



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO.58 OF 2017

AFRO PRIDE LIMITED.....PLAINTIFF

VERSUS

ZHONGMEI ENGINEERING GROUP LTD.....DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....THIRD PARTY

RULING

BACKGROUND

1. The Plaintiff vide a plaint dated 23rd July, 2016 and filed on 28th July, 2016 claims that she is the holder of special license number 323 that was re-granted on 24th May, 2016 and the said special license gave her the exclusive rights to prospect and explore a mineral known as Gypsum in Balambala Sub-County in Garissa measuring approximately 542.5 square kilometres. The plaintiff contends that defendant is excavating the same Gypsum for construction of the Nuno-Modogashe Road (C8) thereby allegedly breaching its exclusive rights. The plaintiff's therefore sought orders of injunction against the defendant and loss of Revenue as a result of the defendant's action in the sum of Ksh. Two Billion (Kshs.2,000,000,000/=).

2. The defendant on the other hand filed a statement of defence and sought contribution and/or indemnity from 3rd party whom she entered into a contract dated 3rd November, 2015 to construct the Nuno-Modogashe (C8) road. The defendant further averred that according to the contract between it and the third party, the third party was to provide the defendant with schedule of borrow pits from which the defendant would explore and excavate various road construction materials. The contract further provided that the project Engineer was tasked with the responsibility of approving the various sites which the defendant intended to explore and extract the construction materials. It averred that having given the defendant the go ahead to proceed with the excavation any award passed against the defendant should be recoverable from the third party.

3. Upon being issued with the third party notice, the third party herein through the firm of Prof. Albert mumma & Co. Advocates filed a third party defence dated 19th July, 2017 and on 25th July 2017 she filed a notice of preliminary objection which was amended on 13/12/2017. The said amended Notice of Preliminary Objection raises the following points:

1. The Honourable Court does not have jurisdiction to take cognizance of deal with and determine the suit and the claim against the third party in light of the mandatory provisions of part 1X of the Mining Act No. 12 of 2016 more particularly Section 155 thereof.

2. The claimants have failed to comply with the mandatory statutory provisions of Section 67 (a) of the Kenya Roads Act, 2007.

THIRD PARTY'S SUBMISSIONS

4. The third party submitted that the special licence granted to the plaintiff under the provisions of Section 17 (2) (b) of the Mining Act Cap. 306 (repealed) was limited to prospecting and exploring for gypsum in the demarcated area for a period of 2 years from 24th May, 2016. The third party submitted that the special licence was therefore not a mining lease which expired on 24th May, 2018 and that the same was not renewed upon its expiry. The third party cited Clause 28 of the said special licence which states as follows:

“Any dispute arising as to the boundaries of the area or as to the terms and interpretation of this licence or any other matters concerning this licence or ancillary thereto shall be referred to the Commissioner whose decision shall be final.”

5. The third party submitted that the functions of the Commissioner for mines and Geology (now defunct) were taken up by the Director of Mines in the directorate of mines, the Director of Geology, the National Mining Corporation and the Cabinet Secretary where applicable.

6. It is further submitted that the functions of the Commissioner of Mines and Geology to hear and determine disputes pursuant to Sections 61 and 62 of the Mining Act (Cap 306 repealed) are now functions that have been taken up by the Cabinet Secretary responsible for mining. She cited Section 55 of the Mining Act No. 12 of 2016 as read with Section 153 (5) and 153 (6) which provides internal disputes resolution mechanisms. The third party finally submitted that the plaint in respect of this suit was filed on 25th July 2016 after the coming into operation of the Mining Act, 2016 whose commencement date was 27th May, 2016 and that the provisions of part 1X (compensation and Disputes) of the Mining Act, 2016 apply with respect to the dispute before this Honourable Court. In conclusion, the third party submitted that pursuant to Clause 28 of the special licence and Section 155 (b) of the Mining Act No. 12 of 2016, the Honourable court lacks the requisite jurisdiction to take cognizance of, hear and determine the dispute before it as the dispute relates to an alleged wrongful act committed or omitted in the course of prospecting and mining operations, by any person against any other person. The third party relied on the following authorities:

1. Speaker of the National Assembly –Vs- James Njenga Karume (1992) eKLR.
2. Section 67 (a) of the Kenya Roads Act, 2007
3. SIMONASH Investment Ltd – Vs- Kenya National Highways Authority & 2 Others. ELC Case No. 109 of 2017 (unreported)
4. Michael Otieno Nyaguti & 5 Others –Vs- Kenya National Highways Authority & 5 Others (2015) eKLR.
5. Rianna Furaha Children Home –Vs- Kenya National Highways Authority (2016) eKLR.
6. Unilever Tea Kenya Limited –Vs- National Land Commission & 2 Other (2017) eKLR
7. Boro Dika –Vs- Gulsan Insaat Sanay, Turism & Another (2018) eKLR.

DEFENDANTS SUBMISSIONS

7. The defendant submitted that although the applicable law then being the Mining Act (Cap 306 Laws of Kenya) was thereafter repealed on 27th May, 2016 wherefore Section 154 (b) of the Mining Act, 2016 provides as follows:

“154 Any dispute arising as a result of a mineral right issued under this Act, may be determined in any of the following manners:

(a).....

(b) Through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement.”

8. The defendant submitted that Section 28 of the special licence read with the Mining Act is clear that the intention of the parties was that any dispute arising from the licence would be adjudicated upon by the Commissioner of Mines and Geology and as such, the proceedings before court are premature.

9. The defendant also submitted that following the repeal of the Mining Act Cap.306, the powers conferred upon the Commissioner were conferred upon the Cabinet Secretary under the current Mining Act of 2016 Section 155. The defendant therefore submitted that the dispute herein being a claim on alleged invasion of the plaintiffs prospecting licence, the dispute falls within the jurisdiction of the Cabinet Secretary, Ministry of Mining and Petroleum as provided for under Section 155 (a) (b) and (e) of the Mining Act. He stated that the suit before this court is premature as the plaintiff has not exhausted the dispute resolution mechanisms provided under the licence and the Ministry Act. He cited the following authorities:

1. International Centre for policy and conflict & 5 others –Vs- The Hon. Attorney General & 5 others (20B) eKLR.
2. Section 67 (a) of the Kenya Road Act, 2007
3. Machira Limited –Vs- China Wu Yi Limited & Another (2018) eKLR.

PLAINTIFF’S SUBMISSIONS

10. The plaintiff did not file the submissions.

ANALYSIS AND DECISION

11. The first issue in this Preliminary Objection is whether this Honourable Court is seized with jurisdiction to deal with and determine this case.

Section 28 of the Special Licence states as follows:

“Any dispute arising as to the boundaries of the area or as to the terms and interpretations of this licence or any other matters concerning this licence or ancillary thereto shall be referred to the Commissioner whose decision shall be final” (emphasis added).”

12. After the repeal of the Mining Act Cap.306 Laws of Kenya, the functions that were being performed by the Commissioner for Mines and Geology have now been taken up by the Cabinet Secretary responsible for mining under the new dispensation. Under Section 155 of the Mining Act No. 12 of 2016 provides that the Cabinet Secretary may inquire into and determine the following matters:

- (a) A dispute of the boundaries of an area held under a prospecting or mining right;**
- (b) Any wrongful act committed or omitted in the course of prospecting and mining operations by any persons against any other person;**
- (c) A claim by any person to be entitled to erect, cut, construct, or use any pump, live of pipes, fume, race, drain, dam or reservoir for mining purposes;**
- (d) A claim to have any priority of water taken, diverted, used or delivered for mining purposes, as against any other person claiming the same; or**
- (e) Assessment.**

13. Again Section 153 (5) of the Mining Act, 2016 provides that where a demand or claim for compensation is disputed the parties to the dispute shall seek to resolve the dispute amicably by agreement reached through negotiations in good faith. Section 153 (6) of the same Act provides that where a dispute cannot be resolved through negotiations within a reasonable period of time, either party to the dispute may refer the matter to the Cabinet Secretary for a determination.

14. From my reading of the above, it is clear in my mind that the provisions of part 1X (compensation and disputes) of the Mining Act, 2016 apply with respect to the dispute before this court.

15. In the case of **Speaker of the National Assembly –Vs- James Njenga Karume (1992) eKLR**, the Court of Appeal held as follows:

“In our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a conclusive view that Order 53 of the Civil Procedure Rules cannot oust clear Constitutional and Statutory provisions.”

16. Again in the case of **International Centre for Policy and Conflict & 5 Others –Vs- the Attorney General & 4 others (2013) eKLR**, the court held thus;

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first given an opportunity to the relevant Constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.....”

17. Where there exist sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be involved until such mechanisms have been exhausted. In this regard, we refer to the decision in **Francis Actan Parsimei & Others –Vs- National Alliance Party and others Nairobi Petition No.356 of 2012 (unreported)** in which the court emphasized the principle that:

“Where the constitution and or a statute establishes a dispute resolution procedure, then that procedure must be used.”

18. The importance of the doctrine of exhaustion of remedies provided by statute was further emphasized by the court in the case of **Geoffrey Muthinja & Another –Vs- Samuel Muguna Henry & Others (2015) eKLR** where the Court of Appeal in dismissing an appeal before it stated as follows;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be of the last resort and not the first port of call the moment a storm brews.....the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts.”

19. The decision by the Superior Court is sound and binds this court. In light of the elaborate mechanisms provided under statute which the plaintiff did not exhaust before instituting this suit, this suit is therefore premature as the court lacks jurisdiction to hear and determine the same before exhausting the internal dispute resolution mechanisms. The same is hereby struck out with costs to the defendants and the third party. The plaintiffs will also bear the costs of this preliminary objection.

Read, delivered and signed in the Open Court this 18th day of June, 2019.

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E. C Cheronno (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Madowo holding brief Albert Muma for the defendant
2. Court Clerk: Amina – present
3. Plaintiff/Advocate: absent
4. Third party/Advocate: absent