



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC APPEAL NO. 77 OF 2016**

**IN THE MATTER OF THE MINING ACT CHAPTER 306 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE CABINET SECRETARY MINISTRY OF MINING  
REVOKING THE SPECIAL LICENCE OF MEGALITH MINING COMPANY LIMITED TAKEN ON 24<sup>TH</sup> MARCH 2015  
CONTAINED IN VOLUME CXVII-47 OF THE KENYA GAZETTE DATED 8<sup>TH</sup> MAY 2015**

**MEGALITH MINING COMPANY LIMITED.....APPELLANT**

**VERSUS**

**THE CABINET SECRETARY MINISTRY OF MINING.....RESPONDENT**

**JUDGMENT**

This is an appeal from the decision of the Cabinet Secretary Ministry of Mining to revoke the appellant's Special Licence No. 246 of 2007 through Gazette Notice dated 24<sup>th</sup> March, 2015 which was published in the Kenya Gazette on 8<sup>th</sup> May, 2015.

On 22<sup>nd</sup> August, 2007 the Commissioner of Mines and Geology ("hereinafter referred to only as "the Commissioner") pursuant to the powers that were conferred upon him by Section 17(2) (b) of the Mining Act, Chapter 306 Laws of Kenya (now repealed) granted to the appellant Special Licence No. 246 (hereinafter referred to as "the licence") which gave the appellant full and exclusive liberty and licence to prospect and explore for precious stones and non-precious minerals for a term of five (5) years in or under an area of approximately 123.40 sq. km situated in Taita Taveta District on terms and conditions that were set out in the said licence.

On 14<sup>th</sup> July, 2011 the conditions of the licence were varied by extending the term of the licence by 10 years with effect from 1<sup>st</sup> July, 2011. Through the said variation, condition No. 18 of the licence on reduction of area was also annulled. Following the said variation, the appellant's licence was now to expire on 30<sup>th</sup> June, 2021 unless terminated earlier for good cause.

Through Gazette Notice No. 3264 dated 24<sup>th</sup> March, 2015 purportedly issued pursuant to section 27 of the Mining Act, Chapter 306 Laws of Kenya (now repealed) (hereinafter referred to only as "the Act" where necessary) the Cabinet Secretary for Mining (hereinafter referred to as "the respondent") revoked the appellant's licence on the ground that the same was non-performing. The appellant challenged the respondent's decision to revoke its licence by way of Judicial Review application. The appellant's judicial review application was dismissed by the court on 18<sup>th</sup> December, 2015 on the ground that the Mining Act, Chapter 306 Laws of Kenya (now repealed) (the Act) provided an alternative remedy of appeal to the appellant. It is following that decision that this appeal was filed on 11<sup>th</sup> August, 2016.

The appellant challenged the decision of the respondent to revoke its licence on the following grounds:

1. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact in making a decision to revoke the Special Licence held by the appellant without first giving the appellant any notice or opportunity to be heard in contravention of the provisions of Section 27 of the Mining Act.
2. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by failing to give reasons leading to his decision made on 24<sup>th</sup> March 2015 revoking the appellant's Special Licence.
3. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by failing to appreciate the principles applicable under Section 27 of the Mining Act before he could make a decision to revoke the Special Licence held by the appellant.
4. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact in reaching the decision dated 24<sup>th</sup> March, 2015

without giving the appellant a notice to show cause as provided for under Section 27 of the Mining Act.

5. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by summarily making a decision to revoke the Special Licence held by the appellant without affording the appellant an opportunity to present its case to prove that it was not in breach of the terms of the Special Licence.
6. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by failing to consider the material placed before him by the appellant.
7. THAT the Cabinet Secretary Ministry of Mining erred in fact by failing to appreciate the great financial investment by the appellant since it was granted the Special Licence.
8. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact in reaching its draconian decision to revoke the appellant's Special Licence which decision will act to frighten away potential investors from the Mining Industry.
9. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact in reaching a decision to revoke the Special Licence held by the appellant for the benefit of third parties and not on the basis of the reasons provided for under the Mining Act.
10. THAT the Cabinet Secretary of Mining erred in both law and fact by being biased, erratic and irrational in the matter the subject of this appeal.
11. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by giving a decision without any basis in law or fact.
12. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact in entertaining extraneous matters that were not relevant to the case.
13. THAT the Cabinet Secretary Ministry of Mining erred in both law and in fact in failing to consider and make a decision of all matters that were relevant to the case.
14. THAT the Cabinet Secretary Ministry of Mining erred in both law and in fact in disregarding and or failing to accord the necessary consideration to the evidence tendered by the appellant.
15. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by failing to appreciate the principles laid down for a fair hearing.
16. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by making a decision to revoke the Special Licence held by the appellant for being non compliant in violation of the appellant's right to be heard and not to be condemned unheard in violation of Article 50 (1) of the Constitution of Kenya 2010 and the rules of natural justice.
17. THAT the Cabinet Secretary Ministry of Mining erred in both law and fact by reaching its decision secretly and in a summary manner without affording the appellant an opportunity to be heard before making the decision to revoke the Special Licence held by the appellant.

In its Memorandum of Appeal, the appellant urged the court to set aside the said decision by the respondent and to provide for the costs of the appeal.

The respondent filed a replying affidavit sworn by the Chief Geologist in the Ministry of Mining, Shadrack Maithya Kimomo on 25<sup>th</sup> January, 2017 in opposition to the appeal. In its response to the appeal, the respondent admitted that the appellant was granted Special Licence No. 246 on 22<sup>nd</sup> August, 2007 to prospect and explore for precious stones and non-precious minerals for a term of 5 years with effect from 1<sup>st</sup> September, 2007. The respondent averred that Special Licence No. 246 ("the licence") did not authorise the appellant to undertake any mining activities. The respondent averred that the appellant was required under Special Condition No. 10(1) (a) of the licence to submit quarterly reports of its activities and that the appellant failed to do so and as such become non performing even after being notified of its status. The appellant averred that the licence was purportedly extended by 10 years with effect from 1<sup>st</sup> July, 2011 through a variation document dated 14<sup>th</sup> July, 2011. The respondent averred that the said variation document was neither stamped nor registered in the Mining Register as was the normal practice. The respondent averred that the variation of the licence and extension of the term thereof was incomplete and as such the purported extension of the appellant's licence by 10 years with effect from 1<sup>st</sup> July, 2011 was invalid.

The respondent averred that since the appellant was issued with the licence, it had only submitted a single report and that when the respondent revoked the licence as non performing, it was on the premise that the variation and extension of the term thereof had been validly undertaken which had turned out not to be the case. The respondent averred that prior to the purported extension of the licence, the same was to expire on 31<sup>st</sup> August, 2012. The respondent averred that following the enactment of the Mining Act No. 12 of 2016, the reinstatement of the appellant's revoked licence could not be considered by the respondent. The respondent urged the court to dismiss the appeal with costs.

The appeal was argued by way of written submissions. The appellant filed its submissions on 7<sup>th</sup> December, 2017 while the respondent filed his submissions on 2<sup>nd</sup> October, 2018. I have considered the appellant's appeal and the replying affidavit that was filed by the respondent in opposition thereto. I have also considered the parties' submissions in support of their respective cases. What I need to determine in the appeal before the court is whether the respondent acted lawfully in revoking the appellant's licence. Special condition No. 24 of Special Licence No. 246 ("the licence") provided for the termination of the licence on the following terms:

**“If and so often as the said fees reserved and made payable to the Commissioner or any of them or any part thereof shall be in arrears or unpaid for thirty (30) days after the same shall respectively be payable (whether the same shall have been legally or formally demanded or not) or if the Licensee shall have made default in observing or performing any of the covenants, provisions or conditions herein contained and on its part to be observed or performed or if the Licensee shall enter into liquidation whether compulsorily or voluntarily (not being a voluntary liquidation solely for the purpose of reconstruction) then and in any case it shall be lawful for the Commissioner by any instrument under his hand and seal duly notified to the Licensee and powers hereinbefore granted to the Licensee and thereupon this present Special Licence or grant and the liberties, licences and powers hereinbefore granted every clause and thing therein contained shall absolutely cease to determine and become void but without prejudice to any right of action or remedy which shall have accrued to the Commissioner in respect of any breach of any covenants or provisions contained herein.”**

On the other hand, section 27 of the Mining Act, Chapter 306 Laws of Kenya (now repealed) (the Act) provides as follows:

**“27. Revocation of prospecting right or exclusive prospecting licence**

**In the case of any breach by the holder of a prospecting right or an exclusive prospecting licence or by any attorney or manager employed by such holder of any of the terms and conditions of his licence or of any of the provisions of this Act or of any of the regulations, it shall be lawful for the Commissioner to call upon the holder of the right or licence to show cause, within a time specified by the Commissioner, why his right or licence should not be revoked, and, should he fail to comply with such order within the time specified or should the cause shown not be adequate in the opinion of the Minister, the Minister may summarily revoke the right or licence, and thereupon all privileges and rights conferred thereby or enjoyed thereunder shall as from the date of such revocation cease:**

**Provided that such revocation shall not in any way affect the liability of such holder in respect of the breach of any provision of the terms and conditions of his licence or of this Act or of any of the regulations committed by him before such revocation.”**

In summary, Section 27 of the Act provides that in the event of any breach by the holder of a licence of any of the terms and conditions of the licence or any of the provisions of the Act or any of the regulations, the Commissioner is supposed to call upon the licensee to show cause within a specified time why his licence should not be revoked and if no response is received to the notice within the prescribed time or the cause shown is in the opinion of the Minister of Mining inadequate, the Minister may proceed to revoke the licence.

Special condition No. 24 of the licence which I have reproduced above is subject to the foregoing section of the Act. Section 27 of the Act provides for the procedure to be followed before a licence is revoked. According to the Gazette Notice through which the appellant's licence was revoked, the revocation was undertaken on the ground that the appellant's licence was non-performing. The revocation was purportedly carried out under Section 27 of the Act. What “non-performing” means is not defined in the Act or in the licence. The respondent contended however that the appellant breached its reporting obligations under the Special Conditions of the licence by its failure to submit quarterly progress reports to the Commissioner. The appellant denied this contention and submitted through further affidavit sworn by Abhimanyu Garwal on 5<sup>th</sup> December, 2017 various quarterly reports that were submitted by the appellant to the Commissioner in the years 2014/2015. The respondent did not controvert the contents of this affidavit. It follows therefore that the reports attached to the affidavit had been submitted to the Commissioner and as such failure to submit quarterly reports could not have been the non-performance which formed the basis of the respondent's decision to revoke the appellant's licence.

Even if it assumed that the appellant's licence was non-performing, was it revoked after due process? As I have mentioned earlier in this judgment, the respondent filed a replying affidavit in response to the appeal. Apart from one letter dated 30<sup>th</sup> September, 2009 informing the appellant that it had not submitted its quarterly progress reports, the respondent submitted no evidence that the Commissioner and the respondent complied with the provisions of section 27 of the Act before revoking the appellant's licence. There was no evidence that the appellant was called upon to show cause why its licence could not be revoked before the same was revoked. Article 47 of the Constitution guaranteed the appellant a right to a reasonable and fair administrative action. By failing to comply with the provisions of section 27 of the Act which provided for the application of the rules of natural justice while revoking the appellant's licence, the respondent violated the appellant's right to a fair administrative action and protection of the law. The issues raised in the respondent's replying affidavit and submissions did not answer the grounds upon which the appellant challenged the revocation of its licence.

Due to the foregoing, it is my finding that the revocation of the appellant's licence through Gazette Notice No. 3264 dated 24<sup>th</sup> March, 2015 published on 8<sup>th</sup> May, 2015 was unlawful. I therefore allow the appeal and set aside the said revocation. The appellant's licence is reinstated and shall run its full term until 30<sup>th</sup> June, 2021 unless otherwise lawfully terminated before then. The appellant shall have the costs of the appeal.

**Delivered and Dated at Nairobi this 24<sup>th</sup> day of January 2019**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Nyiha for the Appellant

N/A for the Respondent

