



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL, JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO.51 OF 2016

(FORMERLY JR. NO. 272 OF 2016 NAIROBI)

IN THE MATTER OF: CONTRAVENTION OF THE PROVISION OF THE MINING ACT, 2016

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW AND ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION**

BETWEEN

TITUS MUSAU NDOME.....APPLICANT

VERSUS

1. CABINET SECRETARY, MINISTRY OF MINING

2. THE HON. ATTORNEY-GENERAL.....RESPONDENTS

MARY N. MUSYIMI.....INTERESTED PARTY

RULING

The Application

1. The Notice of Motion application before the court is dated 29th June, 2016 and filed herein on 30th June, 2016 under Order 53 Rule 3(1) of the Civil Procedure Rules. The application prays for the following orders:

(1) An order of certiorari to remove into this Honourable court And quash the decision made by the Honourable Cabinet Secretary for Mining in the Republic of Kenya to issue SHOW CAUSE NOTICE to the Applicant to revoke the Mining Permit to ex parte Applicant and the ORDER

contained in the said Notice disallowing any further mining or prospecting activities over the land in question.

(2) An order of mandamus compelling the Honourable Cabinet Secretary for Mining in the Republic of Kenya to give due recognition to the validly and legally obtained Mining Permit procedurally issued to the Applicant.

(3) An order of mandamus compelling the Honourable Cabinet Secretary for Mining in the Republic of Kenya to respect and or give due recognition to the Judgment delivered on the 12th day of September, 2003 in Principal Magistrate's Court in Voi Law Courts in Civil Case No. 31 of 2003.

(4) An order of prohibition barring the Honourable Cabinet Secretary for Mining in the Republic of Kenya from interfering with the mining or prospecting activities being undertaken by the ex parte Applicant on the land in question pending the substantive hearing and determination of this matter.

(5) Any orders issued by this Honourable Court be supervised for compliance and or enforced by the Officer Commanding Police Division in Mwatate in Taita Taveta County.

(6) Any other order that this Honourable Court may deem fit to grant thereon.

2. The application is premised on the grounds set out therein and is supported by affidavit of **Titus Musau Ndome** sworn on 29th June, 2016. The deponent is the Applicant herein. The Applicant's case is that he legally holds prospective rights and legal mining permit over **Kamakya A and Kamakya B location in Taita Taveta County** which were issued between 1994 and 1997. The Applicant subsequently obtained written consent from the then Taita Taveta County as required under the Mining Act. However, afterwards a Mr. Thiophilus Kiwia Musyimi (now deceased) then claiming mining rights over the same locations filed a case in court being Civil Case No. 31 of 2003 at Voi Law Courts against the Petitioner which suit was fully heard and determined and dismissed in favour of the Petitioner. The court in its Judgment observed that the land in question was trust land over which the Petitioner had acquired mining and prospecting rights absolute ownership of which cannot be claimed by either party to the suit. The Petitioner's case is that the dispute was heard and determined by a court of competent jurisdiction and no appeal has been lodged against the said Judgment and therefore the Judgment stands up to date. Further, the Petitioner states that the court also recognized the fact that he had procedurally and legally obtained the requisite consent or licence to mine or prospect on the land. Consequently the court issued a permanent injunction against the Plaintiff and his agents from interfering with the mining and or prospecting activities which the Petitioner had acquired over the land for as long as the Petitioner held valid licences. The said Plaintiff has since died and his wife MARY NDUKU MUSYIMI (the Interested Party herein) is the one who is now disobeying the order of the court which her late husband recognized, respected and obeyed. The Petitioner's case is that since then, there have been interference from the Interested Party who is using the Honourable Cabinet Secretary for Mining in the Republic of Kenya to issue threats and notices of cancellation of Petitioner's Mining Permit in blatant disregard and disobedience of the court orders issued in the aforementioned case. There was arbitration in two tribunals over the dispute by the Commissioner of Mines in 22/05/2003 and in 14/02/2013 and both tribunals ruled in favour of the Petitioner. However, the Cabinet Secretary is acting in total contravention of the express provisions of the Mining Act 2016, despite the Petitioner holding valid and legal mining prospecting licences over the land which are irrevocable under the law. The Petitioner's case is that the Honourable Cabinet Secretary for Mining in the Republic of Kenya has been inciting the family of the Interested Party to harass and interfere with Petitioner's prospecting activities on the land, and this interference has caused Petitioner irreparable loss and damage. The Petitioner now accuses the Cabinet Secretary for abuse of office.

The Response

3. The application is opposed by the Respondent vide replying affidavit sworn by **Thomas Mwau Mutwiwa**. It is also opposed by the Interested Party vide a replying affidavit sworn by **Mary Nduku**

Muthiani on 25th August, 2016. The Respondent's case as stated by Thomas Mwau Mutwiwa, the Senior Superintendent Inspector of mines, is that the Applicant held previous licences under the repealed mining Act and his last licence expired in March, 2015 hence by the time this Petition was filed on 22nd June, 2016 there was no licence in force. The Applicant was then required to renew the permits or licences upon certain statutory terms and conditions including the consent of the owners of the land for example the County Government, the Interested Party and so on, and the Applicant was notified to obtain such consents to no avail. To resolve the issue, arbitration meeting was held on 14th February, 2016 in the presence of the Applicant where he was fully heard and it was resolved that he obtains the consent of the Interested Party and also ensure environmental degradation concerns are positively addressed (see minutes of Arbitration "TMM 4"). The Petitioner never took any of those steps. There was also the County Government task force which made the same recommendations (see "TMM 5"). The Respondent's case is that the licence was only deferred **NOT** refused pending the Applicant meeting the above conditions which he has refused to do and he instead rushed to court. The Petitioner was notified of the decision (see "TMM 7"). He was issued with Notice to Show Cause which he disregarded. The Petitioner therefore has no permit or licence the basis of which he can continue to mine or carry out prospecting activities on the Interested Party's land.

Interested Party's Case

4. The Replying Affidavit by the Interested Party **Mary Nduku Muthiani** equally has all the above points. She is the owner of the subject suit premise (see "MNM 1") and she and other family members made the complaints (see "MNM 2"). The Notice to Show Cause is marked "MNM 3". She also annexed copy of the county Task Force Report ("MNM 4") which required the ex parte Applicant to obtain her consent. This is her private property and her case is that she is entitled to full use of her property. Further the Interested Party states that she was not a party in the VOI PMCC NO. 3 OF 2003 and in any event the court gave a condition that the mining was to proceed only if the licence was not revoked or cancelled by the relevant authorities (meaning the Respondent). The Interested Party's case is that by the time the ex parte Applicant acquired the licence the land was trust land but now it is private land after it was converted to Mwachabo Settlement Scheme, and allocated to people including the Interested Party hence the situation has changed and the Applicant has to comply with the changes since the licences have expired and were only for Trust Land not private land.

Submissions

5. With the leave of court parties filed submissions which I have carefully considered together with the application and pleadings. The issues to be determined by this court are as follows:

(i) who is the legal owner of the land;

(ii) whether the Applicant has a current licence to carry out the said mining activities;

(iii) whether the Applicant has the right to carry out mining activities in the Interested Party's land in perpetuity.

Who is the legal owner of the land?

6. It is not in dispute that the Applicant held prospecting rights and mining permits over Kamakya A and B locations in Taita Taveta County. These licences were granted between the years 1994 and 1997. The Applicant subsequently secured written consent from the County Government to prospect in the said location. The Interested Party's husband, the late Theophilus Kiwia Musyimi then claiming rights over the same location filed a Civil Suit No. 31 of 2003 at Voi Law Courts against the Applicant herein which suit was dismissed in favour of the Applicant with the court finding that the said location was trust land which could not be claimed by any of the parties before the court. The court then approved the mining activities which were being conducted by the Applicant on the said location provided the Applicant had current licences and permits to mine the land. The said trust land was later on adjudicated and issued to the members of the community including the Interested Party's husband and the Applicant herein. Upon

adjudication of the area, both the Applicant and the husband of the Interested Party were allocated land in the suit area, with the eventuality that part of the land now being mined by the Applicant and over which the Applicant had prospecting rights was now legally belonging to the deceased husband of the Interested Party. The officials in the Mining Ministry tried to resolve the dispute between the warring parties, and advised the Applicant not to carry out any mining activities on the property belonging to the Interested Party's husband without the consent of the Interested Party. By his letter dated 22nd January, 2003, the Ministry of Mining advised the Applicant in the second last paragraph as follows:

“In view of the above, you are requested to obtain the land owner consent from Mr. Kiwia over his portion of land that extend into your mining claims area. In the meantime any mining or prospecting activity in Mr. Kiwia’s land should cease forthwith until the said consent has been obtained.

Please comply with the said order within thirty (30) days from the date of this letter.”

7. The Applicant disregarded the said letter and instead filed the said suit in Voi Court which granted him permanent injunction against the Plaintiffs in that suit and his agents from interfering with the mining and or prospecting activities over the said land as long as he held valid licences. Indeed, the Applicant has since then come to this court on 14th July, 2016 and successfully applied for an order for provision of police security to the Applicant's prospecting or mining activities in the said location. The Attorney-General's attempt to seek the reversal of those orders was rejected vide the Ruling of the court on 29th July, 2016. However, by consent of the parties the status quo on the matter has been maintained, with the result that there are currently no mining or prospecting activities going on in the suit sites. So, the question as to who is the legal owner of the suit land is answered as follows: the suit land herein belongs to one late Theophilus Kiwia Musyimi who was the husband of the Interested Party.

Whether the Applicant has a current licence and permits to carry out the said mining activities

8. The Applicant's case is that he was issued with licences and permits to carry on the mining and prospecting activities in the area between 1994 and 1997. The Applicant holds that the licences are valid and are irrevocable under the law. The Applicant has refused to obtain consent from the owner of the land, herein the Interested Party. The ex parte Applicant's contention has all along been that he obtained consent from the County Council of Taita Taveta on 1st April, 1996 and that he requires no further consent.

9. I have considered the Applicant's submissions on this issue. While it is true that the ex parte Applicant obtained consent from the County Council of Taita Taveta on 1st April, 1996, the said consent is no longer good for purposes of renewal of the mining rights. The consent obtained on 1st April, 2016 was only good for the first ten years after completion of pegging of mineral location.

10. Section 29 of the repealed Mining Act, under which the mineral right was issued, provides that where a mining location is in Trust Land, no application for renewal of a mineral rights permit can be granted if such extension had the effect of extending validity of the rights beyond ten years from the date of pegging of location unless the Applicant obtained consent of the County Government.

11. Section 29(1)(ii) provides that:-

“...where the location is situated in Trust Land, no such renewal shall be granted except with the consent of the county council within whose area of jurisdiction such Trust Land is situated unless the renewal would not have the effect of extending the validity of the rights in the location beyond the period of ten years from the date of the pegging of the location; any such consent may relate to and be validly given in respect of successive renewals over a period not exceeding five years.”

This means that the ex parte Applicant having obtained consent from the County Council of Taita Taveta on 1st April, 1996 the said consent was only good until 1st April, 2006. Thereafter the Applicant was required to get consent for renewal of mineral rights.

12. It is clear that no consent has been obtained to date even after several reminders to the Applicant. While the Applicant awaited a decision on whether or not his application for renewal of mineral right would be granted, a new regime governing the Mining Sector came into force; **The Mining Act, 2016**. Section 37 and 38 of the Mining Act, 2016 requires persons applying for a prospecting and/or Mining right to obtain consent of the land owner in the case of private land and/or the county government in the case of trust land before they can be issued with a prospecting and/or Mining Licence.

13. Out of abundant caution and in order to give the Applicant sufficient Notice and an opportunity to explain why he had not obtained consent from the land owner and/or the County Government the Respondent issued the Notice to Show Cause under Section 147(3) of the Mining Act, 2016. However, instead of responding to the Notice to Show Cause, the Applicant rushed to court and obtained leave to file the current application seeking Judicial Review orders.

14. The Respondent submitted correctly in my view that the decision to issue the Applicant with a Notice to Show Cause was legal, rational and procedural. The Notice to Show Cause was issued in line with the principle of fair administrative action enshrined in Article 47 of the Constitution and the orders of certiorari cannot issue. The Applicant also sought an order of mandamus to direct the Respondent to give due recognition to the validity of the legally obtained Mining Permit procedurally issued. The Applicant's mining rights expired on or about 18th March, 2015 and an application for renewal is pending. Under Section 29(1) the repealed Mining Act a Mining Right was only valid for a year subject to renewal. Section 29(1) is provided as follows:-

“The rights of a holder of a location shall remain valid for the period of one year from the date of the pegging of the location and shall then expire.”

15. Consequently this court finds and holds that the Applicant does not have a valid license for which an order of mandamus can issue directing the Respondent to recognize.

16. The Applicant also sought an order of mandamus directing the Respondent to respect and give due recognition to the Judgment delivered on 12th September, 2003 in Voi PMCC 31 of 2003. It is trite law that court orders and decrees must be obeyed and disobedience of court orders invite sanctions. However, the Applicant has not alleged breach and has not indicated that he fears the Respondent will violate the Judgment of court. The Respondent has no basis for seeking the order of mandamus. The court in Voi PMCC No. 31 of 2003 issued a permanent injunction restraining Theophilus Kiwia Musyimi, his agents, assignees or employees from interfering with the ex parte Applicant's mining activities. The court further placed a condition that the permanent injunction will only remain in force so long as the licence and consent given to the ex parte Applicant are not revoked or cancelled. At present the Applicant has no consent to carry out prospecting and/or mining activities on the disputed land. The consent previously obtained was only good for ten years from the date of completion of pegging of mineral location pursuant to Section 29 of the repealed Mining Act.

17. From the foregoing, it is the finding of this court that the prayers for Judicial Review in this Application have not been justified and the same are declined.

18. Before I conclude this Ruling, it is important to observe that under the Constitution of Kenya a person's right to property is protected and so, the Applicant cannot purport to have the rights to carry out mining or prospecting activities on the Interested Party's land without consent of the owner of the land in perpetuity. The Applicant's claim to have that right is clearly illusionary, for Sections 37 and 38 of the Mining Act 2016 have made it clear that persons applying for a prospecting and/or mining right must obtain consent of the land owner in case of private land and or the County Government in case of trust land before they can be issued with a prospecting or mining licence.

19. Pursuant to the foregoing the Notice of Motion before the court dated 29th June, 2016 is dismissed with costs to the Respondent and to the Interested Party. Further, any interim orders which may have been issued herein in favour of the Applicant are herewith lifted.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 2nd day of March, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Makuto for Respondent

Mr. Kailo for Applicant

Mr. Kimilu for Interested Party

Mr. Kaunda Court Assistant