



Krystalline Salt Limited & 3 others v Cabinet Secretary, Ministry of Mining and Petroleum & another (Civil Application E002 of 2023) [2023] KECA 485 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 485 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E002 OF 2023
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 12, 2023**

BETWEEN

**KRYSTALLINE SALT LIMITED 1ST APPLICANT
KURAWA INDUSTRIES LIMITED 2ND APPLICANT
MALINDI SALT WORKS LIMITED 3RD APPLICANT
KENSALT SALT LIMITED 4TH APPLICANT**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF MINING AND
PETROLEUM 2ND RESPONDENT**

(Being an application for stay of execution from the judgement of the Environment and Land Court at Malindi rendered by M.A. Odeny, J. on 12th January 2023 in ELC Petition 14 of 2021)

RULING

1. The Applicants seek a stay of the decision of the Court in Malindi Environment and Land Court (ELC) Petition No. 14 of 2021 delivered by the Court (M. A. Odeny, J.) delivered on the 12th January 2023, pending hearing and determination of the Intended Appeal.
The application has been brought under Rule 5 (2) (b) of the Court of Appeal Rules, hereinafter the Rules. The Notice of Motion is dated 6th February 2023 and is supported by the affidavit Hasmita Patel, the Managing Director of the 1st Applicant.
2. The Respondents have opposed this application vide the affidavit dated 22nd February 2023, sworn by the Acting Director of Mines, State Department of Mining, Ministry of Mining.



3. The background to the application arises from a dispute over revocation of salt mining rights over the suit land vide letter dated 12th May 2021 that was issued by the 1st respondent. The Applicants filed a Constitutional Petition before to the ELC seeking various declarations, an order of certiorari and an order of permanent injunction against the Respondents.
4. The bone of contention was the interpretation by the Respondents that the new mining legislation, 2016, extinguished the Applicants salt harvesting rights which they had always enjoyed over their parcels of land, yet they had unexpired leases over the land.

That the Applicants were required to seek fresh salt harvesting rights from the Respondents, and to comply with the conditions under the Act. It was contended that the Mining Act made no reference to edible salt when it brought within its regulatory ambit industrial and construction salt, and that that exempted certain products including edible salt.
5. The Respondents' case was that salt was a mineral, and was not classified as industrial, construction or edible. The Respondents contended that they had the right to regulate the Applicants' activities, contrary to the Applicants' argument that the Mining Act does not apply to them. Further that there was in existence no other regulatory framework for mining in Kenya, contrary to the Applicants allegations double regulation and taxation.
6. The court, vide the impugned judgement found that salt is regulated by the Mining Act and that the Act applied to the Applicants. The Court quashed the impugned letters dated 12th May 2021, and found on the other hand that the Applicants' leases are regulated by the Mining Act. It found that the Applicants were operating within the leases issued under the Registration of Titles Act, which is the old regime, and that the Respondents were at liberty to start the process of compliance afresh to bring the Applicants within the purview of the Mining Act.
7. The Applicants were dissatisfied with the decision rendered and so filed a Notice of Appeal dated 19th January 2023. The application is based on grounds on the face of the application and the Supporting affidavit.
8. The application was heard on the virtual platform on the 28th February 2023. Learned counsel Dr. Jotham Arwa was present for the Applicants, while learned Principle Litigation Counsel Ms. Ruth Lutta was present for the Respondents. Dr. Arwa relied on his written submissions dated 21st February 2023 and highlighted them before us. Principal Litigation Counsel Ms. Lutta also relied on their submissions dated 21st February 2023 and the replying affidavit dated 22nd February 2023.
9. In order to succeed in their prayers in the application, the Applicants are required to demonstrate that the intended appeal is arguable and that should the Court decline to stay the impugned judgment, and the appeal succeeds, it will be rendered nugatory.

This requirement is prescribed by Rule 5 (2)(b) of the Rules and confirmed by this Court in *Halai & Another vs Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
10. Dr. Arwa for the Applicants submitted that they have an arguable appeal with good prospect of success. He urged that the triable issues are whether edible salt is regulated under the Mining Act 2016. He urged that the judgment had immediate and adverse implications on the Applicants business, and threatens to plunge it to chaos and cause irreparable damage. That the effect of the judgment was to terminate Applicants unexpired leases over the land, of periods between 50 years and 90 years, to which they had title without notice or compensation. It was urged that questions of constitutionality of the Applicants' right to benefit from sale and exportation of edible salt was alive and remained unresolved.



11. Ms. Lutta for the Respondent urged that the Applicants had no triable issue, as they do not hold valid Mining licences. Secondly, that the mining falls under the Mining Act, as clearly spelt out under Section 4, Section 255 (1) and Schedule 42 of the Act.
12. We have considered the arguments on the first principle whether the Applicants have a triable issue. The issue whether the Applicants should be regulated under the Mining Act or other law; and whether the Applicants fell under the exemption provision are triable issues. Although the Respondent has urged us to find that there are no arguable grounds, we respectfully are of the view that these are not idle grounds. We in fact are of the considered view and find that the appeal is arguable. This Court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR elaborated on this when it held that it is sufficient if a single bonafide arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004. Further, that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
13. In regard to the nugatory aspect, the Applicants position is that they had existing rights which have been extinguished through legislation, and that if no stay is granted, they may not be able to recover them.

That they stand to give up leases of between 50 and 90 years; to get new leases; and, to pay double taxes, which if not stayed the success of the appeal will be rendered nugatory. That the impugned judgement has the effect of varying their mining rights and if the decision is implemented then the appeal will be rendered nugatory.
14. Counsel refuted that the nugatory test was met for reason the Respondents have the financial muscle to compensate the applicants if the appeal succeeds; cited was *County Government of Kakamega & Anoter vs. Munyao Sila & Another* (2021) eKLR. Counsel added that the applicants are not license holders and not liable to pay royalties; that there was no basis to argue that the Applicants would be subjected to higher royalties. It was revealed that the Applicants were members of a taskforce to execute the impugned judgement and were aware of the 1st respondent's intentions to execute.
15. On the nugatory aspect, which an Applicant must also demonstrate, it has been held that the term 'nugatory' has to be given its full meaning since it does only mean worthless, futile or invalid but also means trifling.

Further, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.

This was illustrated in the case relied on by Ms. Lutta of *Stanley Kangethe Kinyanjui vs. Tony Keter and 5 others*[2013] eKLR,
16. We have considered submissions on the second principle. We are satisfied that the appeal may be rendered nugatory if no stay is granted and the appeal were to succeed. The loss of existing rights, and of long unexpired leases to land, if it took effect may not be reversible, nor be adequately compensatable. In *Raol Investment Ltd. vs. Lake Credit Finance Ltd.* Civil Application No. Nai. 303 of 1997, this Court opined that in cases where the dispute revolves around land should the property pass to a third party, the appeal or intended appeal would be rendered nugatory.



- 17. In our view, the Applicants have met the conditions for the grant of stay pending appeal. In the premises, the order that commends itself to us and which we hereby grant is pending the hearing and determination of the intended appeal, the prevailing Status quo be maintained.
- 18. Costs of this application abide the outcome of the appeal.
- 19. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

