



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 75 OF 2018**

**DORSE GEMS INTERNATIONAL LTD.....PLAINTIFF**

**VERSUS**

- 1. BETH KABURA PAUL MUINDI**
- 2. KEZIA MUMBI PAUL**
- 3. GEORGE MBIRITU MUINDI**
- 4. ANTONY MAGUA MUINDI**
- 5. ESTHER MUANIE MORANNYO**
- 6. PETER KILELO MUINDI**
- 7. JOSEPH CLAUDIO**
- 8. COUNTY GOVERNMENT OF TAITA TAVETA**
- 9. CABINET SECRETARY IN CHARGE OF MINING.....DEFENDANTS**

**RULING**

1. The application for determination is the Notice of Motion dated 5<sup>th</sup> April 2018 brought under Sections 13(7), 19(1), (2), (3)(i) and Section 154 (c) of the Mining Act No.12 of 2016 and all enabling powers of the Law. The Plaintiff/Applicant is seeking orders of temporary injunction restraining the defendants by themselves, employees, agents, servants, workers, brokers, contractors and/or any other person whomsoever and whatsoever from carrying out any mining activities/operations on the tabulated locations as reflected hereunder and from selling or offering for sale any minerals or gemstones mined from the suit properties pending hearing and determination of this application and the suit, and that the court be pleased to order the police through the OCPD Mwatate to enforce the orders and ensure that no activities take place at the suit premises in compliance with this order. The locations are:

Number	Claims	Location
2233	1 to 6	Lunar
1660	1 to 10	Balozi
159	1 to 6	
1658	1 to 10	
1659	1 to 10	

1660	2,3, 5 + 010	
1661	5 to 9	
2234	1 to 6	
2235	1 to 6	

2. The application is premised on the grounds in the face of the motion and supported by the affidavit of CHARLES PETER KIARIE MWANGI sworn on 5<sup>th</sup> April 2018.
3. Briefly, it is the applicant's case that on 27<sup>th</sup> January, 2014 the plaintiff entered into an agreement with 1<sup>st</sup> to 7<sup>th</sup> defendants/respondents all trading as Hardrock Mining Company in which the 1<sup>st</sup> to 7<sup>th</sup> Respondents sold their rights in various mining sites and locations in Taita Taveta County at Mwatate. The consideration was Kshs.3,000,000/= out of which the applicant paid Kshs.2,420,000/= and was granted access to the mining locations on 16<sup>th</sup> March 2014. The applicant avers that a transfer of mineral rights and locations is done in two stages. First the registered owner of the mineral right has to obtain consent from the concerned county government and secondly, the transferor has to execute a Transfer document in the prescribed form at the office of mines.
4. The applicant avers that by mutual consent they agreed to alter and/or vary the initial agreement on 17<sup>th</sup> June 2014 to facilitate the 1<sup>st</sup> to 7<sup>th</sup> respondents to obtain requisite consent to transfer mining rights from the County Government of Taita Taveta. That the balance of Kshs.580,000/= which was outstanding and which the applicant states is willing and ready to pay, was payable upon successful transfer of rights.
5. The applicant avers that upon being given permission and access to the sites the applicant commenced preparations of the sites and locations, and purchased and moved machinery, tools, equipment and personnel to the locations in readiness for excavation and extraction, set up the camp to host personnel, equipment and machinery and for storage of food and water. That upon accessing the sites for construction of the camp, it realized that the locations were actually occupied and strange people were actually excavating the same locations. It is the applicant's contention that the 1<sup>st</sup> to 7<sup>th</sup> Respondents had fraudulently given the 8<sup>th</sup> Respondent permission and authority to move into the same locations and do mining.
6. The applicant states that as a consequence of the frustration of the contract by the defendants, the applicant was forced to move and relocate machinery, equipment and personnel and disband the camp for fear of violence and destruction which had been threatened by the people on the ground, and that at some point the police from Mwatate had to be called to intervene and restore security, peace and order at the site.
7. The applicant further states that a complaint was lodged to the cabinet secretary to intervene and settle the dispute but the cabinet secretary has not given a response, direction, hearing or decision despite frequent visits to his offices. The applicant further avers that it filed two previous suits in court which were however withdrawn before service upon the defendants.
8. The applicant states that it subsequently discovered that there was heavy excavation going on at the said location yielding gemstones for the 8<sup>th</sup> respondent who was colluding with the 1<sup>st</sup> to 6<sup>th</sup> respondents with help of hired goons and local artisanal miners to the detriment of the applicant. The applicant contends that it continues to suffer colossal losses up to date which the respondents may not be able to adequately compensate them, and that it is only through an injunction order that the court can control and protect the applicant's rights to the suit property pending hearing and determination of this suit. The applicant states that the losses are expected to run in excess of Kshs.350,000,000/=.
9. The application is opposed by the 1<sup>st</sup> to 7<sup>th</sup> respondents who filed a notice of preliminary objection dated 17<sup>th</sup> May, 2018 and a replying affidavit sworn by Samuel Mutiso Muindi, the 2<sup>nd</sup> defendant on 17<sup>th</sup> May 2018. Briefly, it is deposed inter alia that on 27<sup>th</sup> January, 2014, Hardrock Mining Company entered into an agreement with the applicant for the purchase of mineral rights for Lunar Location 2233-1-6 and Balozzi Location 1666-1-10 only. That the purchase price was Kshs.3,000,000/= out of which the sum of Kshs,2,420,000/= was paid by the applicant and the balance was to be paid before 31<sup>st</sup> March, 2014. That the Applicant was to take possession on payment of the full purchase price and after execution of the transfer document in the prescribed form, which was to take place at the office of the commissioner of mines and the said transfer effected by the commissioner of mines and Geology and a mining licence was to be issued to the applicant after satisfying the conditions prescribed in the Mining Act.
10. It is the 1<sup>st</sup> to 7<sup>th</sup> respondents contention that the applicant proceeded to set up camp on the said area on 5<sup>th</sup> March 2014 and commenced mining operations without a valid mining consent from the Taita Taveta County Government, the 9<sup>th</sup> respondents, and without a valid prospecting Right from the commissioner of Mines and Geology and before the parties had concluded the sale agreement as no transfer of mineral rights had taken place. That the applicant was requested to desist from mining until the agreement and transfer had been effected and continues to do so.
11. The 1<sup>st</sup> to 7<sup>th</sup> Respondents deny harassing the applicant, adding that the only incident is where the applicant encroached on 3 metres of Bakari Gaujalas Land while building a camp, and that the issue was settled amicably by the Administration officials in conjunction with

other Authorities. It is their contention that the claim by the applicant is unlawful, unfair, unjust and calculated to defeat justice since it is the applicant who failed, refused and or neglected to pay the balance of the purchase price while carrying out mining activities in the area. They also accuse the applicant of trespassing on other mining locations, arguing that granting the orders sought may affect other occupants who are not parties to the agreement between the parties herein, which action may provoke rioting and damage to property and life.

12. The 1<sup>st</sup> and 7<sup>th</sup> respondents aver that the application is suspect as the applicant has illegally been occupying the mining area and has been carrying out mining operation making substantial profits and therefore does not suffer any irreparable loss or damages, adding that it is the 1<sup>st</sup> to 7<sup>th</sup> respondents who are suffering loss due to the applicant's failure to pay the balance of the purchase price of Kshs.580,000/=. It is the 1<sup>st</sup> to 7<sup>th</sup> defendants' case that the application is frivolous, vexatious, and an abuse of the court process and urged the court to dismiss it with costs.

13. The application was canvassed by way of written submissions. The firm of Opolu & Co Advocate for the applicant filed their submissions on 3<sup>rd</sup> August 2018 while M/s Buyuka Obonyo Advocates for the 1<sup>st</sup> to 7<sup>th</sup> Respondents filed theirs on 31<sup>st</sup> October 2018.

14. I have considered the application the affidavits in support and against as well as the rival submissions. This court is tasked to determine whether this application meets the principles laid down for granting temporary injunctions. The principles to be applied when considering an application such as this one before me are now well settled. In the case of Giella -v- Cassman Brown & Co. Ltd (1973) EA 358, it was held that:

- i. An applicant must show a prima facie case with a probability of success.
- ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
- iii. When the court is in doubt it will decide the application on a balance of convenience.

15. An injunction is an equitable remedy and therefore it behoves an applicant to come to court with clean hands. He or she must also make full disclosure of all material facts to enable the court make an informed decision.

16. In its application, the applicant has stated that it entered into an agreement on 27<sup>th</sup> January 2014 with the 1<sup>st</sup> to 7<sup>th</sup> respondents in which the 1<sup>st</sup> to 7<sup>th</sup> respondents sold their rights in various mining sites and locations in Taita Taveta County. The consideration was the sum of Kshs.3,000,000/= out of which the applicant paid the sum of Kshs.2,240,000/=.

17. I have perused the agreement for sale which is attached to the affidavit in support of the application. Clause 1.1.2 of the said agreement provided that the balance of Kshs.2,000,000/= was to be paid to the Transferor on or before 31<sup>st</sup> March 2014. Clause 4 of the said Agreement provided that the transferor was to give to the transferee vacant possession of the mining locations upon payment of the full purchase price. The applicant admits that to date, there is an outstanding balance of Kshs. 580, 000/= which it is yet to pay to the 1<sup>st</sup> to 7<sup>th</sup> respondents. The applicant took up possession even before paying the outstanding balance of the purchase price agreed.

18. In paragraph 12 of the affidavit in support of the application, the applicant states that it was forced to relocate its machinery, equipment and personnel and disband the camp it had set up for fear of violence and destruction. The applicant has however not stated when it moved out. The applicant in the main suit is seeking an order for specific performance and in the alternative damages, among other reliefs.

19. It is clear that the dispute herein is over which party is in breach of the sale agreement that was entered into by the parties herein. The applicant has admitted that it is yet to clear the balance of the purchase price. The applicant has also admitted that it has moved out of the mining areas. If the court were inclined to grant the orders sought, it would mean that the applicant is granted permission to return to the mining area even when it has not fulfilled its obligations under the agreement executed by the parties. Such an order would be in the form of a mandatory injunction which the applicant is not seeking and which in any event, has not been proved. Mandatory injunction can only issue in very clear and special circumstances which is not the case in the present case.

20. Having considered the plaintiff's application together with the affidavits in support and against as well as the submissions made, I am not satisfied on the material before me that the plaintiff has established a prima facie case against the defendants with a probability of success. On whether or not the applicant would suffer irreparable harm if the orders sought are not granted, I take the view that the loss that may result if the orders sought are not granted can be quantified in damages as the income derived from the mining activities on the mining areas can be ascertained. Furthermore, in the application the applicant has even quantified the loss it has allegedly suffered.

21. The upshot of the foregoing is that the plaintiff has failed to satisfy the conditions for granting the orders sought. In the circumstance, I find no merit in the Notice of Motion dated 5<sup>th</sup> April 2018 and the same is hereby dismissed with costs to the 1<sup>st</sup> to 7<sup>th</sup> respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 20<sup>th</sup> day of February 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Opu for Applicant/Plaintiff

No appearance for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE

20/2/19