHONI KIHARA.....1ST DEFENDANT

COMMISSIONER FOR MINES AND GEOLOGY...2ND DEFENDANT

RULING

By its Chamber summons of the 9th May 2005, the Applicant seeks temporary injunction in terms of prayers 3, 4, 5, and 6 as follows:

3. That the Honorable Court be pleased to issue a temporary injunction against the 1st Defendant, her servants, employees, agents and/or others claiming through her restraining her and/or her servants, employees, agents and/or others claiming through her and/or any of them from entering upon and/or remaining upon the Plaintiff's land known as Land Reference Number 12199/4, Tiata Taveta pending the hearing and determination of this application.

4. That the Honorable Court be Pleased to issue a temporary injunction against the Second Defendant restraining him, his officers, employees, servants and/or agents and/or any other person acting under him or vide any power and/or authority vested in him by law and/or any of them from issuing and or purporting to issue any prospecting and/or mining rights and/or licenses to the 1st Defendant and/or any other person over the Plaintiff's land known as Land reference Number 12199/4 Tiata Taveta and /or any other without complying with the provisions and/or requirements of the law for example the Mining Act (Cap 306) and particularly to restrain him from doing so without the consent of the Plaintiff pending the hearing and determination of this application.

5. That the Honorable Court be pleased to issue a temporary injunction against the 1st Defendant and/or her servants, employees, agents and/or others claiming through her restraining her and/or her servants, employees, agents and/or others claiming through her and/or any of them from entering upon and/or remaining upon the Plaintiff's land known as Land Reference Number 12199/4 Taita Taveta, pending the hearing and determination of the Plaintiff's intended appeal to the Court of Appeal.

6. That the Honourable Court be pleased to restrain the 2nd Defendant his officers, employees, servants and/or agents and any person acting under him or vide any power and/or authority conferred upon him by the law and/or any of them issuing or purporting to issue any prospecting and/or exclusive prospecting and/or mining rights and/or licenses to the 1st Defendant and/or any person over the Plaintiff's land known as Land Reference Number

12199/4 Taita Taveta, without complying with the provisions and/or requirements of the law for example the Mining Act (Cap 306) and particularly to restrain him from doing so without the consent of the Plaintiff pending the hearing and determination of the Plaintiff's intended appeal to the Court of Appeal.

Mr. Kayai for the 1st Respondent took a preliminary objection that the court had no jurisdiction to grant these orders.

The Applicant wishes to appeal against the ruling of Mr. Justice Kariuki dated the 26th of April 2005 in which he struck out the Plaintiff's suit herein on the grounds that the relief claimed in the suit could not be granted in respect of the 1st Respondent because the same was time barred. As against the 2nd Respondent the suit was struck out because the suit was both time barred under the provisions of the Section 3 (1) of the Public Authorities Limitation Act and the relief claimed could not be granted as Section 13A of the Government Proceedings Act had not been complied with. Also because an injunction relief cannot lie against the government by virtue of the provisions of Section 16 (1) of the Government Proceedings Act

Mr. Kayai submitted that:

1. The suit having been struck out there was no jurisdiction to grant an injunction.
2. A similar application seeking a stay under Rule 5 (2) (b) of the Court of Appeal Rules had been made.

Mr. Rotich for the 2nd Respondent adopted Mr. Kayai's submissions and also relied on Section 16 (2) of the said Act and submitted that to grant the relief would be tantamount to sitting on appeal against the said Ruling.

In Response, Mr. Rachuonyo submitted the jurisdiction of the Court to grant an injunction was to preserve the subject matter of the suit pending an appeal. He relied on **Erinford Properties Ltd Vs Cheshire County Council [1974] 2 All ER 448** in which Megarry J having declined to grant an interlocutory injunction granted an injunction to restrain the same pending the hearing of the appeal. He cited with approval a passage from the judgment of Pennycuik J in **Orion Property Trust Ltd V Duncane Court Ltd [1961] 3 All ER 466** at page 471 where he stated as follows:

“The Court of first instance has jurisdiction to make an order preserving the subject matter of the action in the appeal, even though the action has wholly failed.”

The decision of Megarry J in this case cited above has always been accepted as good law and I have no doubt that this court has jurisdiction to make the orders sought if the merits of the case allow it.

With regard to Mr. Rotich's submission that no injunction can issue against the Government, I accept this, but the Act gives the court jurisdiction to make a declaration. For the reasons given I dismiss the preliminary objection and will deal with the application on its merits.

DATED and DELIVERED at NAIROBI on 25th MAY 2005

P.J RANSLEY

JUDGE