



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Tunoi, Shah & Owuor, J.J.A.)

CIVIL APPLICATION NO. NAI. 105 OF 1998 (UR.44/98)

BETWEEN

KASIGAU RANCHING (D.A.) LTD.....APPLICANT

AND

1. JOHN GITONGA KIHARA

2. MARY WANJIKU MBUGUA

3. OLONGIDA NGILORTI

4. MISHEN MUSA

5. BARAKA MINING CO. LTD.....RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at
Nairobi
(Mbiti, J.) dated 25th February, 1998
in**

H.C.C.C. NO. 5936 OF 1993)

DRAFT RULING OF THE COURT:

The applicant is the registered owner of all that parcel of land known as L.R. No. 12180 situate at Kasigau within Taita Taveta District. The respondents were, some time ago, licensees of the applicant, for prospecting of minerals and precious stones. The licences were withdrawn. This court in fact, in Civil Appeal No. 134 of 1994, which appeal was between the same parties who are before us said:

"The defendants had been granted a licence which had expired

and there was no evidence of any renewal of such

licence. Upon the plaintiff withholding his consent the

defendants were clearly trespassers."

It is clearly arguable as to whether the Department of Mines and Geology in any way allow trespassers to continue prospecting on someone else's land. It is also clearly arguable as to whether the applicant could ever become a trustee of the respondent's alleged right to the minerals which may be on the said parcel of land.

But Mr. Oluoch for the respondent was at pains to argue, that as the Department of Mines & Geology had granted to the respondents a licence to mine on the property of the applicant, they were entitled to carry out their mining operations regardless of the lack of consent on the part of the applicant. He referred to sections 7(1)(M) and 7(2) of the Mining Act Cap 306 (the Act) to support his argument. But that cannot be.

Section 7(1)(M) of the Act simply provides that private lands are excluded from prospecting and mining except with the consent of the owner thereof. This section does not help the respondents. On the contrary it exempts private lands from prospecting and mining except with the consent of the owner.

Section 7(2) of the Act authorizes the Minister to decide whether or not a particular land is excluded under the section (from prospecting and mining) but it does not authorize the Minister to send prospectors and miners from going on to the land without the consent of the owner thereof.

The provisions in the Act relied upon by Mr. Oluoch does not take his argument any further but, to the contrary, the said provisions protect the owner of land should be not want prospectors and miners on his land.

It will suffice to say, at this stage, that the intended appeal is clearly arguable, a fact which was eventually conceded by Mr. Oluoch who however, steadfastly maintained that the intended appeal would not be rendered nugatory in the event of success as the applicant could still sell the land it wanted to sell to pay off the mortgage for which debt Agricultural Finance Corporation of Kenya was threatening to sell the land. Mr. Oluoch urged that as the applicant had no rights in the minerals in the land it could suffer no harm whilst the respondents continued prospecting thereon. That argument is not correct. Any prospective buyer who is aware of the presence of the respondents on the land with their temporary structures and mining machines would shy away from buying that land as a result whereof the applicant would not be able to sell the land exposing it to the inevitable forced auction sale. Mr. Oluoch's argument that the applicant only owns the top soil and therefore can suffer no harm as a result of prospecting going on on the land is not cogent. Save for minerals the applicant owns everything on and in the soil. If the licence to prospect is withdrawn by the landowner the licence issued by the Commissioner of Mines and Geology stands terminated. The commissioner cannot purport to give permanent rights to prospectors to mine and Mr. Okwach's assertion to the contrary is, to say the least, baseless.

The applicant has satisfied both the principles to be considered when granting a stay or injunction under rule 5(2)(b) of the Rules of this Court.

The next issue to be decided at this stage is what status quo do we order maintained. It must be, clearly, the status quo ante that is to say the parties must be put back into the position they were before the judgment of the superior court. Prior to that judgment the respondents or their agents were restrained from entering upon, prospecting and/or mining or in any other way dealing with the applicant's land. That is the status quo we would order so that those respondents who are on the applicant's land must remove themselves from the applicant's land. Their belongings and equipment must also go with them. These therefore are our orders. The costs of this application will be costs in the appeal.

Dated and delivered at Nairobi this 6th day of November, 1998.

P.K. TUNOI

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL