



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

MISC. APPLICATION NO. 15 OF 2019

CHESERET ARAP KORIR.....APPLICANT

VERSUS

EQUATORIAL LAND HOLDINGS LTD.....RESPONDENT

RULING

[NOTICE OF MOTION BY THE RESPONDENT DATED 2ND MARCH, 2020

AND THAT BY THE APPLICANT DATED THE 31ST MARCH, 2020]

1. EQUATORIAL LAND HOLDINGS LIMITED, The Respondent, seeks vide the Motion dated the 2nd March, 2020 for the following prayers;

“(1) Spent.

(2) Spent.

(3) That pending the hearing and determination of the appeal to the Court of Appeal, an injunction do issue restraining the Respondent, his relatives, family members, employees, servants, agents or any other person/entity affiliated/associated with him or acting through or under his instructions from evicting the Applicant company from parcels of land Nandi/Chemase/974 and Nandi/Legemet/224, selling, demolishing, trespassing on, transferring, leasing, charging, wasting, alienating, or in any other way interfering with or dealing with the properties, developments, improvements or construction on the parcels of land Nandi/Chemase/974 and Nandi/Legemet/224.

(4) Spent.

(5) That the costs of this application be awarded to the Applicant.”

The application is based on the four (4) grounds marked (a) to (d) on its face summarized as follows:

(a) That on the 26th February, 2020, the Court dismissed with costs their application dated 10th June, 2019 to adopt the arbitral award. That the *status quo* order for seven (7) days granted lapses on the 4th March, 2020.

(b) That they have since filed an appeal and as they have heavy statutory obligations to undertake before they vacate the suit lands under the **NEMA ACT**, **Mining Act, 2016** and **Explosives Act**, it is in the interests of justice that the orders sought be granted.

The application is supported by the affidavits sworn by **David May** on the 2nd March, 2020 and 9th March, 2020. That it is the case of the Respondent as discerned at paragraph 5, 6, 8 and 9 of the supporting affidavit that;

- They will require at least three (3) years to neutralize the cyanide and the storage tanks and generally rehabilitate the mine to acceptable environmental condition. That the lands must therefore, remain under their control for maintenance and protection until the areas has been inspected by the Ministry of Mines and a Closure Certificate issued.

- That the National Environment Management Authority (**NEMA**) will be required to issue an approval for closure and issue a Certificate confirming that the area has been decontaminated from poisonous chemicals and acids.
- That experts from South Africa will be required to attend and dismantle the infrastructure on site including the laboratory before the same is decontaminated.
- That **Sections 177 to 179 of the Mining Act, 2016** imposes heavy statutory obligations upon the Respondent on the lands' mitigation, and rehabilitation which requires additional time running into months to ensure compliance.

2. The application is opposed by **Cheseret Arap Korir**, the Applicant, through his replying and further affidavit filed on the 3rd March, 2020, and 11th March, 2020. That it is the Applicant's case that the application is made in bad faith as it seeks for twelve (12) months and three (3) years under different paragraphs. That the draining of the dams will not take long as alleged as it took less than a week to drain it onto the adjacent land of **Julius Marsin Kogo** and **Pius Kogo** when conservatory order was issued in **Eldoret Environment & Land Court No. 127 of 2018** on 1st March, 2019. That the Respondent knew the lease would not be renewed from 19th March, 2018 when they were served with the non-renewal notice but never took steps to rehabilitate the lands. That the **Mining Act** has elaborate exit process that do not need Court orders, but the Respondent is yet to give the Cabinet Secretary an exit plan as required under the Act. That the lease agreement did not provide for an appeal and what the Respondent seeks can only be done through consent of the parties. That the Respondent has been using the Ministry of Mining, NEMA and local police to procure and intimidate him into renewing the lease. That if the Respondent is given time, it will continue its operations, and destructions of the lands to his detriment.

3. The learned Counsel for the Respondent and Applicant appeared before the Court on the 4th March, 2020 and after their oral submissions, the Court inter-alia directed them to file and exchange written submissions. The Court also extended the status quo order granted on the 26th February, 2020 to the 26th March, 2020 when highlighting of submissions was coming up. That following the scaling down of the Court's operations due to Covid-19 Pandemic pursuant to the Ministry of Health, and the Hon. Chief Justice's directions, the Court did not sit on the 26th March, 2020, and highlighting did not take place. That the Respondent then filed through **online** the Motion under Certificate of Urgency dated the 26th March 2020, seeking for extension of the *status quo* order. That the Court dealt with the application, and granted the extension of the *status quo* order for fourteen (14) days electronically. That the Court further directed Counsel to discuss, and see whether they could agree the Court to proceed to write the ruling on the basis of the filed pleadings and submissions.

4. The Applicant then filed the Motion dated the 31st March, 2020 under Certificate of Urgency through online seeking for the following prayers;

“(1) Spent.

(2) That the Court be pleased to vacate/set aside the orders of status quo issued on the 26th February, 2020, and extended on 4th March, 2020 and later on 26th March, 2020 for a period of 14th days.

(3) That the Respondent be punished for contempt in accordance with the laws.

(4) Costs of the instant application be provided for.”

The application is based on the eleven (11) grounds marked **(a)** to **(k)** on its face, and supported by the affidavit sworn by **Cheseret Arap Korir** on the 31st March, 2020. The application was dealt with electronically by **Odeny J**, the duty Judge, on 2nd April, 2020 directing among others that the Respondent stops any activities on the suit land until the application is heard and determined, that the parties file their submission, and the application be heard electronically on the 9th April, 2020. That it is the Applicant's case that the Respondent took advantage of the Covid-19 pandemic, that forced the scaling down of the Court operations, and resumed general use of the Applicant's lands carrying out Mining operation without consent, and while knowing that it had no lease or authority to do so. That the Respondent's conduct is meant to ridicule and indignify the Court, and the impunity should not be allowed to continue. The applicant annexed among others eight (8) copies of photographs showing what he called **“normal operations on the suit land.”**

5. The application is opposed by the Respondent through the replying affidavit sworn by **David May** on the 5th April, 2020. That it is the Respondent's case that the status quo order of 26th February, 2020 was extended on the 4th March, 2020, and there were no orders issued restraining it from engaging in any mining activities. That however, as communicated to the Court on the 4th March, 2020, they had stopped the gold production, and other activities on the 26th February, 2020 following the Court's ruling. That the only activities being carried out on the suit land are those related to cleaning out and making the mine safe for final closure. That the activities include stripping down the infrastructure, removing waste rock materials from the approximately twenty thousand (20,000) tonnes dump, and erection of underground concrete support structures which includes blasting process. That the mining activities being carried out since 26th February, 2020 are on their alternative property from which they have an access to the mine. That the status quo order was made and renewed at their application, and they have not violated it.

6. The learned Counsel for the Respondent, and the Applicant filed their submissions dated the 19th March, 2020 and 20th March, 2020 for and against the Motion dated 2nd March, 2020 respectively. The learned Counsel for the applicant and Respondent also filed the submissions dated 3rd April, 2020 and 8th April, 2020 for and against the Motion dated the 31st March, 2020 respectively. Then on the 9th and 14th April 2020, the learned Counsel for the parties highlighted their respective submissions through skype media.

7(A) That it is the Respondent's submissions in respect of the Motion dated 2nd March, 2020 that the Court has jurisdiction to hear, and determine the application dated the 2nd March, 2020. That their prayers are aimed to preserve the *status quo* in order that the appeal is not rendered nugatory, or otiose or academic. The learned Counsel cited the following Superior Court decisions among others in support of that principle;

- **Erinford Properties Ltd Vs Cheshire County Council [1974] A11 ER 448**, where Megarry J, stated that there was no inconsistency in granting an injunction after dismissing a Motion to prevent the Court of Appeal decision from being rendered nugatory should its decision be reversed.
- **Madhupaper International Ltd Vs Kerr [1985] eKLR**, where the Court of Appeal faulted the High Court decision not to grant injunction that would manifestly have resulted in an order contrary to its ruling. The Court of Appeal recognized the principle in **Erinford Properties Ltd Vs Cheshire County Council [Supra]**, and proceeded to observe as follows;

“It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this Court from a sudden inconvenient dislocation of its lists but more because this Court would have the distinct advantage of seeing what the Judge made of it. The learned Judges of the High Court should take note of this concurrent jurisdiction which the two Courts have and exercise theirs.”

- **Butt Vs Rent Restriction Tribunal [1979] eKLR**, which echoed the principle in **Erinford Properties Ltd Vs Cheshire County Council [Supra]**.

The learned Counsel further referred to the case of **Patricia Njeri & 3 Others Vs National Museum of Kenya [2004] eKLR**, on the principles to be considered in determining an application for injunction pending appeal. That such considerations are whether the Court of Appeal's decision would be rendered nugatory should it reverse the decision made; whether granting the application would inflict greater hardship than it would avoid, and whether the appeal is frivolous or not. The Counsel submitted that unless the injunction sought is granted the Applicant would have the Respondent evicted from the suit land, and should their appeal be successful, the decision would be merely an academic exercise. That as the Respondent has been in possession of the suit lands for over ten (10) years, and has delicate infrastructure thereon, their appeal is not frivolous. That the Supreme Court of Kenya's decisions in **Nyutu Agrovet Ltd Vs Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators-Kenua Branch (Interested Party) [2019] eKLR**, and **Synergy Industrial Credit Limited Vs Cape Holdings Limited [2019] eKLR**, settled the question whether the Court of Appeal has jurisdiction to entertain an appeal from the High Court's decision under **Section 35 of the Arbitration Act**.

(B) That in respect to the Motion dated 31st March, 2020, the learned Counsel submitted that the Applicant has failed to establish basis for setting aside the status quo orders. The learned Counsel referred to the court of Appeal's decision in the case of **Shimmers Plaza Limited Vs National Bank of Kenya Limited [2015] eKLR**, on what *status quo* order means, and submitted that the Respondent stopped all activities after the ruling of 26th February, 2020 when the status quo order was made. That though there was no order restraining or injunctioning the Respondent from carrying out mining activities on the suit lands, they have not done so since the 26th February, 2020. That on the prayer that the Respondent be punished for contempt, the learned Counsel submitted that the Applicant has not discharged the duty of prove which is to a standard higher than in civil cases. The Counsel referred to the case of **Katsuri Ltd Vs Kapurchand Depar Shah [2016] eKLR**, setting out the elements to be proved as clear, unambiguous terms of the order that is binding upon the alleged contemnor; knowledge or proper service of the order; prove of breach of the terms of the order, and that the breach was deliberate. That other than the fact that the Respondent was aware of the status quo order, the Applicant has not demonstrated the other three elements.

8(A) The learned Counsel for the Applicant submitted that the Motion dated the 2nd March, 2020 has no merit as this Court do not have jurisdiction to entertain it. That the lease agreement at *Clause 12.1(b)* expressly excluded the right of appeal. That as the right of appeal was not provided for, it can only arise through consent of parties or leave of the Court, and none has been obtained. That the Respondent cannot rely on the Supreme Court's decision in the case of **Nyutu Agrovet Ltd Vs Airtel Networks Kenya Ltd [Supra]** as in that case, leave to appeal had been sought, and granted unlike in this case. That again, the Supreme Court in the *Nyutu case* did not address the scenario where the parties had excluded the right of appeal in the lease agreement (contract). That accordingly, there is no appeal properly before the Court of Appeal, and this Court has no jurisdiction to hear and determine the injunction application. That the supreme Court limited the scope of appeals from decisions on **Section 35 of the Arbitration Act** to ***“where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section, and thereby made a decision so grave, so manifestly wrong, and which has completely closed the door of justice to either of the parties.”*** That the Respondent has not shown that the Court set aside the arbitral award on the basis of grounds other than those expressly provided for under the said Section, and hence the appeal is just a fishing expectation. The learned Counsel referred to the Court of Appeal's decision in **Peter Nyaga Murake Vs Joseph Mutunga Nairobi CA No. 86 of 2015** cited in **George Odhiambo Umidha Vs Co-operative Bank of Kenya Ltd & Another [2018] eKLR**, where the Court held that;

“without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

That the principles applicable in determining whether or not to grant injunction pending appeal are as set out in the locus *classicus* of **Giella Vs Cassman Brown Co. Ltd [1973] EA 358**, and as there is no appeal *per se*, the Respondent has not established a prima facie case with probability of success. That the Respondent do not stand to suffer irreparable injury unlike the Applicant, and that the balance of convenience tilts in favour of not granting the injunction. The learned Counsel further submitted that the prayer for stay for twelve (12) months coming after the seven (7) days' stay granted on the 26th February, 2020 is tantamount to asking the Court to sit on appeal of its own

order, which is not provided for by the law. That as the Respondent has not availed evidence that it had written to the Cabinet Secretary as required by **Section 149 of the Mining Act No. 12 of 2016** on any hazardous substance, excavations, and buildings on the suit lands following the termination of the lease agreement, the prayer for stay should not be granted.

(B) That in respect to the Motion dated the 31st March, 2020, the learned Counsel submitted that the Respondent has taken advantage of the scaling down of the Court operation to resume operations on the Applicant's lands while the status quo issued on the 26th February, 2020, and extended on the 4th March, 2020 and 26th March, 2020 was subsisting. That the Court should therefore, be vacated. That the order meant no activities, and the Respondent's action to the contrary calls for it to be set aside as being an order issued through the Court's discretion, the Respondent does not deserve it. The learned Counsel referred to the dictum in the case of **Reef Building Systems Ltd Vs Nairobi City Council (Unreported)** cited in **Elizabeth Wamuranga Kika Vs Jamii Bora Bank Ltd [2014] eKLR** that;

"...as the order of injunction is an equitable relief issued to prevent the ends of justice from being defeated, it may be discharged or varied or set aside if it is shown it is contrary to the ends of justice to retain it in force."

The Counsel further submitted that the status quo order prohibited utilization of the suit land by either party, but the Respondent went ahead to carry out activities therein as proved through the attached photographs. That the Respondent's conduct should not be allowed to go unpunished. The learned Counsel referred to this court's decision in **David Ouma Okore Vs Phelesia Adoyo Otieno & Another [2016] eKLR**, and **Section 29 of the Environment and Land Court Act No. 19 of 2011**, and asked for the maximum fine against the Respondent for contempt.

9. The following are the issues for the Court's determinations in the two applications;

(a) Whether the Court has jurisdiction to hear, and determine the application for injunction pending appeal.

(b) Whether the Respondent has met the conditions for granting of injunction pending appeal.

(c) Whether the Applicant has made a reasonable case for setting aside or vacating the status quo order issued on the 26th February, 2020, and extended on the 4th March, 2020 and 26th March, 2020.

(d) Whether the Applicant has made a reasonable case for the Respondent to be punished for contempt of Court in respect of the status quo order.

(e) What orders to issue?

(f) Who pays the costs in respect of each of the applications?

10. The Court has carefully considered the grounds on each of the applications, the affidavit evidence filed by both parties, the learned Counsel's written submissions, and the valuable highlighting by **Mr. Imende, Prof. Muigai, and Mr. Mugere** for the Respondent, and **Mr. Kinyanjui** for the Applicant and come to the following conclusions;

(a) That the record confirms that after the Court delivered its three rulings on the applicant's Motions dated the 5th May 2019, 19th July 2019 and the two by the Respondent dated 10th June 2019, their net effect was to set aside the arbitral award dated the 30th April, 2019 and delivered on the 3rd May, 2019. That immediately after the delivery of the said rulings, Mr. Menezes, then learned Counsel on record for the Respondent, orally moved the Court seeking for temporary injunction to enable the Respondent to safely carry out remedial measures to make the suit lands safe. That Counsel informed the Court that the process would take twelve (12) months; that the first six (6) months, the Respondent will require total possession of the lands; and thereafter access only for the remainder of the period. That the oral application was opposed by Mr. Kimani, learned counsel for the Applicant. That after considering the oral submissions of both Counsel, the Court observed and ordered as follows;

"Having heard Counsel on the oral application on whether or not to issue temporary injunction order to enable the Respondent safely dismantle, and remove their equipment on the suit land as they vacate, and noting that there is nothing except possibly taxation of costs remaining in this Miscellaneous application, and noting Eldoret ELC No. 127 of 2018 is still pending and the parties herein are in that matter, the Court orders as follows;

(a) That as the next step is to order this file to be closed, and so as to allow the Respondent decide whether or not to formally move the court, the parties are directed to maintain the existing status quo on the suit lands for a period of seven (7) days. This order to be in force, and to automatically lapse on 4th March, 2020 at 4.00 p.m.

(b) That this file be closed."

That it is clear the Respondent did not at all indicate that they were seeking the twelve (12) months to enable them file and prosecute an appeal. That the time being sought then was to enable the Respondent undertake the necessary preparations to allow a safe exit from the suit lands. That as was subsequently confirmed by the parties, the status quo order of 26th February, 2020 that was extended on the 4th March, 2020 and 26th March, 2020 clearly meant no further mining activities were to be carried out on the suit lands, possession of which was to remain with the Respondent.

(b) That the Respondent then filed the Notice of Appeal dated the 28th February, 2020 that was lodged with the registry on the 2nd March, 2020. That on the same 2nd March, 2020 the Respondent filed the Motion of the same date primarily, seeking for injunction pending hearing and determination of the appeal to the Court of Appeal.

(c) That prayer (2) of the Motion dated the 2nd March, 2020 is for the order of temporary injunction for a **“period of 12 months to enable the Applicant to comply with statutory site mitigation and rehabilitation measures.”** That it more or less seeks what Counsel for the Respondent had sought orally on the 26th February, 2020 when the *status quo* order for seven (7) days was granted. That however, that prayer had been sought for the period **“pending the interpartes hearing and determination of this application”** as can be seen on the first line of that prayer (2). That as the application is being determined today through this ruling, the Court finds the prayer as drafted is incapable of being granted.

(d) That as the Applicant has questioned the jurisdiction of the Court to determine the Motion dated 2nd March 2020, it is important that the Court make a determination on that issue on the outset before dealing with any other issue. That is for the reason that if the court was to hold that it is without jurisdiction, then it has to drop its tools as was held by *Nyarangi JA*, in the case of **Owners of Motor Vessel “Lilian S” Vs Caltex Oil (K) Ltd (1989) KLR 1** that;

“...jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

That the Superior Court’s decisions cited by both Counsel for the Applicant and Respondent are in agreement that this Court is with jurisdiction to hear and determine an application for injunction like the Motion dated the 2nd March 2020, so long as there is a statutory right of appeal provided for the order being appealed against or leave to appeal or consent to appeal has been obtained. That paraphrase it another way, that the Court is with jurisdiction to entertain an application for injunction pending appeal on an order dismissing an application so long as there is a pending properly filed appeal. That the learned Counsel for the Respondent, submissions have cited the case of **Erinford Properties Ltd Vs Cheshire County Council [1974] A11 ER 448, Madhupaper International Ltd Vs Kerr [1985] eKLR, Butt Vs Rent Restriction Tribunal [1979] eKLR** on the history of the principle, and its application by the High Court in the case of **James Juma Muchemi and Partners Ltd Vs Barclays Bank of Kenya Ltd [2011] eKLR** and the Court of Appeal of Kenya in the cases cited.

(e) That the Applicant’s position is that Clause 12.1 of their lease agreement did not provide for an appeal, and as no leave to appeal or consent was sought, and obtained then, there is no valid appeal pending and hence this Court is without jurisdiction. The learned Counsel for the Respondent has submitted that the Supreme Court’s decision in **Nyutu Agrovet Ltd Vs Airtel Networks Kenya Ltd [Supra]** on the right of appeal on orders issued by the High Court under **Section 35 of the Arbitration Act** to the Court of Appeal is now settled and hence the appeal is not frivolous but a valid one. That the following excerpts of the Supreme Court of Kenya’s decision is **Nyutu Agrovet Ltd Vs Airtel Networks Kenya Ltd [Supra]** are important in determining this issue;

“[71]. We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus, our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for orders of setting aside of the award....Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

[72] Furthermore, considering that there is no express bar under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness.

[75]...We are on our part persuaded by the argument that where an award is set aside on constitutional grounds, then that should be one of the exceptional grounds in which an appeal should be preferred against the decision made under Section 35 because Section 35 is clear as to the issues for which proof is required before setting aside of an arbitral award...

[77] In concluding on this issue, we agree....that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section, and thereby made a decision so grave, so manifestly wrong, and which has completely closed the door of justice of either of the parties. That this circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

[80]...We have clarified the circumscribed jurisdiction of the Court of Appeal in that regard. Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to the Court to determine whether the appeal before it meets the threshold explained in this judgment or in the words of Kimondo J, the “journey was a false start.”

That unlike in the **Nyutu Agrovet Ltd Vs Airtel Networks Kenya Ltd (Supra)**, where leave to appeal upon the order of setting aside of the arbitral award being made was applied for and granted by *Kimondo J*, the Respondent herein did not, and to date has not, applied for leave to appeal or obtained it. That further, the findings of the Supreme Court as can be discerned from the excerpts set out above, to the understanding of this Court appear to specify the forum for seeking for leave to appeal over orders of the High Court or this Court issued pursuant to **Section 35 of the Arbitration Act**, to be the Court of Appeal. That this Court finds so because it is the Court of Appeal that will determine whether the intended appeal meets the threshold, and is within the **“circumscribed and narrow jurisdiction”** clarified by the Supreme Court. That it is the Court of Appeal that the intended Appellant

would seek to show that this Court's decision of 26th February, 2020 of setting aside the arbitral award was as the Supreme Court required, **"a decision so grave, so manifestly wrong"** and that it has completely closed its door of justice. That it follows therefore, that the decision as to whether or not the Notice of Appeal filed herein by the Respondent constitutes a proper or valid appeal is a matter to be determined by the Appellate Court. That with the available facts, and the decided cases presented, the Court finds and holds that it has jurisdiction to hear and determine the Motion filed by the Respondent dated the 2nd March, 2020 among others, seeking for injunction pending hearing and determination of the appeal.

(f) That from the facts presented by the Respondent, even on a scenario that it was to vacate from the suit lands as earlier indicated by their Counsel in their oral submissions of 26th February 2020, and the statutory provisions guiding exit from a mining activity like **Sections 143 to 150 of the Mining Act No. 12 of 2016**, it is apparent the Respondent would require some time to prepare the suit land before safely vacating. That however, the Respondent appear not to have taken any steps towards that direction, as it has not disputed the Applicant's contention that it is yet to write to the Cabinet Secretary as required by **Section 149 of the said Act**. That while considering the time to give the Respondent, the Court should also consider the interests of the Applicant over the suit lands. That the court is of the view that a period of ninety (90) days would be sufficient for the Respondent to take reasonable steps, and involve the relevant Government and statutory agencies as by law required, so as to attain an orderly and safe exit from the suit land.

(g) That in view of the finding in (f) above, it follows that the Applicant's prayer (2) in the Motion dated 31st March, 2020 fails, the Court having found merit in granting the Respondent an injunction for three (3) months.

(h) That though the Applicant's case was that the Respondent has been carrying out mining activities on the suit lands from the 26th March 2020, the latter has disputed the claim and explained that the activities captured in the attached photographs are **"related to cleaning out and making the mine safe for final closure."** [See paragraph 7 of the Replying affidavit filed on 9th April, 2020]. That deposition has not been specifically rebutted or challenged through a further affidavit. That while the Applicant may be right in their interpretation of the photographs, the Respondent could also be right. That the obligation is on the Applicant to tender proof above balance of probabilities, and below beyond reasonable doubts to succeed in the application for contempt. That the Court in the absence of authoritative confirmation on what was carried by the equipments appearing in the photos or the nature of the activities being carried out, the Court finds the Applicant has failed to discharge the duty to establish contempt against the Respondent.

(i) That in respect of the two Motions, the Court finds that each party should bear their own costs notwithstanding the provision of **Section 27 of Civil Procedure Act Chapter 21 of Laws of Kenya**.

11. That flowing from the foregoing, the court finds and orders as follows;

(a) That the Applicant's Motion dated the 31st March, 2020 has no merit, and is dismissed with each party bearing their own costs.

(b) That the Motion dated the 2nd March, 2020 has partial merit, and is allowed limited in the following terms;

(i) That an order of injunction in terms of prayer 3 of the Motion dated the 2nd March, 2020 is hereby granted restraining **Cheseret Arap Korir**, the Applicant, by himself or those claiming through him from evicting Equatorial Land Holding Limited, the Respondent, from land parcels **Nandi/Chemase/924** and **Nandi/Legemet/224**, or interfering with the legal ownership status of the said parcels for a period of ninety (90) days to enable the Respondent take the necessary legal and statutory steps to either give possession to the Applicant or move the Court of Appeal for further orders.

(ii) That each party bears their own costs in that application.

Orders accordingly.

Delivered and signed at Eldoret this 7th day of May, 2020

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all Parties/Counsel and is to be digitally transmitted by the Deputy Registrar through the e-mail addresses provided by Counsel.

Court Assistant: Christine