



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC NO.134 OF 2014

FRANCIS EDWARD STRANGE PLAINTIFF/APPLICANT

VERSUS

MBOE SAMBU RESOURCES LIMITED 1ST DEFENDANT/RESPONDENT

MARK LLYOD STEPHENSON 2ND DEFENDANT/RESPONDENT

RULING

1. The application for determination before this court is the notice of motion dated 23rd April 2014 brought pursuant to **Order 22 rule (22), (23), Order 45 (1) and (2) of the Civil Procedure Rules Section 1A, 1B and 3A and Section 80 of the Civil Procedure Act (Cap 210 laws of Kenya)** and all other enabling provisions of the law. Orders sought in the application are:-

1. *Spent.*
2. *That this honourable court do grant an Order Restraining, Stopping, Prohibiting and/or Baring the 2nd respondent and/or his agents, employees and/or servants from carrying on any operations and/or activities on the 1st respondent's mining site situate in Title Number Transmara/Moita/299 in Transmara County until the hearing and determination of this application inter parties.*
3. *That this honourable court do grant an order restraining, stopping, prohibiting and/or baring the 2nd respondent and/or his agents, employees and/or servants from carrying out any operations and/or activities on the 1st respondent's mining site situate at Title Number Transmara/Moita/299 in Transmara County until the hearing and determination of the suit herein.*
4. *That the costs of this application be provided for.*

2. The application is premised on the grounds on the face of the application and supported by the affidavit of Francis Edward Strange a shareholder and director of 1st Respondent sworn on the 23rd of April 2014.

3. Briefly the deponent in his affidavit states that the 1st Respondent has interest in a goldmine situate at Transmara/Moita/299 in Transmara County and has obtained the consents of the land owner allowing it to prospect for minerals and rare earth on their land and that a consent of the Transmara Sub-County has also been acquired through its sister company Afriken Minerals shown as “FES-3”.

4. He also states that the 1st respondent leased a mining equipment and had it placed on the site awaiting the sanction of the board of directors on the commissioning of the site and equipment but the 2nd respondent took over the said equipment from the site without permission of the board of the 1st respondent and started crushing and extracting gold from the said site.

5. This action by the 2nd respondent, he depones, is illegal and unlawful because they have neither been sanctioned nor have they been ratified by the board of directors of the 1st Respondent. That the said action further jeopardizes the operations of the 1st respondent and exposes them to civil suits and criminal sanctions.

6. Further that despite his numerous pleas with the board of directors of the 1st respondent no action has been taken. He adds that the application has been made without any unreasonable delay and prays that the orders sought herein be granted in the interests of justice and fairness. Lastly that the defendants/respondents shall not be prejudiced as the matter will be heard on merit and a decision will be arrived at.

7. The application is opposed vide the replying affidavit sworn by Mark Llyod Stephenson, the 2nd defendant/2nd respondent on 5th May 2014 in which he states that he is one of the directors of the 1st defendant/1st respondent herein. He states that the plaintiff/applicant has stopped the operations of the company without following the right procedure and without good reason. He adds that the said company's assets and projections so far is well over Kenya Shillings 50 million which the company continues to lose with this case in court and therefore the plaintiff should be ordered to deposit the same amount in court as security for the losses so far incurred.

8. He prays that the orders herein should be vacated as the same were given without considering the interest of the company and its assets and materials on site, directors, investors and employees on site whose fate have not been determined. He denies the contents of the annexures together with the allegations in the supporting affidavit. Mr. Stephenson also depones that as a director of the 1st respondent, the applicant is not competent to bring this suit against the 1st defendant herein without a valid resolution of the Board of Directors of the 1st respondent authorizing him to do so. It is also the deponent's contention that the applicant has not disclosed to the court that he owns only 5% shares in the company, which shares do not give him a voice to speak against the company.

9. It is also contended on behalf of the defendants that the applicant is not thinking of the likely prejudice to the 1st defendant of this case, especially considering that the applicant has not demonstrated what prejudice he would suffer if the orders sought are not granted. He urges the court to dismiss the application.

10. The defendants also filed Grounds of Opposition pursuant to **Order 51 Rule 14 (1)** of the **Civil Procedure Rules, 2010** to the effect that:-

1. *The application does not disclose course of action. (sic)*
2. *That the application is frivolous, misconceived and bad in law.*
3. *The same is tainted with malafides.*
4. *The application is premature.*
5. *The application is meant to defeat and injure the operations and character of the defendants.*

6. *The application is brought under irrelevant sections of the law and therefore does not apply. (sic)*
7. *The two respective orders do not relate to the suit herein hence null and void abnitiio.*
8. *That there is misjoinder in the suit.*
9. *The applicant lacks locus standi and or capacity to bring the suit herein.*

10. *The applications offends the provisions of the civil procedure rules of that of the provisions of the Act Chapter 486 of the Company Laws of Kenya.(sic)*
11. *That the fraudulent orders are being used to harass the defendants, their employees in any site related to them exposing them to huge loss of machineries which could be stolen and or taken to waste since the court did not give any order protecting the same.*
12. *That on the basis on the objections herein the respondent hereby gives notice to the effect that they shall raise preliminary objection on point of law at the hearing of the application herein.*

13. *The application ought to be dismissed with costs to the Respondent.*

11. Briefly, the facts leading to the instant application are that by a plaint dated 4th April 2014, the plaintiff/applicant seeks the following reliefs:

(i) *A permanent injunction do issue against the 2nd defendants, his employees, and/or agents or anyone acting under his instructions restraining him from conducting any further extraction and crushing of ore or any other operations and/or activities on the Gold mine site held by the 1st defendant at Kehancha within Migori County.*

(ii) *A declaration that the 2nd defendant has breached his fiduciary duties as a Director of the 1st defendant.*

(iii) *General damages.*

(iv) *Costs of the suit.*

12. Together with the plaint, the plaintiff/applicant moved the court vide the notice of motion of even date for the following orders:-

1. *That the application be certified as urgent and service thereof be dispensed with and the same be heard ex-parte in the first instance.*
2. *That this honourable court do grant an order restraining, stopping, prohibiting and/or barring the 2nd respondent and/or his agents, employees and/or servants from carrying on any operations and/or activities on the 1st respondent's mining site situate at Kehancha in Migori County until the hearing and determination of this application inter partes.*
3. *That this honourable court do grant an order restraining, stopping, prohibiting and/or barring the 2nd respondent and/or his agents, employees and/or servants from carrying on any operations and/or activities on the 1st respondent's mining site situate at Kehancha in Migori County until the hearing and determination of the suit herein.*
4. *That the costs of this application be provided for.*

13. On 7th April 2014, counsel for the plaintiff/applicant appeared before court ex-parte and upon hearing him, the court granted prayer 2 of the said notice of motion restraining, stopping, prohibiting and/or barring the 2nd respondent and/or his agents, employees and/or servants from carrying on any operations and/or activities on the 1st respondent's mining site at Kehancha in Migori County until the hearing and determination of the application inter partes. The plaintiff/applicant was ordered to serve the application upon the respondents for inter partes hearing on 22nd April 2014.

14. Unfortunately the court did not sit on 22nd April 2014 and on 23rd April 2014, the plaintiff/applicant filed the instant application. It is clear that since the orders issued on 7th April 2014 were to last until inter partes hearing on 22nd April 2014, the orders had lapsed by the time the instant application was filed on 23rd April 2014. The application dated 4th April 2014 was neither withdrawn nor abandoned, and the same remains on the record todate, though it is unprosecuted.

15. On 23rd April 2014, the plaintiff/applicant appeared before this court (though differently constituted) and obtained an interim order of injunction in terms of prayer 2 of the said application, namely an order restraining, stopping, prohibiting and/or barring the 2nd respondent and/or his agents, employees and/or servants from carrying out any operations and/or activities on the 1st respondent's mining site situate at Title Number Transmara/Moita/288 in Transmara County until the hearing and determination of the application inter partes.

16. On the 6th May 2014, the parties agreed to canvass the application by way of written submissions to

be filed and exchanged at least three (3) days before 9th June 2014 when the parties were expected to highlight the submissions. By 9th June 2014, only counsel for the defendants/respondents had filed and served their set of written submissions. On the 9th June 2014, both counsel agreed that the court should proceed to craft a ruling since the matters in issue were on points of law.

1. I have now carefully read through the plaint and the two applications. I have also carefully read the submissions filed on behalf of the defendants/respondents which bring out the following points:-

1. *The subject matter of the instant application is different from the subject matter in the plaint, namely that LR Transmara/Moita/299 does not feature anywhere in the plaint;*
2. *That the interim order of injunction granted on 23rd April 2014 was made on a new application in which the plaintiff/applicant totally failed to disclose there was a previous application which needed either to be withdrawn or have the orders issued on 7th April 2014 extended before filing a fresh application or having the application withdrawn;*
3. *That the orders sought in the instant application cannot be granted because they are at variance with the reliefs sought in the plaint, the latter not mentioning LR Transmara/Moita/299;*
4. *That the plaintiff/applicant ought to have petitioned this court in the matter of the Companies Act, and not to come by way of plaint and that in the circumstances the plaintiff/applicant is engaged in abuse of the court process;*
5. *That alternatively the plaintiff/applicant ought to have petitioned the Registrar of Companies for directions failing which, he ought to have resigned as a director.*

17. After a careful analysis of the above, I find and hold that the instant application is indeed an abuse of the due process of the court and ought not to be allowed. First and foremost the interim orders granted on 23rd April 2014 were premised on non-disclosure to the court by the plaintiff/applicant that there was another application seeking similar orders and which application remained unprosecuted. If the court hearing the applicant at the ex-parte stage on 23rd April 2014 had been given the full facts, the interim orders of injunction would not have been granted.

18. Secondly, it is clear that the orders sought in the instant application are at variance with the reliefs sought in the plaint. As the orders of injunction can only be premised upon the reliefs sought in the plaint, the instant application, which seeks totally new orders on a different subject matter are incapable of being granted, unless there is a corresponding amendment of the plaint, nor the prayers of the application.

19. Thirdly, the affidavit in support of the instant application introduces a third party, namely Afriken Minerals Limited whose relationship with the two defendants/respondents is not disclosed, nor is it made a party to the suit. For this reason, I find that this supporting affidavit does not support the reliefs sought in the plaint.

20. Fourthly, it is my considered view that the instant application should be stayed pending the hearing and determination of the application dated 4th April 2014 by dint of the provisions of **Section 7** of the **Civil Procedure Act, Chapter 21 Laws of Kenya**.

21. For all the above reasons, I am convinced beyond doubt that the instant application is an abuse of the court process. It is without merit and ought to be dismissed.

22. If I am wrong on the above findings I am of the considered opinion that the plaintiff/applicant has not complied with the conditions for the granting of injunctions as set out in the case of **Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358**. He has not demonstrated what damages he is likely to suffer if the orders sought herein are not granted nor has he shown that the loss he is likely to suffer is not compensable by way of damages. Even if I were to consider this case on balance of convenience, the same would tilt in favour of the defendants/respondents because of lack of consistency in the prayers set out in the application and the reliefs sought in the plaint.

23. For all the above reasons, I find no merit in the notice of motion dated 23rd April 2014 and dismiss it altogether with costs to the defendants/respondents.

It is so ordered.

Dated, signed and delivered at Kisii on 1st day of July, 2014

R.N. SITATI

JUDGE.

N/A for Mr. Kago for Plaintiff/Applicant

Mr. O. Kisera for Mrs. Nyang for Defendants/Respondents

Mr. Bibu - Court Assistant