



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC SUIT NO. 141 OF 2017**

**KISHUSHE RANCHING CO-OPERATIVE**

**SOCEITY.....PLAINTIFF/RESPONDENT**

**VERSUS**

**WANJALA MINING COMPANY LTD.....1<sup>ST</sup> DEFENDANT**

**SANGHANI LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The 2<sup>nd</sup> defendant/applicant has moved the Court under the provisions of section 1A, 1B and 3A of the Civil Procedure Act and Order 40 of the Rules asking for orders that:

**1. Spent**

**2. Spent**

**3 Spent**

**4. This Honourable Court be pleased to enlarge the 180 days period set out in clauses 2 and 4 of the Decree pending the hearing and determination of this application.**

**5. This Honourable Court be pleased to extend the time within which the 2<sup>nd</sup> Defendant/Applicant was required to remove the stockpile (as defined in the Decree) and any other of their equipment or effects presently lying thereon for a further 180 days from 25<sup>th</sup> August, 2018.**

**6. Costs of this application be awarded to the 2<sup>nd</sup> Defendant/Applicant.**

2. The application is supported by the grounds inter alia that the applicant received approval of the County Government of Taita Taveta to remove the stock pile on 1<sup>st</sup> August 2018 and immediately embarked on the process of mobilising transport and shipment of the stockpile from the suit property. That in light of the administrative delays in getting the approvals, the 2<sup>nd</sup> defendant/applicant was unable to complete the removal within the 180 days as per the consent entered on 26.2.2018. That the applicant has tried to engage the plaintiff/respondent who has neglected, refused and or declined to sign the consent for the extension of time.

3. The plaintiff is opposed to the application through the replying affidavit sworn by its chairman Mr Elistone Mbela deposed that there is no material placed before the Court to support the claim that the entire 180 days granted to the applicant was expended in procuring approvals necessary to enable the applicant move the stockpile present on the suit land. That part of the time has been eaten by the applicant's own inertia as it took them over a month to establish contact with the County Government of Taita – Taveta.

4. The Respondent deposed that it has bent over back words to accommodate the applicant who he doubts is clear on the time projection she requires having initially sought 360 days. The Plaintiff/Respondent also feels the application is premature as the Respondent has not closed its doors to holding negotiations as evidenced by correspondences annexed as "A1 – A5". The plaintiff urged the Court to disallow the application.

5. The applicant in a supplementary affidavit dated 8<sup>th</sup> October 2018 denied that she has not been diligent as alluded to in the replying affidavit. Mr Sanghani deposed that it is only after they started removing the stockpiles in March that they were stopped by the County Government of Taita Taveta and had to negotiate with them to allow for continuation of the works. That they initially sought 360 days extension to cater for any unforeseeable circumstances occasioned by directives from the County or National Government. That the continued withholding of the consent denies the Applicant its rights to recover its investments and the government any royalties due to it under section 183 of the Mining Act. That it is also unreasonable for the plaintiff to impose monetary conditions on the 2<sup>nd</sup> defendant when there is no dispute the stockpile belongs to the 2<sup>nd</sup> defendant who has incurred huge sums in the mining of the ore. The applicant urged the Court to grant the orders sought.

6. The advocates rendered oral submissions supported by case law. The plaintiff/Respondent cited the case of **Porton Capital Technology Funds & Others vs 3 M UK Holdings (2011) EWHC 2895** which discussed the subject of unreasonably withholding of a consent. In this case, the Court found the vendor's refusal to give consent was unreasonable. The Applicant on its part cited inter alia the cases of **E. A Portland Cement Co. Ltd vs Superior Homes Ltd (2017) eKLR** and **Lawrence Kinyua Mwai vs Nyarungiru Farmers Co Ltd & Another (2011) eKLR** which discussed whether the Court can interfere with the terms of a consent entered into between parties. In the E. A Portland Cement case, the High Court quoted the finding in the **Brookbond Liebig Ltd vs Mallya (1975) E A 266** and **Flora Wasike vs Destimo Wamboka (1988) IKAR 625** "*that the Court has qualified or conditional discretion when it comes to interfering with the consent judgment or orders.*"

7. In the present case, the parties only want a revision of paragraph 2 of the consent in relation to extension of time. The consent was adopted as an order of the Court on 26.2.2018 and a decree issued on 16<sup>th</sup> March 2018. As per the decree; the defendants were given up to 180 days from the date of settlement to remove the stockpile. The Applicant has pleaded that when it commenced the execution process, it was stopped by the County Government of Taita Taveta and therefore had to seek their approvals. That the County Government only gave the approval on 1.8.18 thus leaving the applicant with limited time to be able to remove all the stockpile within the timelines agreed. The plaintiff/Respondent on its part blame the applicant of indolence in obtaining the approval from the County Government thus not deserving of the extension of time.

8. The applicant did annex letters dated 29.6.18, 20.6.18, 26<sup>th</sup> July 2018 & 1<sup>st</sup> August 2018 from the County Government of Taita Taveta showing engagements undertaken with the County Government to be granted the approvals. Annex **NRS – 2** is a letter dated 3.4.18 originating from the Applicant and addressed to the Government of Taita Taveta informing the County Government of the Applicant's readiness to remove the stock pile. Further the Applicant's letter dated 20<sup>th</sup> April 2018 refers to a meeting that was agreed to take place on 2<sup>nd</sup> May 2018 between the Applicant and the County Government. The meeting was confirmed by the County Government's letter dated 28<sup>th</sup> April 2018. The Applicant also wrote to the Ministry of Mining & Petroleum referring them to the Court decree issued on 16<sup>th</sup> March 2018.

9. The correspondences annexed by the applicant thus show that they actively engaged the County Government in the months of April – July 2018 before the approval was issued on 1<sup>st</sup> August 2018. This clearly answers the plaintiff's deposition that the Applicant has not demonstrated that the period between April – July 2018 was expended in obtaining approval from the County Government of Taita Taveta.

10. When the consent was reached, the issue of obtaining approval from the County Government was not provided for. In as much as this Court does appreciate that a consent judgment is equal to a contract which Courts should not re-write for parties, the applicant is not asking for re-writing of the contract but extension of time which provision was included in clause 4 of the consent. In the case of **Nathalal Monji Rai and Others vs Standard Bank Kenya Ltd (1998) LLR6400 (CAK)** referred to in the case of **Superior Homes Ltd vs E. A Portland Cement Co. Ltd (2014) eKLR**, the Court of Appeal held that in "*a consent order, the phrase liberty to apply means that when an order is drawn up, its working out might involve matters which it might be necessary to obtain the decision of the Court but does not confer any right to vary the order. The liberty to apply provisions are only for purposes of assisting in the implementation of a consent order.*"

11. The purpose of the present consent was to enable the 2<sup>nd</sup> defendant/Applicant remove and receive its stockpile lying on the suit land as well as hand over vacant possession of the suit property to the plaintiff. The 2<sup>nd</sup> defendant/Applicant has explained why she was not able to comply within the agreed timelines. The plaintiff accused the applicant of rushing to Court before negotiating the terms. In my view, there was no need to re-negotiate the terms of the consent where what was sought was only time to give effect to the earlier order.

12. The Applicant has in this case demonstrated why it could not seek for the extension earlier (i.e. before obtaining the approval) and when he did so, the plaintiff imposed conditions (thus unreasonably withholding the consent to extend time. For the foregoing reasons, I find merit in the application and allow it. However the extension shall be for a period of 90 days from the date of delivery of the ruling taking into account that the Applicant had the whole of August to do part of the works. Each party shall meet their costs of the application.

**Dated, signed & delivered at Mombasa this 7<sup>th</sup> March 2019**

**A. OMOLLO**

**JUDGE**