



REPUBLIC OF KENYA



Mbiriri v Cabinet Secretary Ministry of Petroleum and Mining (Environment and Land Appeal 2 of 2021) [2024] KEELC 1176 (KLR) (4 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 2 OF 2021**

JA MOGENI, J

MARCH 4, 2024

IN THE MATTER OF AN APPEAL UNDER SECTION 157 OF THE MINING ACT, 2016 FROM THE DECISION OF THE CABINET SECRETARY MINISTRY OF PETROLEUM AND MINING REVOKING THE SPECIAL LICENCE OF JOSEPH KAMAU MBIRIRI CONTAINED IN GAZETTE NOTICE NUMBER 5720 OF THE KENYA GAZETTE DATED 11/06/2021

BETWEEN

JOSEPH KAMAU MBIRIRI APPELLANT

AND

THE CABINET SECRETARY MINISTRY OF PETROLEUM AND MINING RESPONDENT

JUDGMENT

Introduction

1. This is an appeal from the decision of the Cabinet Secretary Ministry of Mining to revoke the Appellant's Special Licence Code PL/2018/0188 formerly Special Licence No. 194 through Gazette Notice No. 5720 dated 11/06/2021.
2. On 1/04/1998, the Commissioner of Mines and Geology (hereinafter referred to only as "the Commissioner") pursuant to the powers that were conferred upon him by Section 17(2) (b) of the *Mining Act*, Chapter 306 Laws of Kenya (now repealed) granted to the Appellant Special Licence No. 194 (hereinafter referred to as "the licence") which gave the Appellant full and exclusive liberty and licence to prospect, explore and mine for precious and non-precious minerals for a term of two (2) years in or under an area of approximately 250. sq. km consisting of Blocks A and B situated in Kuraze, Kwale District on terms and conditions that were set out in the said licence.



3. Through Gazette Notice No. 5720 dated 11/06/2021 purportedly issued pursuant to Section 27 of the *Mining Act*, Chapter 306 Laws of Kenya (now repealed) (hereinafter referred to only as “the Act” where necessary) the Cabinet Secretary for Mining ((hereinafter referred to as “the Respondent”) revoked the Appellant’s licence on the ground that the same was expired. The Appellant challenged the Respondent’s decision to revoke its licence through this Application.
4. The Appellant challenged the decision of the Respondent to revoke its licence on the following grounds:
5. In its Memorandum of Appeal, the appellant urged the court to set aside the said decision by the respondent and to provide for the costs of the appeal.
6. The Respondent did not oppose the Appeal. The Court directed that the Appeal is argued by way of written submissions. By the time of writing this Judgment, the Appellant had not duly submitted.
7. That notwithstanding the appeal is before me and indeed the dispute is properly filed. Therefore, what I need to determine in the appeal before the court is whether the Respondent acted lawfully in revoking the Appellant’s licence. Special condition no. 26 of Special Licence No. 194 (“the licence”) provided for the termination of the licence on the following terms:

“If and so often as the said fees reserved and made payable to the Commissioner or any of them or any part thereof shall be in arrears or unpaid for thirty (30) days after the same shall respectively be payable (whether the same shall have been legally or formally demanded or not) or if the Licensee shall have made default in observing or performing any of the covenants, provisions or conditions herein contained and on its part to be observed or performed or if the Licensee shall enter into liquidation whether compulsorily or voluntarily, (not being a voluntary liquidation solely for the purpose of reconstruction) then and in any case it shall be lawful for the Commissioner by any instrument under his hand and seal duly notified to the Licensee to determine the several liberties licences and powers hereinbefore granted to the Licensee and thereupon this present Special Licence or grant and the liberties, licences and powers hereinbefore granted every clause and thing therein contained shall absolutely cease to determine and become void but without prejudice to any right of action or remedy which shall have accrued to the Commissioner in respect of any breach of any covenants or provisions contained herein.”[Emphasis mine].

8. On the other hand, Section 147 of the *Mining Act*, (now repealed) (the Act) provides as follows:
 - (1) The Cabinet Secretary, on the recommendation of the Mineral Rights Board, may suspend or revoke a mineral right if the holder-
 - a. fails to make a payment required under this Act on the due date;
 - b. fails to comply with any condition specified in the right or an obligation placed on the holder by this Act, or fails to take the action required by the Cabinet Secretary to be taken in accordance with subsection (3);
 - c. commits an offence under this Act;
 - d. makes or is found to have made a false statement in the application for the grant or renewal of the mineral right; or
 - e. is adjudged bankrupt or in the case of a company it is declare insolvent.



- (2) The Cabinet Secretary may suspend or revoke a prospecting or mining permit if the holder does not commence prospecting or mining operations under the permit in accordance with the approved work programme or programme of mining operations.
 - (3) Before suspending or revoking a mineral right in accordance with subsection (2), the Cabinet Secretary shall give the holder a written notice requiring him -
 - a. to comply with the condition or obligation within a reasonable period of time; or
 - b. to show cause, within that period, as to why the mineral right should not be suspended or revoked.”
9. Further, Section 173 of the Act also provides as follows:
 - (1) The Cabinet Secretary may suspend or revoke a licence or permit granted under this Part if the holder -
 - a. fails to make a prescribed payment by the due date;
 - b. fails to comply with a condition specified in the licence or an obligation imposed on the holder by this Act and fails to take action to remedy a breach within a reasonable time;
 - c.
 - d.
 - e.
 - f. ...
 - g.
 - h.
 - (2) Before suspending or revoking a licence or permit under subsection (1) the Cabinet Secretary shall give the holder of the licence or permit written notice requiring the holder –
 - a. to comply with the condition or obligation within a reasonable period of time; or
 - b. where this is not possible, to show cause within that period, why the licence should not be suspended or revoked.”
10. In summary, the Act provides that in the event of any breach by the holder of a licence of any of the terms and conditions of the licence or any of the provisions of the Act or any of the regulations, the Respondent is supposed to call upon the licensee to show cause within a specified time why his licence should not be revoked and if no response is received to the notice within the prescribed time or the cause shown is in the opinion of the Respondent inadequate, the Respondent may proceed to revoke the licence.
11. Special condition No. 26 of the licence which I have reproduced above is subject to the foregoing section of the Act. Section 147 and 173 of the Act provides for the procedure to be followed before a licence is revoked. According to the Gazette Notice through which the Appellant’s licence is revoked, the revocation was undertaken on the ground that the Appellant’s license had expired. The revocation was purportedly carried out under Section 147 of the Act and further to the public notice appearing both in the Daily Nation and the Standard Newspapers of 12/02/2021. The question before me therefore is whether the Appellant’s notice was revoked after due process.



12. The Respondent has not opposed this Appeal or filed a response to the Appeal despite being served. There is an Affidavit of service dated 16/10/2023 confirming that the Respondent was duly served with the Appeal and subsequent mention notices for directions on dispensing of the Appeal. The Respondent was served both on 21/09/2023 and on 2/10/2023. The documents were received, signed and stamped.
13. There is no evidence before me demonstrating that the Respondent complied with the provisions of Section 147 of the Act before revoking the Appellant's licence. There was no evidence before me that the Appellant was called upon to show cause why its licence could not be revoked before the same was revoked. Article 47 of *the Constitution* of Kenya guaranteed the appellant a right to a reasonable and fair administrative action. By failing to comply with the provisions of Section 147 of the Act which provided for the application of the rules of natural justice while revoking the Appellant's licence, the Respondent violated the Appellant's right to a fair administrative action and protection of the law.
14. Due to the foregoing, it is my finding that the revocation of the appellant's licence through Gazette Notice No. 5720 published on 11/06/2021 was unlawful. I therefore allow the appeal and set aside the said revocation. The Appellant's Licence code PL/2018/0188 formerly Special Licence No. 194 is reinstated unless otherwise lawfully terminated. The Appellant shall have the costs of the Appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH 2024.

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MOGENI J

JUDGE

In the virtual presence of: -

Ms. Sultani holding brief for Mr. Gaita for the Appellant

None appearance for the Respondent

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

