



**Mayfox Mining Company Ltd v Cabinet Secretary, Ministry of Mining & 2 others;
Lorado Company Limited (Interested Party) (Judicial Review Miscellaneous Application
E076 of 2024) [2025] KEHC 5602 (KLR) (Judicial Review) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E076 OF 2024**

JM CHIGITI, J

MAY 5, 2025

BETWEEN

MAYFOX MINING COMPANY LTD EXPARTE APPLICANT

AND

CABINET SECRETARY, MINISTRY OF MINING 1ST RESPONDENT

DIRECTOR OF MINES & GEOLOGY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

LORADO COMPANY LIMITED INTERESTED PARTY

RULING

1. The applicant herein moved the Court by way of Chamber Summons dated 24th June 2024 seeking orders for leave to initiate judicial review proceedings.
2. The court certified the matter as urgent but declined to grant leave to commence judicial review seeking orders of Certiorari, mandamus and Prohibition.
3. The parties agreed to fast track the hearing of the suit precipitating the filing of the substantive application dated 5th November 2024.
4. The applicant thereafter revisited the issue of leave to operate as a stay that was precipitated by a Gazette Notice Number 3874 of 28th March 2025 which it felt offended its claim.



5. The parties agreed to file submission limited to prayer D of the Notice of Motion dated 5th November, 2024 wherein the applicant prays for an order of prohibition be issued prohibiting the 1st and 2nd Respondents from allocating or registering any new licences over the Applicant's cadastre area pending the hearing and final determination of these proceedings.

6. This ruling is limited to this issue.

The Applicant's case.

7. It submits that it was the holder of Special Prospecting Licence No. 221, issued on 26th March, 2015, pursuant to a license granted on 3rd February, 2005 to Sebimu Exploration and Mining Company Limited.

8. It seeks an order of prohibition pursuant to prayer (d) of the Applicant's Notice of Motion dated 5th November, 2024 to preserve the subject matter of these judicial review proceedings by restraining the 1st and 2nd Respondents from allocating or registering any mineral rights over the cadastre area previously held under Special Prospecting Licence No. 221.

9. It submits that this arises due to the Respondents' ongoing actions, including the gazette of AHG Metals Kenya Limited vide gazette notice dated 28th March, 2025, signaling an imminent issuance of a licence over the very area under dispute.

10. It is its submission that Order 53 Rule 1(4) of the Civil Procedure Rules which provides as follows;

“The grant of leave under this rule to apply for an order of mandamus, certiorari and prohibition shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Judge otherwise orders.”

11. Reliance is placed in the case of Republic of Kenya -vs- County Government of Nyandarua & 2 Others; Mbaria T/A Que Bar and Bob Kinyua Waruhiu TA Western Inn Rest and Lodging (Exparte) Judicial Review E008 of 2023 (2024) KEHC 649 (KLR) (1 February 2024) where Judge C Kariuki in considering the principles to be considered when issuing stay placed reliance on the case of Republic -Vs- Baringo County Government & Another Ex Parte Stephen Cheptoo & 8 Others (205)e KLR where the court observed as follows;

“Whether or not to grant stay is at the discretion of the court granting leave. Order 52 (Rule 1(4) of the Civil Procedure Rules 2010 gives the court wide and unfettered discretion to grant a stay. That discretion must be exercised judiciously. The key consideration is whether the Applicant has established an arguable case worth further investigation during the substantive hearing; whether the stay will be efficacious in the circumstances and whether the failure to grant stay would render the substantive motion nugatory”

12. The Applicant submits that it has established a clear prima facie case for the grant of the judicial review orders sought within the principles enunciated by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others 120031 KLR 125 where it was held that:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case.”

13. It submits that it made a formal application for renewal of its license and diligently complied with all requests from the 1st and 2nd Respondents made a Payment of ground rent and prospecting fees



- totaling Kshs. 2,025,000, submitted, uploaded and submitted all requested documents and a technical exploration report, along with an explanation of the exploration moratorium. It submits that it is aggrieved that the 2nd Respondent issued a letter dated 5th June, 2024 rejecting the renewal application.
14. It submits that the Respondents removed the Applicant's cadastre area from the system before any decision was communicated, raising serious procedural impropriety and evidencing bad faith.
 15. It submits that its appeal to the Respondents via a letter dated 12th June, 2024, has never been responded to and the silence and continued progression towards allocating the area to AHG Metals Kenya Limited demonstrate administrative disregard, entrenching the need for urgent judicial intervention.
 16. The Applicant submits that unless an order of prohibition is granted to restrain the Respondents from issuing a license to AHG Metals Kenya Limited, these proceedings will be rendered nugatory, futile, or academic.
 17. It submits that the Respondents have already gazetted AHG Metals Kenya Limited which clearly establishes that the Respondents are at an advanced stage of allocating the area, despite the pendency of these proceedings.
 18. It relies on the case of the High Court in *Republic v Commissioner of Lands & Another Ex Parte Kithinji Murugu M'Mukindia* [2017] eKLR cautioned:

“The Court should act to prevent the rendering of proceedings nugatory by administrative agencies rushing to complete impugned actions before judicial determination.”
 19. It submits that the balance of convenience favors preserving the status quo and protecting the Applicant's interests from irreversible harm, pending the Court's final decision.
 20. It submits that it may be argued by the Respondents or the Interested Party that the Gazette Notice concerning AHG Metals Kenya Limited is merely an expression of intention to issue a license, and that any person including the Applicant is at liberty to object within 42 days. However, the Applicant submits that this mechanism does not constitute an effective or adequate alternative remedy.
 21. It further submits that The Gazette Notice published by the Respondents is particularly concerning in the present case, given that the Applicant has already lodged an appeal against the rejection of its license renewal vide letter dated 12th June, 2024.
 22. It submits that if the Court does not intervene, the Respondents are likely to proceed with issuing a mineral right to AHG Metals Kenya Limited despite the pendency of this case.
 23. It urges the Court to act so as to prevent the rendering of proceedings nugatory by administrative agencies rushing to complete impugned actions before judicial determination.”

The Respondent's case.

24. The Attorney-General submits that the introduction of the Gazette Notice into the suit after the leave has been granted is irregular.
25. It submits that in judicial review cases an applicant only relies on documents filed in the chamber summons and in the event one wants to file further documents leave has to be sort.
26. It submits that the applicant has not sought leave in the circumstances and the document ought to be expunged from the record.



27. The Attorney-General further submits that the decision sought to be stayed has already been implemented.
28. Reliance is placed in the case of *George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega* (supra) where it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed.
29. It also relies on the case of *R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another* (supra). According to these decisions, it is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.
30. It was thus held in *Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995* that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded.
31. In *Republic v Cabinet Secretary for Transport & Infrastructure & 5 others Ex parte Kenya Country Bus Owners Association (Thro Paul G. Muthumbi Chairman) Samuel Njuguna Secretary Joseph Kimiri Treasurer & 8 others* [2014] eKLR Justice Odunga held:

“The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. What then are the circumstances under which the Court may grant a direction that the grant of leave do operate as a stay of the proceedings in question until the determination of the application or until the judge orders otherwise? Order 53 Rule 1(4) of the Civil Procedure Rules provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

Where, however, the decision sought to be quashed has been fully implemented leave ought not to operate as a stay. See *George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005*.

32. This position arises from the fact that once a decision has been implemented, stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.
33. However, it was held in *Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995* that in an application for leave to apply for judicial review and stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review. Therefore, where the outcome of the judicial review might be contrary to the conclusion reached by the body or person whose decision is challenged, stay of proceedings should be granted as it might lead to an awkward situation where a decision which ought not to have been made has been concluded.
34. Maraga, J (as he then was) in *Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006* was of the view that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the Ex parte applicant’s application is not rendered



nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

35. The Attorney-General further submits that this is a matter of public interest thus the order of Stay ought not be granted as sought by the applicant in this matter.
36. In the case of *Munir Sheikh Ahmed v Capital Markets Authority* [2018] eKLR Lady Justice P. Nyamweya held as follows:

“The second factor that comes to play in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of the public interest. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J. in *R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another* (supra), where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders.

The public interest element in the grant of a stay was also the subject of the decision in *R (H). vs Ashworth Special Hospital Authority* (supra), where Dyson L.J held that where there is a public interest element involved, the Court strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal’s decision was unlawful.

Lastly, the public interest as a relevant factor was also considered by Nyamu J. (as he then was) in *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 42, wherein the learned Judge cited the decision in *R VS Monopolies and Mergers Commission Ex parte Argyll Group PLC* (1986) 1 WLR 763 that the Court can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration.”

The Interested Party’s case.

37. The interested party submits that the dispute before this court concerns the grant of a mineral right within the Naduat area of Nakalale Ward of Turkana County.
38. It submits that the area in question has been administered by the 1st and 2nd Respondents as follows:
- a. Between 26th March, 2015 to 9th May, 2024 the area was allocated to the applicant Mayfox Mining Company Limited under special license No. 221. On 9th May, 2024 the said License No. 221 was removed from the mining cadastre portal and the area remained vacant;



- b. On 10th May, 2024 the interested party Lorado Company Limited lodged an application for a prospecting License on the mining cadastre portal over the area and the said application was accepted by the system and assigned No. 5455. The said prospecting application No. 5455 was expunged from the mining cadastre portal on 14th May, 2024;
 - c. d) e) Between 14th May, 2024 to 4th July, 2024 the area was reallocated to the applicant Mayfox Mining Company Limited under special license No. 221. On 4th July, 2024 the said License No. 221 was removed from the mining cadastre portal;
39. It further submits that on 5th July, 2024 the area was split into three blocks and assigned as follows:
- I. Prospecting Application No/5677 made by AHG Metals Kenya Limited;
 - II. Prospecting Application No/5681 made by H-Nuo Kenya Company Limited;
 - III. Prospecting Application No/5683 made by AHG Metals Kenya Limited.
40. It is its case that on 11th December, 2024 prospecting applications No.s 5677, 5681 and 5683 were changed to applications for mining licenses and repositioned on the Mining Cadastre portal by interchanging their positions and assigning new numbers.
41. It submits that on 20th March, 2025 the 1st Respondent issued a notice of his intention to grant a mining license to AHG Metals Kenya Limited under application for mining license ref. ML/2025/0237 at the lapse of 42 days from the date of the said notice.
42. They submit that there are procedural mistakes, bias and unfairness on the part of the 1st and 2nd Respondents that bring into question their actions and motives in administering the area that is subject of these proceedings, to wit;
- a. On 14th May, 2024 the Respondents expunged an application made by the interested party Lorado Company Limited without according the interested party due process and a letter written by the interested party on 15th May, 2024 which has not been answered by the respondent to date.
 - b. The applications by AHG Metals Kenya Limited and H-Nuo Kenya Company Limited have been progressed from applications for prospecting licenses to applications for mining licenses within a space of six months which is highly irregular, illegal and displays utter bias and ulterior motive on the part of the 1st and 2nd Respondents. The question that is outstanding in this instance is did these two companies conduct an exploration program under a prospecting License in order to qualify to progress to mining? If so, under what legal regime and/or License? According to it there is none.
43. The interested party has no faith in the mechanism provided for lodging an objection under Gazette Notice No. 3874 as any such objection will be at the discretion of the Respondents and whose actions indicate a determination to grant a mining License to AHG Metals Kenya Limited and H-Nuo Kenya Company Limited by hook or crook.
- Analysis and Determination;
- The issue for Determination is whether or not the applicant has made out a case for the grant of the prayer sought.



44. The court has looked at the application dated 5 November 2024 and the verifying affidavit of Manga Mugwe dated 5th of November 2024.
45. The court has noted that at paragraph 18 The applicant annexed a Gazette Notice as annexure MW 15 which is dated 20th of March 2025. This simply means that at the time of filing the verifying affidavit, the said Gazette notice was not in existence inviting this court to tread with caution.
46. The court has also taken note of the fact that the Exparte Applicant did not seek leave to file further documents after the leave stage.
47. None of the parties herein dispute the fact that the Gazette Notice exists.
48. However, the court cannot shy away from the fact that it has a duty to protect, promote and fulfil the rights of litigants under Article 10 and 20 of *the Constitution*. The court must never be so hopelessly placed to the extent that it cannot preserve the suit property during the subsistence of the suit.
49. In the case of Mombasa Misc. Civil Application (JR) No.26 of 2010 Republic –vs- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Exparte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schriel the court held that:

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.” (see in the Matter of an Application by Saifudeen Abdullabhai & 4 Others for Leave to Apply for Judicial Review and for Orders of Certiorari and Prohibition [2013] eKLR).

50. In the case of Taib A. Taib V Minister for Local Government & 3 Others [2006] eKLR, Maraga J (as he then was) stated that:

“I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore, where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction”.

The court went further to state that;

“The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision-making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision-making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision



of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.”

51. The court has a duty to ensure that the substratum of the suit is not lost *lis pendens* eroding and or defeating the purpose of the suit.
52. This court did not need a *prima facie* case to be established before granting the status quo order.
53. The court is in agreement with the Respondent that this is a matter of public interest. An inaction on the part of the court will ultimately lead to an outcome that will prejudice one of the litigants or the entire mining sector and the public offending the rule of law that calls for a fair hearing.
54. The applicant has not made out a case for the grant of the order as sought. However, sitting as the fair administrative action court, I find it appropriate to issue an order that status quo be maintained pending the hearing and final determination of the proceedings before it.

Disposition.

55. An order of status quo will accord with Article 47 of *the Constitution* which guarantees the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair for all the parties before the court.

Order.

1. Prayer D of the Notice of Motion dated 5th November, 2024 is disallowed.
2. An order of status quo is hereby issued pending the hearing and final determination of these proceedings.
3. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY 2025.

J. M. CHIGITI (SC)

JUDGE

