



**Kavii v Base Titanium Limited & 2 others (Environment & Land Petition
E002 of 2022) [2024] KEELC 3798 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 3798 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION E002 OF 2022**

**AE DENA, J
MARCH 20, 2024**

BETWEEN

LEMMY MUTUA KAVII PETITIONER

AND

BASE TITANIUM LIMITED 1ST RESPONDENT

NEMA 2ND RESPONDENT

COUNTY GOVERNMENT OF KWALE 3RD RESPONDENT

RULING

1. This ruling is pursuant to the 1st Respondents/Applicant's Notice of Motion dated 27/7/2023. The same is for leave to the Applicant to appeal to the Court of Appeal against the ruling of this court made on 29/6/2023 dismissing the Applicants preliminary objection dated 25/11/22 on this court's jurisdiction to handle this petition. The Applicant further seeks for orders of stay of proceedings in this court pending the hearing and determination of the intended appeal.
2. The preliminary objection above questioned the jurisdiction of this court to hear and determine the petition herein. In my ruling aforesaid I made a finding that the ELC court has original jurisdiction to hear and determine disputes under the *Mining Act*. According to the Applicant, there is currently conflicting jurisprudence between this court's ruling on its jurisdiction to handle a dispute arising from compensation on a mining right as provided for under the *Mining Act* and the judgement of the ELC Court in Mombasa in *Peter Nzeki & 14 Others Versus Base Titanium Limited & 4 Others* [2021] eKLR.
3. Aggrieved by my decision, the 1st Respondent/Applicant intends to file an appeal before the Court of Appeal has filed and served Notice of Appeal dated 10/7/23 under Mombasa COACA E145/2023 and has requisitioned for typed proceedings with the hope that a binding decision will be made over the issue of jurisdiction.



4. It is noteworthy this court granted a temporary stay of 30 days pending the filing of the present application.
5. The brief history above informs the basis of the instant application. The application is supported by the Affidavit of Simon Wall the Applicants General Manager External Affairs. The deponent reiterates the history above, attaches the Notice of Appeal and Memorandum of Appeal outlining the grounds for the appeal. It is stated that the intended appeal is arguable and will be rendered nugatory if the proceedings in this suit are not stayed pending the hearing and determination of the intended appeal.
6. It is further stated no prejudice will be occasioned to the Respondent were the suit to be stayed sine the petition does not make reference to continuing constitutional violations that demand immediate determination by the court. That in any event the mining activities neared to the petitioner's structures closed long before the Petition was filed and rehabilitation of the land completed. Additionally the petitioners had waited for 18 months post the said closure to file the present petition. That it will save judicial time in the event the appeal is allowed.
7. Mr. Wall states that the application has been filed timeously without unreasonable delay.

Response

8. The application is opposed by a replying affidavit sworn by Lemmy Mutual Kavii the Petitioner herein filed before court on 5/10/2023. It is stated that the no resolution of by the Directors of the Applicant to file the application has been furnished and therefore the supporting affidavit to the application should be expunged and the application dismissed.
9. The Respondent avers that the decision of a court of concurrent jurisdiction is not binding and as such this court cannot be persuaded by the authority in the *Peter Nzeki & 14 Others Versus Base Titanium Limited & 4 Others* [2021] eKLR.
10. That the application is aimed at re-litigating the persuasiveness of the judgement in *Peter Nzeki & 14 Others* (*Supra*). That this court cannot seat on appeal on its decision. Referring to paragraph 24 the Petitioners affidavit dated 14/11/22 it is stated that the Petitioner has rightly deponed that he continues to suffer for the loss of land, crops and amenities erected on the property. Photos of ongoing activities are attached. That stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to access justice. That stay of proceedings is not an automatic right but the court should consider whether it is in the interest of justice to stay proceedings and if yes on what terms.
11. It is urged that should the court be inclined to stay the proceedings the same should be conditional upon immediate stoppage of the 1st Respondents Mining activities pending determination of the intended appeal, to avoid sanctioning the continuing violations.
12. The Petitioner/Respondent states that stay of proceedings is a discretion of the court which should be granted on merit and in the interest of justice. That the Petitioner's fundamental rights are continuously being violated by the 1st Respondent and the stay orders if granted will aid in the continuous violation of such rights. The court is urged to dismiss the application.
13. The Applicant in response to the above filed a Supplementary Affidavit by the said Mr. Wall who states that there is no legal requirement to file a director's resolution authorizing the filing of an application and swearing supporting affidavit. That the Applicant was not seeking to re-litigate *Peter Nzeki* (*supra*) but to emphasize the emerging serious issues of law to merit determination by the Court of Appeal. That the grounds of appeal have been misunderstood and were meant to support the the appeal is arguable which is a ground the court must consider. It is denied that the decision of *Peter Nzeki & 14*



Others has been stated to be binding. The Applicant reiterates that there are no mining activities. That the photos produced by the Petitioners were misleading in that some of the equipment's (DMU) have never been used since 2019.

14. The court directed parties to file written submissions over the application and which orders have been complied with. Parties were also given an opportunity to highlight on the same on 14/11/23. The court has considered the submissions as filed by all parties together with the authorities thereto.

Determination

15. I find it necessary to at this early stage of my ruling dispose of the preliminary issues that have been raised by the Respondents. I agree with the Applicants that there is no requirement for a Directors resolution authorizing the filing of the application and its attendant affidavits. For me as long as the application is filed within an existing suit like in the present case then the initial resolution/authority to institute the suit should suffice for subsequent interlocutory matters.
16. With regard to the grounds of appeal and memorandum of appeal I'm persuaded that they are only limited to give an indication of what is intended to be raised at the Court of Appeal. In any case the appeal is not being argued before the court that rendered the decision being appealed against. It will be argued at the Court of appeal level.
17. The main issue for determination is whether the application is merited. I will first determine whether the proceedings in this petition should be stayed pending appeal and if the answer is in the affirmative then I will deal with conditions to be attached thereto.
18. The application is brought under the provisions of Orders 42 Rule 6, 43 Rule 1(2) of the Civil Procedure Rules and Section 75(1) of the Civil Procedure Act. Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order



upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

19. The court in *Global Tours & Travels Limited; Nairobi HC Winding up* Cause No. 43 of 2000 while laying the threshold for grant or denial of orders of stay of proceedings pending appeal stated that grant of the said orders is purely a matter of the discretion of the court. The court further listed several factors to consider in deciding whether to grant the orders or not as follows;
 - a. The need for expeditious disposal of cases,
 - b. The prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one,
 - c. The scarcity and optimum utilization of judicial time and
 - d. Whether the application has been brought expeditiously”.
20. This court notes that stay of proceedings is not the same as stay of execution. I will therefore be guided by the requirement for expeditious disposal of cases and the scarcity and optimum utilization of judicial time. I note that the intended appeal touches on the jurisdiction of this court to determine the petition herein. Jurisdiction, as has been established touches on the core mandate and ability of this court to render itself on any matter placed before it – see *Owners of Motor Vessel ‘Lillian Vs. Caltex Oil (Kenya) Ltd* (1989) eKLR.
21. In the case of *Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya)* [2001] eKLR, Onyango-Otieno, J (as he then was) persuasively stated; -

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”
22. The jurisdiction of this court is being questioned. There is an opportunity to have the matter of jurisdiction laid to rest once and for all and which will provide clarity of direction to both the parties in this dispute. This would be more efficient in my view. I find that the proposed appeal is arguable. Assuming it is established by the Court of Appeal that this court is devoid of jurisdiction then whatever proceedings would have taken place will be rendered nugatory and the same will amount to a waste of precious judicial time. The back and forth on jurisdiction I agree, can be settled by the Court of Appeal as insinuated by the Applicant herein. I cannot seat on my decision already rendered.
23. The court has also been moved to grant leave to file the appeal. I have seen the actions taken by the Applicant in filing their pleadings before the Court of Appeal and I find that there is no inordinate delay.
24. The Respondent has urged that should this court allow the stay of the proceedings herein then it should be conditional upon the stopping of the mining activities herein. I think to impose such a condition would be going into the substantive issues and merits of this petition. In any event there has been no demonstration that the Respondents would not be able to meet any ensuing costs in this litigation.
25. The upshot of the foregoing is that this court finds it proper to grant the orders sought. The application dated 27/7/2023 is allowed and costs shall be in the cause.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 20TH DAY OF MARCH 2024.



A.E DENA

JUDGE

Mr. Towet holding brief for Asli for the Petitioner/Respondent

Mr. Sakimpa and Ms. Onesmus for the Respondents/Applicants

Mr. Daniel Disii – Court Assistant

