



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 748 OF 2013 (FORMERLY PETITION NO. 16 OF 2013)

EXCLUSIVE MINES LIMITED PETITIONER

VERSUS

MINISTRY OF MINING 1ST RESPONDENT

COMMISSIONER OF MINES AND GEOLOGY.....2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

JAMES KOORO MUGWUKU INTERESTED PARTY

RULING

Having considered the petition herein together with the Respondents and Interested party's responses and also cross-petition, this Court delivered its judgment on 14th November 2014 in the following terms:-

- 1. A conservatory order restraining the 1st and 2nd Respondent either on their own, their agents, servants or employees from in anyway granting either an Exclusive prospecting licence or mining lease to any other company/person other than the Petitioner to the area covering 400 Km (squared) South of Ishiara within Embu County including the area around Kirigo Hills.***
- 2. A Declaration that the Petitioner is entitled to an Exclusive Prospecting Licence for an area covering 400 Km (squared) South of Ishiara within Embu County in terms of its application of 20th February, 2007***
- 3. An order compelling the 1st and 2nd Respondents to take such steps as are necessary to confer title upon the Petitioner as Exclusive Prospective Licence and/or Mining Lease for the area covering 400 Km (squared) South of Ishiara within Embu County including the area around Kirigo Hill.***
- 4. A Declaration that the Interested party has no right to conduct mining activities within the area covering 400 Km (squared) within the area covering 400 Km (squared) South of Ishiara within Embu County allocated to and occupied by the Petitioner.***
- 5. Costs of the petition.***

Aggrieved by that judgment, the Interested party filed a Notice of Appeal dated 24th November 2014 and on 8th December 2014 filed a Notice of Motion (herein the Interested party's Notice of Motion) under Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders:-

- 1. That the application be certified as urgent and heard on priority basis.***

2. ***That this Honourable Court issue a temporary order of stay of execution of the Judgment/Decree herein pending the hearing and determination of this application.***
3. ***That there be a stay of execution of the Judgment/Decree herein pending the hearing and determination of the Intended Appeal.***
4. ***That cost of this application be provided for.***

That application was supported by the Interested party's affidavit and based on the grounds, inter alia, that:-

- ***The interested party has an arguable appeal with high chances of success***
- ***That the stay should be granted so that if the appeal is successful, it will not be rendered nugatory***
- ***that it is fair and in the interest of justice that the application be granted***
- ***That the Interested party stands to suffer substantial loss and/or damage if stay is not granted.***

Those averments were highlighted in his supporting affidavit in which he deponed, inter alia, that:-

- ***The appeal has very high chances of success***
- ***He will suffer substantial loss if the stay of execution is not granted as he has invested substantially in exploration activities over his exploration licence EPL 264 area***
- ***He has paid a sum of Ksh. five hundred and fourty three thousand five hundred and thirty six (Ksh. 543,536/=) to renew his exploration licence EPL 264 for this year etc.***

On 16th December 2014, the Petitioner filed grounds of opposition to the Interested party's application claiming, inter alia, that the application was defective and no security for performance of the decree had been provided and, in any event, the order that affects the Interested party in the judgment dated 14th November 2014 was a declaratory judgment which cannot be stayed. The Respondents through S.M. Kimomo the acting Commissioner of Mines filed a replying affidavit stating that this Court's judgment has infact been complied with.

On 5th May 2015 counsel for the Interested party appeared before the Deputy Registrar at this Court and obtained a temporary order of stay in terms of prayer 2 of his Notice of Motion dated 8th December 2014 and having been served with that order, the Petitioner promptly

filed his own Notice of Motion dated 22nd May 2015 (herein the Petitioner's Notice of Motion) seeking a review/setting aside of the order issued by the Deputy Registrar issued on 5th May 2015 on the grounds, inter alia, that that order was issued on a date when the matter was coming up for mention and not hearing and in any case, the Deputy Registrar did not have jurisdiction to issue such an order in a decree that had infact been fully executed. That Notice of Motion was supported by the Petitioner's affidavit in which he deponed, inter alia, that on 5th May 2015, both his advocate and the Interested party's advocate were at the Registry but since the Court was not sitting, both of them left for Nairobi but at 3.40 p.m. his advocate was served with the order staying execution of the judgment and decree herein issued on the same day. The Petitioner deponed further that the matter was only listed for mention on 5th May 2015 yet the Deputy Registrar heard the application ex-parte in a matter that she had no jurisdiction to act.

KAUMBA SAMWEL ODIWUOR a State counsel appearing for the Respondents filed an affidavit in support of the Petitioner's Notice of Motion adding that following this Court's Judgment, the Respondent issued a licence to the Petitioner in compliance with the same and therefore a stay order could not be issued and in any case, the matter was only listed for mention on 5th May 2015 and therefore the order was issued in error.

The interested party filed a replying affidavit in which he deponed, inter alia, that the Deputy Registrar had the jurisdiction to issue the orders dated 5th May 2015 and that the judgment has not been executed.

Mr. S.M. KIMOMO the Acting Commissioner of Mines and Geology similarly filed an affidavit clarifying that a licence had been issued to the Petitioner in compliance with this Court's judgment.

When the parties' advocates appeared before this Court on 14th July 2015, it was agreed that both the Interested party's Notice of Motion dated 8th December 2014 and the Petitioner's Notice of Motion dated 22nd May 2015 be canvassed together by way of written submissions which have been filed. This ruling is therefore in respect of those two applications which I have considered together with the rival affidavits and annexures thereto and counsels' submissions.

I shall commence with the Petitioner's Notice of Motion dated 22nd May 2015 seeking a review/setting aside of the Deputy

Registrar's orders of 5th May 2015. Those orders were issued pursuant to the Interested party's application seeking a temporary stay of execution of this Court's judgment delivered on 14th November 2014. That application was premised under **Order 42 Rule 6 of the Civil Procedure Rules** which provides for orders of stay in case of appeal. While **Order 47 of the Civil Procedure Rules** donates special powers to a Registrar or, in a subordinate Court an Executive officer to hear and determine some applications, it is clear from **Order 49 Rule 7(b) of the Civil Procedure Rules** that an order for stay pending appeal under **Order 42 Rule 6 of the Civil Procedure Rules** is not among some of the orders that the Registrar may issue. The Deputy Registrar was therefore not empowered to issue the orders dated 5th May 2015 and the same having been issued without jurisdiction must be reviewed and set aside because a Court can only exercise jurisdiction conferred upon it either by the Constitution or other written law. I therefore find that the Deputy Registrar acted ultra vires in issuing the orders dated 5th May 2015 and the same are hereby reviewed and set aside ex-debito justitiae.

Besides, the case having been listed for mention and not hearing, it was procedurally improper for the Deputy Registrar to issue such substantive orders in the absence of the other party.

Turning now to the Interested party's Notice of Motion dated 8th December 2014, it sought the main prayer of stay of execution of this Court's judgment pending the hearing and determination of an Intended appeal. The application was brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** which under **Sub rule (2)** provides as follows:-

"No order for stay of execution shall be made under Sub-rule (1) unless:-

- a. ***The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- b. ***Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"***.

It is clear therefore that the High Court's jurisdiction to grant an order of stay pending appeal under **Order 46 Rule 6 of the Civil Procedure Rules** is fettered by three conditions namely establishment of sufficient cause, satisfaction by the applicant that substantial loss may ensue if the order is not granted and the furnishing of security. The application must also be made without un-reasonable delay. On the issue of un-reasonable delay, the Interested party's Notice of Motion was filed on 8th December 2014 just over three (3) weeks after the Court delivered its judgment on 14th November 2014. The Interested party cannot therefore be guilty of any delay as he moved the Court promptly.

On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred. I have looked at the Interested party's affidavit in support of his Notice of Motion and nowhere in his seventeen (17) paragraph affidavit does he make any offer of any security nor bind himself to meet any such orders that the Court may impose. While the law leaves it

to the Court's discretion to make such orders as to security as it may deem fit, it is a good practice for an applicant seeking such an order to intimate to the Court his preparation to meet such orders as the Court may impose as this assists the Court while exercising its discretion in that respect.

In an application under **Order 42 Rule 6 of the Civil Procedure Rules**, however, the central issue that the Court must determine is that of substantial loss. **Platt Ag. J.A** (as he then was) addressed that issue in **KENYA SHELL LTD VS KIBIRU 1986 K.L.R 410 at page 416** as follows:-

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented”.

On his part, **Gachuhi Ag. J.A** addressed that issue as follows in the same case:-

“It is not sufficient by merely stating that the sum of Ksh. 20,380/- is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted”

That is the route that Courts have taken in applications of such nature – see for example **SILVERSTEIN VS CHESONI (2002) 1 K.L.R 867** and also **MUKUMA VS ABUOGA 1988 K.L.R 645**.

Guided by the above principles, I shall now examine if the Interested party has established that he will suffer substantial loss which, in my view, must be such loss that if he were to succeed on appeal, the very substratum on which his claim was founded would have been defeated if not wholly but at least to a substantial degree. In other words, the basis upon which the litigation was mounted would have been lost. In both paragraphs 9 & 11 of his two affidavits, the Interested party has stated as follows on the issue of substantial loss:-

“That I will suffer substantial loss if the stay of execution sought is not granted as I have invested substantially in exploration activities over my exploration licence EPL 264 area”

No attempt is made to illustrate what substantial exploration activities he has undertaken. That averment is therefore a bare allegation and does not provide this Court with any **“sufficient cause”** upon which stay may be granted as provided under **Order 42 Rule 6(1) of the Civil Procedure Rules** which reads as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may “for sufficient cause”

order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside” (emphasis added)

In **BUTT VS RENT RESTRICTION TRIBUNAL 1982 K.L.R 417 Madan J.A** (as he then was) described the Court's jurisdiction in such applications as follows:-

“It is in the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether or not there are particular circumstances in the case to make an order staying execution”

In the matter before me, the only order that directly affects the Interested party is the Declaration order directing that he has no right to conduct mining activities within the area already allocated to the

Petitioner and in my view, this is not an order capable of being stayed and in any event, the Respondents against whom the order is directed have already complied with the judgment of this Court. An application for stay is meant to prevent substantial loss that may occur or real breach of a legal right and therefore such an order of stay is not tenable where the act sought to be stayed has already been complied with.

In paragraph 11 of his supporting affidavit, the Interested party has deponed that he has paid some Ksh. 543,536/= to renew his exploration licence and has annexed two Banker's cheques for that sum both dated 3rd October 2014. That sum was paid when this case had been heard and was pending judgment. It is not clear why the Interested party paid that sum when the dispute was pending determination by this Court which is a clear evidence of male fides on his part and in any event, the money was paid to Respondents herein and there is no suggestion that either they or the Petitioner are incapable of refunding this sum should his appeal be successful. In view of all the foregoing, the Interested party's Notice of Motion lacks merit and must be dismissed which I hereby do.

Ultimately therefore and upon considering both the Interested party's Notice of Motion dated 8th December 2014 and the Petitioner's Notice of Motion dated 22nd May 2015, this Court makes the following orders:-

- 1. *The Interested party's Notice of Motion dated 8th December 2014 is dismissed with costs to the Petitioner and Respondents.***
- 2. *The Petitioner's Notice of Motion dated 22nd May 2015 is allowed and the Deputy Registrar's order issued on 5th May 2015 are set aside ex-debito justitiae. Costs thereof shall be borne by the Interested party.***

It is so ordered.

B.N. OLAO

JUDGE

13TH OCTOBER, 2015

13/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Anzala for Petitioner – present

Attorney General for Respondents – absent

Mr. Maina for Mr. Wainaina for Interested party – present

COURT: Ruling delivered this 13th day of October 2015 in open Court.

Mr. Anzala for Petitioner present

Mr. Maina for Mr. Wainaina for Interested party – present

No appearance for Respondents.

B.N. OLAO

JUDGE

13TH OCTOBER, 2015