



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MOMBASA**

**JUDICIAL REVIEW & CONSTITUTIONAL DIVISION**

**JUDICIAL REVIEW APPLICATION NO. 9 OF 2018**

**IN THE MATTER OF: THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4**

**OF 2015**

**AND**

**IN THE MATTER OF: MOMBASA CHIEF MAGISTRATE’S COURT CIVIL**

**SUIT NO. 51 OF 2018 BETWEEN KRONE LIMITED VERSUS KERILEE INVESTMENT LIMITED, K13R MINEALS, AND  
NAMAJIMANA ALEX**

**AND**

**IN THE MATTER OF: AN APPLICATION BY NAMAJIMANA ALEX, K13R MINERALS LIMITED, AND KERILEE  
INVESTMENT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI TO REMOVE  
INTO THIS HONOURABLE COURT FOR PURPOSES OF BEING QUASHED THE ENTIRE PROCEEDINGS TOGETHER  
WITH DECISION/ORDER MADE THEREIN ON 17<sup>TH</sup> JANUARY, 2018 BY HONOURABLE C.N NDEGWA (PRINCIPAL  
MAGISTRATE) IN MOMBASA CHIEF MAGISTRATE’S COURT CIVIL SUIT NO. 51 OF 2018 BETWEEN KRONE (U)  
LIMITED VERSUS KERILEE INVESTMENT LIMITED, K13R MINERALS AND NAMAJIMANA ALEX**

**BETWEEN**

**NAMAJIMANA ALEX.....1<sup>ST</sup> APPLICANT**

**K13R MINERALS LIMITED.....2<sup>ND</sup> APPLICANT**

**KERILEE INVESTMENT LIMITED.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE COURT AT MOMBASA.....RESPONDENT**

**AND**

**KRONE (U) LIMITED ..... INTERESTED PARTY**

**RULING**

**The Application**

1. Pursuant to leave granted on 8<sup>th</sup> February, 2018, the ex-parte applicants filed a Notice of Motion dated 19<sup>th</sup> February 2018 brought under

Section 8(2), (4), (9) of the Law Reform Act, Section 7 (a) and (9) (1) of the Fair Administrative Action Act and Order 53 Rule 1 (3) of the Civil Procedure Rules seeking the following orders:

a) THAT orders of Certiorari be issued to remove into this Honorable Court for purposes of quashing the entire proceedings together with the Decision/Orders made therein on 17<sup>th</sup> January, 2018 by Honorable C.N.Ndegwa (Principal Magistrate) in Mombasa Chief Magistrate's court civil suit no. 51 of 2018 between Krone (U) Limited and Kerilee Investments Limited, K13R Minerals Limited and Nambajimana Alex.

b) THAT each party to bear its own costs.

2. The application is premised on the grounds set out therein and those in the statutory statement dated 7<sup>th</sup> February, 2018, verifying affidavits of NAMBAJIMA ALEX and JOHN WAMBI sworn on 7<sup>th</sup> February, 2018 and the Supplementary Affidavit of JOHN WAMBI sworn on 29<sup>th</sup> March 2018.

3. The ex-parte applicants allege that on 17<sup>th</sup> January, 2018, Hon C.N. Ndegwa (Principal Magistrate) in CMCC No. 51 of 2018 restrained the applicants herein together with the Kenya Ports Authority from releasing for shipment Wolfram Minerals (Tungsten Ores and Concentrates) contained in Containers No. SEGU 1055727 and DFSU 1199652.

4. The applicants claim that in doing this, the Interested Party herein failed to disclose to the court that there were orders issued by the High Court of Uganda in Civil Suit No. 604 of 2017 and in Chief Magistrate's court of Uganda at Nakawa Miscellaneous criminal application no. 006 of 2018 in relation to minerals.

5. The ex-parte applicants contend that the Respondent illegally ascribed itself jurisdiction and acted ultra vires by issuing orders that were beyond its purview. To support this assertion, the applicants claim that:

a) The dispute in CMCC No. 51 of 2018 concerns minerals that originated in Uganda and are vested in the government of Uganda.

b) The subject matter of the dispute is worth USD 216,000.

c) The dispute in CMCC No. 51 of 2018 arose in Uganda and is being litigated in the High Court of Uganda and in the chief Magistrate's court of Uganda.

d) None of the parties in CMCC No. 51 of 2018 are Kenyan citizens as the Plaintiff and the 1<sup>st</sup> Defendant in the matter are Ugandan registered companies, the 2<sup>nd</sup> Defendant is a UK registered company while the 3<sup>rd</sup> Defendant is a Ugandan citizen.

6. The ex-parte applicants allege that the Consulate of the Republic of Uganda wrote to the Chief Justice of Kenya vide a letter dated 31<sup>st</sup> January 2018 informing the Chief Justice of the orders made in Uganda and expressing the dissatisfaction with the orders issued in CMCC No. 51 of 2018. Further, the applicants state that the Inspector General of Uganda communicated to Interpol and International Relations Office confirming that the courts in Uganda had cleared the minerals for export.

7. It is the applicant's case that as a result of the orders issued in CMCC No. 51 of 2018, the 1<sup>st</sup> Applicant has suffered losses in the form of demurrage costs and that the consignee of the minerals has threatened to terminate its contract with the 1<sup>st</sup> Applicant.

### **The Response**

8. The Interested party opposed the application by way of a Replying Affidavit sworn by RONALD MURIISA on 6<sup>th</sup> April, 2018.

9. The Interested Party states that it carries on the business of mining Wolfram minerals (Tungsten ores and concentrates) and it lays a claim on the minerals herein. The Interested Party admitted that it instituted CMCC No. 51 of 2018 and that on 17<sup>th</sup> January, 2018, injunctive orders were issued against the applicants herein and the Kenya Ports Authority restraining them from releasing for shipment the minerals. The Interested party claims that the 1<sup>st</sup> applicant filed an application dated 26<sup>th</sup> January, 2018 seeking to set aside the orders issued on 17<sup>th</sup> January, 2018 but before the application could be heard the applicants instituted the instant proceedings.

10. On the allegation of non-disclosure of material facts, the Interested Party avers that the order by the Chief Magistrate's court was issued on 25<sup>th</sup> January 2018 after the Respondent had issued orders in CMCC No. 51 Of 2018. Alternatively, the Interested Party contends that the issue of non-disclosure requires the evaluation of the evidence before the lower court and such evaluation is not within the realm of judicial review.

11. On the allegation that the Respondent acted ultra vires and without jurisdiction, the Interested Party states that the applicants did not raise a preliminary objection before the lower court challenging the jurisdiction of the court. The Interested Party contends that this issue can be easily dealt with by the lower court without instituting judicial review proceedings. Further, the Interested Party claims that judicial review remedies can only be sought after an applicant has exhausted all other remedies.

12. On the issue of the court lacking jurisdiction due to the subject matter originating in Uganda, the interested party states that although the minerals originated in Uganda, the minerals had left Uganda while the suits in Uganda were ongoing. Additionally, the Interested Party states that the primary purpose of CMCC No. 51 of 2018 is to preserve the minerals pending determination of the ownership rights to the minerals.

13. With regard to the monetary value of the minerals, the Interested Party contends that the documents showing the minerals to be valued at USD 216,000 has no probative value as it does not bear the particulars for which the receipt is being issued.
14. With regard to the communication to the Chief Justice of Kenya, the Interested Party urged this court to disregard the letter as it was never exhibited before the lower court.
15. It is the Interested Party's case that the proceedings before the subordinate court were proper and the orders issued on 17<sup>th</sup> January 2018 were clothed with jurisdiction.
16. The Respondent did not respond to the application.

### Submissions

17. The Application was canvassed by way of written submissions. The ex-parte applicants filed their submissions on 19<sup>th</sup> April, 2018 while the Interested Party and the Respondent filed their submissions on 6<sup>th</sup> April 2018. The submissions were highlighted on 10<sup>th</sup> April 2018 and 12<sup>th</sup> April, 2018. Mr. Kibara appeared for the ex-parte applicants, Mr. Gikandi appeared for the Interested Party and Mr. Makuto appeared for the Respondent.
18. Mr. Kibara submitted that the subject matter herein was being exported by the 1<sup>st</sup> Ex-parte applicant with the final destination being Toronto but now the minerals are being held at Mombasa as a dispute has arisen as to their ownership. Counsel stated that three cases had been instituted in Uganda in relation to the minerals. The first case, Counsel argued was between the Interested Party and the 3<sup>rd</sup> Ex-parte applicant herein, and it involved the management of the Interested Party's mines, Nyamuliro mines in Uganda. Counsel submitted that orders were issued in this case but the orders did not affect the exportation of the minerals. It is these orders that Counsel insisted were shown to the Respondent in CMCC No. 51 of 2018.
19. The second case, Mr. Kibara submitted, involved the Interested Party and the 1<sup>st</sup> ex-parte applicant and orders were issued on 19<sup>th</sup> January 2018 and 20<sup>th</sup> December, 2017 dismissing the Interested Party's case. The third case, Counsel submitted, was a criminal case No. 006 of 2018 in which the 1<sup>st</sup> ex-parte applicant was the suspect. Counsel contended that the orders that were issued therein directed that the minerals be exported. Subsequently, the Interested Party lodged CMCC No. 51 of 2018 and injunctive orders were issued stopping the exportation of the minerals.
20. Mr. Kibara submitted that the Respondent lacked the jurisdiction to entertain CMCC No. 51 of 2018 as the parties in the suit resided in Uganda, the agreement between the parties was signed in Uganda and the property the subject matter of the suit was mined in a mine situated in Uganda.
21. Mr. Kibara submitted that in CMCC No. 51 of 2018 the Interested Party had pleaded fraud and in particular smuggling of the minerals as against the applicants. Counsel submitted that the criminal allegations denied the court its civil jurisdiction to hear the matter.
22. Mr. Kibara submitted that the Respondent's actions of issuing the orders of 17<sup>th</sup> January, 2018 were tainted with illegality and the said orders were made without jurisdiction or in excess of jurisdiction and were hence irrational and unreasonable. To support his assertions Counsel cited the celebrated case of **Owners of the Motor Vessel "Lilian S" versus Caltex Oil (Kenya) Ltd [1989] KLR and 3**.
23. Mr. Kibara submitted that he was invoking the supervisory jurisdiction of this court instead of appealing against the orders issued on 17<sup>th</sup> January, 2018 to save on time.
24. Mr. Makuto, learned Counsel for the Respondent submitted that only two issues arise for determination by this court. First, whether the Respondents had jurisdiction and second, whether there was material disclosure before the Respondent. On the first issue, Counsel submitted that Section 7 of the Magistrates Court Act caps the monetary jurisdiction of a Principal Magistrate's court at Kshs. 10,000,000. Counsel contended that according to the pleadings the subject matter herein is valued at USD 216,000 which if converted to Kenyan Shillings exceeds ten million Kenyan shillings hence the subordinate court did not have the jurisdiction to entertain the matter.
25. On the second issue, Mr. Makuto submitted that there was material non-disclosure in CMCC No. 51 of 2018 as the Interested Party did not reveal to the court that the matter was being litigated before the courts in Uganda. Counsel submitted that the non-disclosure amounted to abuse of the court process thus this court should exercise its supervisory jurisdiction and quash the proceedings before the subordinate court.
26. Mr. Gikandi, learned Counsel for the Interested Party submitted that the ex-parte applicants did not challenge the jurisdiction of the Respondent in CMCC No. 51 of 2018. Therefore, they are estopped from now claiming that the subordinate court lacked jurisdiction. Further, Counsel submitted that the ex-parte applicants had made an application in CMCC No. 51 of 2018 seeking to set aside the ex-parte orders of 17<sup>th</sup> January, 2018 and the said application was yet to be determined.
27. Mr. Gikandi submitted that judicial review remedies should be sought after exhausting all other available remedies. Counsel submitted that the ex-parte applicants had not demonstrated to the court that they ought to be exempted from resorting to the available remedies. Counsel contended that the issue of jurisdiction can still be brought before the subordinate court and dealt with by that court.
28. On the issue of monetary jurisdiction of the subordinate court, Mr. Gikandi submitted that the value of the minerals is 26, 435, 192 Ugandan shillings not Kenyan shillings. On the issue of the subject matter originating in Uganda, Counsel contended that the subject matter was now in Kenya and the Interested Party despite being registered in Uganda has the right to access the Kenyan court.

29. Mr. Gikandi submitted that there was nothing illegal or irrational about the proceedings before the subordinate Court as the court was clothed with the requisite jurisdiction to hear the matter as it involved the tort of conversion.

30. In rejoinder, Mr. Kibara submitted that the principle of estoppel cannot be raised on the issue of jurisdiction since jurisdiction is an issue of law. Counsel also contended that the availability of alternative remedies should not be a bar to issuance of judicial review remedies. As to the value of the minerals, Counsel submitted that the 26, 435, 192 Ugandan shillings was the duty paid for the minerals and not the value of the minerals.

### **Analysis and Determination**

31. The issues that arise for determination by this court are:

- a) Whether the ex-parte applicants should have exhausted all available remedies before instituting these proceedings.
- b) Whether the subordinate court had the jurisdiction to hear and determine CMCC No. 51 of 2018.

#### **a) Whether the ex-parte applicants should have exhausted all available remedies before instituting these proceedings.**

32. The Interested Party insisted that the ex-parte applicants had prematurely instituted these proceedings without exhausting all other available remedies. Counsel for the Interested Party submitted that the issues being raised in this matter would have been raised before the lower court hence the ex-parte parties are estopped from bringing these proceedings. Counsel cited Section 9 of the fair Administrative Action Act which provides that an administrative action shall not be reviewed unless the mechanisms including internal mechanisms for appeal or review and other remedies available under any other written law have been exhausted. On the other hand, the ex-parte applicants submitted that the availability of other remedies does not bar a litigant from seeking judicial review remedies.

33. This court has the jurisdiction to hear and determine judicial review matters. This matter has been brought under several statutes including the Fair administrative Action Act. However, Section 9 (2) (3) and (4) of the Act provides as follows:

**(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate court, shall if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under sub-section (1)**

**(4) Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.**

The Interested Party contends that the ex-parte applicants should have challenged the jurisdiction of the subordinate court in CMCC No. 51 of 2018. Further, it faults the ex-parte applicants for instituting these proceedings without allowing the subordinate court to hear and determine their application to set aside the order of 17<sup>th</sup> January, 2018.

34. In the case of **Republic versus The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, Nyamu J observed as follows:

**“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...”**(emphasis added)

Also, in the case of **Republic versus National Environment Management Authority [2011] eKLR**, the Court of Appeal held that:

**“...in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”**

35. It is not in dispute that the matter herein revolves around the ownership of the minerals. The parties do not also contest that this matter has been subjected to litigation before the courts of Uganda, both the High Court of Uganda and the Chief Magistrate’s Court and various orders have been issued. This court cannot evaluate the merits of the orders issued by those courts as it is trite law that judicial review proceedings are not concerned with the merits of the decision but the procedure leading up to the decision.

36. Despite the above, another suit was instituted by the Interested Party before the Chief Magistrate’s Court at Mombasa being Civil Suit No. 51 of 2018 against the ex-parte applicants. According to the copies of the pleadings attached to the supplementary affidavit of JOHN WAMBI sworn on 29<sup>th</sup> March, 2018, the Interested Party claimed that the applicants had smuggled the minerals from Nyamuliro Wolfram mine to the Port of Mombasa. Subsequently, the Interested Party on 17<sup>th</sup> January, 2018 filed an application under a certificate of urgency seeking an order of injunction pending the hearing and determination of the application to restrain the Defendants, the applicants herein, and the Kenya Ports Authority from shipping the minerals contained in containers SEGU1055727 and DFSU1199652. The application was heard ex-parte and the order of injunction was issued on the same day.

37. The ex-parte applicants appear to have been dissatisfied by the order because on 26<sup>th</sup> January 2018 they filed an application seeking to have the orders issued on 17<sup>th</sup> January, 2018 set aside. The applicants based their application on the ground that the Interested Party had not disclosed the existence of the suits in Uganda involving the same subject matter. This application was set down for hearing on 7<sup>th</sup> February, 2018. However, the application was not heard as the applicants instituted the instant proceedings.

38. Did the applicants institute these proceedings prematurely? The ex-parte applicants have brought these proceedings under, inter-alia Section 9 (1) of the Fair Administration Action Act. However, sub-section (2) of that Section as mentioned earlier clearly states that review of an administrative action shall not be entertained unless the applicant has exhausted other internal mechanisms of appeal or review or has exhausted other remedies available to him or her.

39. The ex-parte applicants filed an application to set aside the orders issued on 17<sup>th</sup> January, 2018 by the Respondent. However, the ex-parte applicants did not await the determination of the application. Instead, they brought these proceedings seeking the orders of certiorari to quash the proceedings before the subordinate court and the orders issued on 17<sup>th</sup> January, 2018. In my view, the ex-parte applicants acted prematurely. They ought to have prosecuted their application before the lower court and had the same determined by the court. If dissatisfied with the determination the applicants had the opportunity for review, or appeal the decision altogether.

40. The Ex-parte applicants had submitted that the matter before the court was urgent as it involved export of minerals. However, it is the finding of this court that the said minerals are themselves subject of disputed ownership. That ownership must itself be determined in the ongoing case in the lower court. The grant of a judicial review remedy at this stage may lead to injustice especially if the issue of ownership still remains contested.

41. This court's jurisdiction to entertain judicial review applications should be exercised with caution. Parties should not be allowed to institute judicial review proceedings in situations where there are ongoing proceedings which can yield alternative remedies.

42. Further, while it is true that an applicant can apply to be exempted from exhausting other available remedies, it is also true that in this case, the applicants did not make such an application. If such an application is made, the court would evaluate the circumstances surrounding the application. It could be that the available remedies are not appropriate or that the remedies would not be in the interest of justice. In the instant case, the remedies available to the ex-parte applicants are not inappropriate nor are they against the interest of justice.

43. Having determined the first issue in the positive, there is no need to address the second issue.

44. The application dated 19<sup>th</sup> February, 2018 is dismissed. The ex-parte applicants to bear the costs.

**Dated, Signed and Delivered in Mombasa this 3<sup>rd</sup> day of May, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Kibara for Ex parte Applicant

Mr. Gikandi & Ms. Murage for Interested Party

Mr. Kaunda Court Assistant