



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 29 OF 2018**

**MBOE SAMBU RESOURCE LIMITED.....PLAINTIFF**

**VERSUS**

**ADEN HUSSEIN MOHAMMED..... DEFENDANT**

**R U L I N G**

1. The Plaintiff vide plaint dated 15<sup>th</sup> October 2018 instituted the present suit in the Environment and Land Court Narok. The Plaintiff claimed he was the holder of a Special Prosecuting Licence No. SPL/2015/0028 for a period of 25 years over approximately 10sq kms within Masurura Area, Kilgoris Sub-County. The Plaintiff alleged that the Defendant had sometime in February, 2017 without the Plaintiff's permission encroached onto the area protected by the Plaintiff's special licence and commenced excavating for minerals. The Plaintiff vide the Plaint prayed for orders against the Defendant for:-

**(a) A declaration that the actions of the Defendant his agents, servants or anyone acting under his instructions on the land covered by Special Prospecting Licence No. SPL/2015/0028 amounts to a breach of the Plaintiff's right under Special Prospecting Licence No. SPL/2015/0028.**

**(b) THAT the Honourable Court be pleased to issue a permanent injunction restraining the Defendant by himself or through any of his agents, employees, servants, nominees and/or assigns or any person whatsoever acting on his behalf and/or under his mandate from conducting any activities, prospecting for minerals and/or extracting minerals from all the area covered by SPL/2015/0028.**

2. Simultaneously with the plaint the Plaintiff filed a Notice of Motion application and sought the following orders:-

**1. Spent**

**2. THAT this Honourable court do issue a temporary injunction against the Respondent by himself, his servants or agents or anyone authorized by him or acting under him in any manner or otherwise howsoever from to stop, cease and terminate, any Prospecting for minerals and extraction of minerals activities on all the land covered by Special Prospecting License No. SPL/2015/0028 pending the hearing and determination of this application.**

**3. THAT this Honourable court do issue a temporary injunction against the Respondent by himself, his servants or agents or any one authorized by him or acting under him in any manner or otherwise howsoever from to stop, cease and terminate any prospecting for minerals and extraction of minerals activities on all the land covered by Special prospecting License No. SPL/2015/ 0028, pending the hearing and determination of the suit herein.**

**4. THAT costs of the application be provided for.**

3. The application was premised on the grounds set out on the body of the application and the affidavit sworn in support of the application by Stephen Kimanyi, a director of the Plaintiff/Applicant. The Plaintiff's assertion was that the Defendant had no licence whatsoever to allow him to extract minerals in the area earmarked for the Plaintiff yet he had excavated a mine shaft just about 20metres from the Plaintiff's main shaft which could cause the collapse of the Plaintiff's shaft. The Plaintiff averred that the Defendant's encroachment and activities within the area allocated to the Plaintiff is an affront to the Plaintiff's rights and could result in conflicts with the community and the licensing authorities to the prejudice of the Plaintiff. The Plaintiff/Applicant contends unless the Defendant's activities are restrained by an order of injunction, the Plaintiff stands to suffer irreparable damage that cannot be compensated in damages.

4. The Defendant filed a statement of defence on 19<sup>th</sup> November 2019 and denied the Plaintiff has any valid special prospecting licence as alleged in the Plaint over an area covering 10sq kms as pleaded. The Defendant contended that it was his company M/s G. E Company Ltd which infact had a mineral prospecting and mining licence over the area in dispute. The Defendant under paragraph 16 of the defence pleaded the suit was misconceived and untenable and gave notice of preliminary objection on the following points of law:-

**“16. The Defendant contends that the instant suit as drawn and filed is misconceived, bad in law and otherwise legally untenable. Consequently, the Defendant reserves the right to raise and canvass Preliminary Objections on points of law, as hereunder:-**

**i. The Plaintiff herein is neither the registered owner nor proprietor of the portion of land, pertaining to and/or concerning the ground location of the mineral prospections complained against.**

**ii. The lease and/or contract upon which the instant suit is founded is illegal and contrary to the provisions of Sections 38 and 39 of the Land Act, No. 6 of 2012.**

**iii. The activities by the Plaintiff are neither sanctioned nor authorized by the law.**

**iv. The suit herein is premature, misconceived and bad in law.**

**v. The plaint herein does not disclose any reasonable cause of action against the Defendant.**

**vi. The instant suit amounts to and/or constitutes an abuse of the due process of court.**

5. The Defendant further filed a statement of grounds of opposition to the Plaintiff's Notice of Motion dated 15<sup>th</sup> October 2017 dated 16<sup>th</sup> November 2018 and set out the following grounds:-

**1. The instant Notice of Motion Application, is, premature, misconceived, incompetent and otherwise legally untenable.**

**2. The Plaintiff/Applicant herein, not having been authorized and/or licensed to carry out and/or undertake prospection of minerals and mining, whatsoever, same is devoid and/or bereft of the requisite locus standi, to commence and/or maintain the instant suit.**

**3. The suit by and/or on behalf of the Plaintiff/Applicant herein is barred and/or prohibited by the provisions of the Environment Management Coordination Act (EMCA). Consequently, the entire suit herein is a nullity ab initio.**

**4. In any event, the Plaintiff/Applicant has neither shown nor exhibited any prima facie case with overwhelming chances of success. Consequently, the Plaintiff/Applicant has not satisfied the requisite conditions to warrant granting the orders of temporary injunction whatsoever.**

**5. Besides, the Plaintiff/Applicant has not shown and/or established any irreparable loss or at all, the same is bound to accrue and/or suffer, if the orders sought are not granted.**

**6. At any rate, the Plaintiff's/Applicant's suit together with the Notice of Motion Application filed and/or mounted by the Plaintiff/Applicant, do not disclose and/or capture any reasonable cause of action.**

**7. Besides, the instant application constitutes and/or amounts to an abuse of the due process of court.**

**8. The Plaintiff/Applicant herein is not suited.**

**9. In the premises, the Notice of Motion application dated 17<sup>th</sup> October 2017 herein is devoid of merits, whatsoever and/or howsoever.**

On 14<sup>th</sup> November 2018 Lemashon Keri and Olenapoe Kitiapi filed an application dated 12<sup>th</sup> November 2018 to be enjoined as interested parties but this application was not prosecuted and thus the Applicants are not parties to the suit.

6. The suit was on 13<sup>th</sup> December 2018 ordered transferred to Kisii Environment and Land Court for hearing and determination and on 27<sup>th</sup> March 2019 the court directed that both the preliminary objection by the Defendant and the Plaintiff's Notice of Motion dated 15<sup>th</sup> October 2018 be heard together and be argued by way of written submissions. The Plaintiff/Applicant filed their submissions on 29<sup>th</sup> November 2018 whereas the Defendant's submissions were filed on 7<sup>th</sup> December 2018.

7. The Plaintiff's case for temporary injunctive relief is premised on its claim that it holds a Special Prospecting License No. SPL/2015/0028 issued by the Ministry of Mining covering an area of approximately 10sqkms for a 25 years period. The Plaintiff contends that the Defendant unlawfully encroached onto the area covered under its special prospecting license and commenced undertaking prospecting and/or mining activities. The Plaintiff as evidence of the Special Mining License has annexed as "SK-2" an abstract of the web page <https://portal.mminingcadastre.go.ke> of the Ministry of Mining - Mining cadaster portal. However, although there is indication of SPL/2015/0028 there is nothing to show when the application for the license was made, whether or when it was issued and if issued on what terms and for what period. There is no evidence adduced to demonstrate that the prerequisite conditions that require to be satisfied or met before the grant of a special prospecting license were indeed met to enable the license to be issued. The Plaintiff further averred that the prospecting license was valid for a period of 25 years from the date of issue in 2015 and further stated that he had the land owner's consents to carry out prospecting and mining activities for 25 years as per annexure "SK-3" over the area covered by the license.

8. The Plaintiff's complaint was that in February 2017 the Defendant encroached onto the area covered by the Plaintiff's license and started

excavating for minerals without the Plaintiff's permission and/or consent. The Plaintiff stated that even after he warned the Defendant, the Defendant never stopped the intrusion and instead went ahead to excavate a mine shaft which posed a risk to the Plaintiff/Applicant's own shaft which could collapse owing to the Defendant's unlawful activities which necessitated the filing of the present suit and the application for interlocutory application.

9. The Defendant in response to the Plaintiff's suit and the interlocutory application filed a defence dated 16<sup>th</sup> November 2018 and inter alia raised a preliminary objection as pleaded under paragraph 16 of the defence. The Defendant filed a statement of grounds of opposition dated 16<sup>th</sup> November 2018 to the Plaintiff's application for injunction.

#### **The Preliminary Objection:**

10. The Defendant in his submissions filed herein did not specifically deal with the preliminary objection as outlined under paragraph 16 of the defence. The thrust of the Defendant's submissions was in response to the Plaintiff's application for injunction dated 15<sup>th</sup> October 2018. It is not clear whether or not the Defendant abandoned the preliminary objection.

11. The Plaintiff specifically made submissions on the preliminary objection taken by the Defendant. The Plaintiff took the position that the Defendant's preliminary objection was not merited. The Plaintiff submitted the preliminary objection taken was misconstrued and misconceived and did not constitute a preliminary objection as defined in the case of **Mukisa Biscuit Manufacturers Ltd -vs- West End Distributors Ltd [1969] EA 696** where the Court set out the principles applicable in considering preliminary objections. In the case, Sir Charles Newbold, P. stated as follows:-

**“...A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

12. It is settled law that a preliminary objection cannot be raised where the facts pleaded are in dispute and where the court would need to evaluate factual evidence in order to make a determination. The preliminary objection as stated in the **Mukisa Biscuit's case** (supra) has to be on a pure point of law where no facts and/or evidence needs to be ascertained before a determination can be made. The points and/or issues that render themselves to preliminary objections though not exclusive would be such issues as jurisdiction of the court, limitation of actions, res judicata and locus standi.

13. I have considered the points listed under paragraph 16 of the defence as justifying the raising of a preliminary objection and with respect to the issues/points in my view relate to matters that would require to be ascertained by way of taking evidence. The issues/matters are contested by the Plaintiff and a determination cannot be had until the matter is heard on merit. In the circumstances, I rule that the preliminary objection lacks any merit and is unsustainable. The same is hereby ordered dismissed.

#### **Application for Injunctive Relief:**

14. The Plaintiff has predicated his application for injunction on the fact that he is the registered holder of Special Prospecting License No. SPL/2015/0028 issued by the Ministry of Mining. As I observed earlier in this ruling, it is not apparent how or when the Applicant obtained the license. The document exhibited as “**SK-2**” as evidencing the issuance of the Special Prospecting License cannot be the license. A license in my view has to be issued by an authorized person and has to be signed. The license also has to have terms and conditions.

15. Sections 72 to 84 of the Mining Act No. 12 of 2016 makes provisions for prospecting licenses. I set hereunder some of the relevant provisions.

Section 72 - 74 of the Act provides for application for prospecting license and the requirements as follows:-

**72. (1) A person may apply for a prospecting licence to the Cabinet Secretary in the prescribed form and accompanied by the prescribed fee.**

**(2) An applicant for a prospecting licence shall provide the following information to the Cabinet Secretary –**

**(a) the mineral or minerals in respect of which the licence is sought;**

**(b) the area in respect of which the licence is sought;**

**(c) particulars of the proposed programme for prospecting operations to be carried out under the licence;**

**(d) details of the experience and financial resources available to the applicant to be able to conduct the prospecting operations;**

**(e) a plan giving particulars of the proposals by the applicant with respect to the employment and training of Kenyan citizens; and**

**(f) a plan giving particulars of the proposals by the applicant with respect to the procurement of local goods and services.**

**(3) The Cabinet Secretary shall not grant a prospecting licence unless he is satisfied that -**

**(a) the size area of land over which the prospecting licence is sought is reasonable having regard to the proposed programme of prospecting operations by the applicant;**

**(b) the applicant has adequate financial resources, technical competence and mining industry experience to carry on the proposed programme of prospecting operations;**

**(c) the applicant has submitted an environmental rehabilitation and restoration plan;**

**(d) the local product plan by the applicant with respect to the procurement of locally available goods and services are acceptable; and**

**(e) the employment plan by the applicant with respect to employment and training of Kenyan citizens are acceptable.**

**(4) The Cabinet Secretary shall prescribe the items required to be submitted by the applicant where an application for the prospecting licence is approved under this Act.**

**73. The area covered by a prospecting licence shall be a block or a number not exceeding one thousand five hundred contiguous blocks each having a side in common with at least one other block the subject of the application.**

**74. The term of a prospecting licence shall be specified in the licence, and in any case shall not exceed four years.**

16. It is clear from the above provisions that an application for a prospecting licence has to be made in the prescribed form and a fee paid and that there are various conditions an applicant is required to satisfy. Notably under Section 72(c) an Applicant is required to submit an environmental rehabilitation and restoration plan. Under Section 74 of the Act a prospecting licence cannot be granted for a term in excess of 4 years.

17. Section 78 provides for the terms that a prospecting licence must carry. It provides as follows:-

**78. A prospecting licence issued in accordance with this Act shall include the following information in addition to the information referred to in section 72 -**

**(a) an approved programme for prospecting operations, including expenditure estimates;**

**(b) an approved plan for the procurement of local goods and services;**

**(c) an approved plan to employ and train citizens of Kenya; and**

**(d) an approved environmental impact assessment report, a social heritage impact assessment and environmental management plan, where required.**

18. Section 83 of the Act specifies that in the case of renewal of a prospecting licence, the same cannot be renewed for a period greater than 3 years and further that a prospecting licence shall not be renewed for more than two times after the initial grant of the licence.

19. I have made the references to the various provisions of the law to contextualize the Applicant's application for injunction. A court considering an application for injunction on the grounds that a prospecting licence had been issued to the party and breach of the same is alleged cannot ignore the provisions.

20. In an application for temporary injunction an Applicant must firstly demonstrate that they have a prima facie case with a probability of success; secondly, the Applicant must show that he stands to suffer irreparable damage or injury unless the injunction is granted and thirdly, should the court entertain any doubt in regard to the first two conditions, the court may consider the application having regard to the attendant circumstances and the balance of convenience. See the case of **Giella -vs- Cassman Brown & Company Ltd [1973] EA 358** which our courts have routinely resorted to in determining applications for injunction as it laid the principles to be taken into account in granting or refusing to grant injunctions.

21. In the present case, I find difficulty in holding that the Plaintiff holds a valid prospecting licence. No application within the provisions of Section 72 of the Act was exhibited and no payment of any fee for such an application was also exhibited. The court is being asked to treat a copy of the download "**SK-2**" as the special licence. As the provisions of the Act show there are prerequisites to be met before the Cabinet Secretary can grant a prospecting licence. It has not been demonstrated that these prerequisites were met by the Applicant. Further a prospecting licence is granted with attached conditions. The web page abstract "**SK-2**" does not show there were any approval conditions.

22. The Applicant further stated the term of the prospecting licence was 25 years. It is not clear where he was reading that from. The Act provides that an initial prospecting licence can only be granted for a maximum of 4 years and any renewals can only be for a period of 3 years for a maximum of two times. In the present case the Applicant states he obtained the licence in 2014 meaning the same, if at all it had been granted lapsed/expired in 2018 unless a renewal was sought and obtained.

23. Having regard to the evidence on record and the submissions by the parties, I am not persuaded the Applicant had demonstrated a prima facie case with a probability of success. In the case of **Mrao -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal as per Bosire, JA stated as follows:-

**“So what is a prima facie case? I would say that in civil cases it is a case in which the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

24. On the material presented by the Applicant, I am not in a position to state that he had a right that has been infringed since he has failed to demonstrate he held a valid prospecting license. I therefore hold he has failed to demonstrate a prima facie case to warrant the court to grant a temporary injunction.

25. As I have held no prima facie case has been established by the Applicant, I need not consider the second limb of the conditions upon which a temporary injunction may be granted. The conditions for grant of injunction are sequential such that if the first condition of establishing a prima facie case with a probability of success fails, the application of necessity fails and there would be no need to consider whether irreparable damage will be suffered by the Applicant.

26. The upshot is that I find no merit in the Applicant’s application dated 15<sup>th</sup> October 2018 and I accordingly dismiss the same with costs to the Respondent. The temporary injunction granted in favour of the Plaintiff/Applicant on 30<sup>th</sup> October 2018 is hereby vacated and discharged.

27. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JUNE 2019.**

**J. M. MUTUNGI**

**JUDGE**