



**Kiswili (on own behalf and on behalf of 65 others) v Base Titanium Limited & 3 others (Petition 3 of 2021) [2022] KEELC 168 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 168 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
PETITION 3 OF 2021**

**AE DENA, J  
MAY 4, 2022**

**BETWEEN**

**MICHAEL KISWILI ..... PLAINTIFF  
ON OWN BEHALF AND ON BEHALF OF 65 OTHERS**

**AND**

**BASE TITANIUM LIMITED ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT  
COMMISSIONER FOR MINES AND GEOLOGY ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By way of a Notice of Motion application dated 24<sup>th</sup> January 2022 the applicant who is the 1<sup>st</sup> Respondent herein seeks for stay of further proceedings in this case pending hearing and determination of an intended appeal against the ruling and order of this Court made on February 10, 2022. The applicant also prays that costs of this application be provided.
2. The Applicant relies on the grounds that the said ruling which was to the effect that this court has jurisdiction to hear and determine disputes arising from the *Mining Act* is wrong. The Applicant pointed that they had filed a notice of appeal challenging the jurisdiction of the court and the impending hearing of the Petition scheduled on 11<sup>th</sup> and 12<sup>th</sup> May 2022 should not take place. That it will be in the interest of justice to have the Court of Appeal conclusively deal with issues concerning jurisdiction of the High Court to determine disputes arising under the *Mining Act*.
3. The Notice of Motion is supported by the affidavit of Simon Wall the General Manager-External Affairs of the 1<sup>st</sup> Respondent. It is deposed that pursuant to the ruling there exists two conflicting



decisions on the interpretation of the *Mining Act* with regards to ELC original jurisdiction to determine disputes arising from the said Act.

### **1<sup>st</sup> Respondents Reply**

4. In opposition to the application the Respondent relies on the replying affidavit sworn by Michael Kiswili on March 3, 2022. It is stated that the application had been made in bad faith and is calculated at obstructing the timeous determination of the Petition. It was alleged that the appeal was an afterthought since the Applicant was represented during delivery of the ruling and participated in the fixing of dates for the hearing of the Petition without raising any objection or hint on intention to appeal. That the issue as to jurisdiction arises out of the 1<sup>st</sup> Respondent deliberate mis interpretation of the provisions of the *Mining Act* and the ratio decidendi in Petition 39 of 2019 relied on to impugn the ruling. It is deposed that even if the hearing of this Petition proceeded as per the directions of the court, the applicant would still enjoy its rights to appeal of the final judgement.

The 4<sup>th</sup> Respondent on its own behalf and for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent supported the application herein by filing submissions.

### **Submissions**

5. The parties agreed to have the application canvassed by way of written submissions.

### **Applicants submissions**

6. The Applicant's filed submissions on March 11, 2022. It was submitted that the intended appeal had strong chances of success. Counsel contended in the ruling of February 10, 2022 this court relied heavily on Justice Yano's ruling in Petition No. 39 of 2019 *Peter Nzeki & 14 others v Base Titanium Limited & 4 others* [2021] eKLR which was given at interlocutory stage. Subsequently on 25<sup>th</sup> February 2021 the said court delivered judgement in the matter where the position taken in the ruling changed based on binding decisions of the Court of Appeal on the subject. That this court failed to consider Justice Yano's final decision which provided the answers to the issues of procedure of alternative jurisdiction which this court dealt with in its ruling. That the errors made by the court in the ruling of February 10, 2022 were evident and needed to be corrected on appeal.
7. Further arguments raised by the Applicant were that it was clear from the court of Appeal decisions cited in the said judgement, if alternative jurisdictions were to be ignored and this court assumes original jurisdiction, this would defeat the objectives of Article 159[2] of *the constitution* and the *mining Act* which resonated with *the Constitution* on alternative means of resolution. The said decisions are *Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & another.* [2015] eKLR and *Geoffrey Muthinja & Ano. Vs. Samuel Muguna Hernry & 1756 others* [2015] eKLR. That had this court considered the judgement it would have come up with a different conclusion and upheld the Application subject of the impugned ruling.
8. Based on the foregoing Counsel urged that the intended appeal had strong chances or probabilities of success based on the law particularly Article 159(2) of *the Constitution.*
9. It was also submitted the intended appeal would be rendered nugatory if stay is not granted. Citing the court of appeal decisions referred by Justice Yano counsel posited that the court ought not disregard *the Constitution* and such action would be a nullity.

The Applicant prayed for the application to be allowed as prayed.



## Petitioners arguments

10. The Petitioners filed their submissions on March 21, 2022. The contents of their replying affidavit were reiterated in the submissions. The Petitioners also adopted the petitioner's submissions filed in response to the 1<sup>st</sup> Respondent Notice of Motion dated April 28, 2022(sic). They prayed for the application to be struck out. Counsel urged the instant application was an afterthought aimed at delaying the expeditious disposal of this Petition contrary to Article 159(2) of *the Constitution* which states that justice shall not be delayed. That the rights will continue being denied even before the same are determined by filing unnecessary appeal. Relying on the court of appeal decision in *Peter Kamau Njuguna v Stephen Mugichu & 3 others* Civ. Appeal 186 of 2003 [2011] eKLR it was submitted that this court having made a finding of fact based on the evidence in the Petition it cannot be challenged on appeal. In addition, it was submitted that the issues in Petition No 39 of 2019 were different from the ones in the Petition before this court. That in the former, the main issue for determination was compensation and relocation of the Petitioners therein while issues in the instant petition were for the abuse of the Petitioners right to a clean and healthy environment. Counsel adopted its submissions dated July 13, 2021 to buttress this point.

## The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents arguments

11. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their submissions on 14<sup>th</sup> March 2022. The same were made in support of the application. It was submitted that the application was merited and the orders sought ought to be granted on grounds that; the petition questions the validity and procedure of issuing an EIA, orders for environmental restoration against the 1<sup>st</sup> Respondent and cancellation of the mining licence issued by the 3<sup>rd</sup> Respondent. That the said procedure for the said processes have been outlined in the EMCA Act and the *Mining Act* and are not a preserve of this court. That the application is merited as it seeks orders which this court has power to issue as per Order 42 Rule 6 of the *Civil Procedure Rules*. That the appeal had chances of success and hence the application should be allowed.

## Analysis and Determination

12. I have considered the application and the grounds and prayers sought. I have also considered the response thereto and the submissions of all parties. The main issue for determination is whether the 1<sup>st</sup> Respondent/applicant has met the threshold for grant of orders of stay of proceedings pending appeal. The application is brought under the provisions of Order 51 Rule 1, Order 42 Rule 6(1) of the *Civil Procedure Rules 2010* and Section 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya.

Order 42, rule 6. (1) provides as follows; -

‘No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.’

13. The instant application has been prompted by the ruling of this court. In the said ruling this court based its findings on the main issue for determination and which was on the Petitioner's rights to a



clean and healthy environment. On this ground it was the court's view that it has the jurisdiction to determine the petition. This court also relied on the ruling cited herein to buttress this point. Counsel contends that subsequently the Learned judge rendered a judgement in the matter where his position changed which if this court had considered would have found it did not have jurisdiction to determine this dispute. I find it necessary to point at this stage that the said judgement is not binding on this court but is persuasive. The Applicant 1<sup>st</sup> Respondent maintains that this court does not have the requisite jurisdiction to handle the petition. According to the Applicant the dispute arises from mining and therefore alternative jurisdiction ought to have been exhausted as provided in the Mining Act based on Court of Appeal decisions cited. ELC should not be the first port of call in the determination of this dispute. That in addition this went against the objective of the Constitution of Kenya 2010 on alternative jurisdictions rendering any proceedings a nullity.

14. The court of appeal in Kenya Power & Lighting Company Ltd Versus Esther Wanjiru Wokabi Civil Appeal No 326 of 2013 [2014] eKLR enumerated the requirements to be considered in an application for stay of proceedings pending appeal. These are,
- a) Whether the Applicant has established that he/she has a prima facie arguable case;
  - b) Whether the application was filed expeditiously and
  - c) Whether the Applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Ringera J had this to say in *Global Tours and Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000

As I understand the law whether or not to grant stay of proceedings or further proceedings on decree or order, appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings, if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously". (emphasis is mine)

Guided by the above I will proceed to consider the application

#### **Whether the Applicant has established that he/she has a prima facie arguable case;**

15. The point of jurisdiction alone in my view is an arguable point for without jurisdiction the court cannot make one more step as was sealed in Owners of Motor Vessel Lilian S Versus Caltex Oil [K] Limited [1989] eKLR. Moreover, it is now established that the appeal is not necessarily one that must succeed, but one which ought to be argued fully before the court as long as it is not frivolous see Joseph Gitabi Gachau & another v Pioneer Holdings (A) Ltd & 2 others, Civil Application No 124 of 2008 [2009] eKLR. I find that there is an arguable appeal.
16. This court is also enjoined to weigh the pros and cons of granting or not granting the order in other words whether the appeal would be rendered nugatory should the proceedings not be stayed. Indeed, the main Petition has been set down for final hearing and determination before this court on 11<sup>th</sup> and 12<sup>th</sup> May 2022. The other consideration in my view is whether it would be prudent to use scarce judicial time in undertaking the hearing when the jurisdiction of the court is being called into question and



awaiting determination by the court of appeal. In my view it would be not. Prudence would demand that the matter on jurisdiction is clarified for certainty and final closure. A delay on this basis would be justifiable in my view and will be in the interests of justice for both the parties.

17. As to the timeliness of the application, this application was filed on 25<sup>th</sup> February 2022 which was 21 days after the ruling of this court which was read on 4<sup>th</sup> February 2022. Counsel for the Applicant stated he faced challenges obtaining a copy of the ruling from the registry until later when it was posted in the portal. As at the time of delivery of the ruling, the same had been typed by myself however it required some formatting by a secretary before it could be proof read and signed by this court. I'm aware that the court in Kwale has been slowed down in terms of secretarial personnel and the delay may have been occasioned by the Registry. This notwithstanding it is my view that the application has been made within reasonable time.
18. For the foregoing reasons this court finds merit in the application before court for determination. The upshot is that the Notice of Motion Application dated 24<sup>th</sup> February 2022 is hereby allowed. The proceedings in this Petition shall be stayed pending the outcome of the appeal. Costs shall be in the cause.

**DELIVERED AND DATED AT KWALE THIS 4<sup>TH</sup> DAY OF MAY 2022**

**A.E. DENA**

**JUDGE**

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

Ms Akello H/B for Oyatsi ..... for the Applicant

N/A .....for the Respondent.

Mr. Denis Mwakina- Court Assistant.

