



**Mbiriri v Kilio & 2 others (Civil Appeal (Application)
E023 of 2023) [2023] KECA 1191 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1191 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E023 OF 2023
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
OCTOBER 6, 2023**

BETWEEN

JOHN KAMAU MBIRIRI APPELLANT

AND

AGNES NDUNGE KIWUWA & ASSOCIATES 1ST RESPONDENT

ROBERT KIWUWA KILIO 2ND RESPONDENT

WASHUMBU (D.A.) RANCHING CO LTD 3RD RESPONDENT

*(An application for injunction and for stay of execution of the Judgment
and Decree of the Environment and Land Court (L. L. Naikuni
J.) dated 25th May 2023 in Mombasa ELC Case No. 423 of 2017)*

RULING

1. The Applicant herein, Joseph Kamau Mbiriri, is seeking orders of an injunction to restrain Robert Kiwuwa Kilio, Agnes Ndunge Kiwuwa & Associates and Washumbu (DA) Ranching Co. Ltd (the 1st to 3rd Respondents herein) from interfering in any manner whatsoever with his mining activities at the mine known as Riziki mining location No 1970- 1971, and of a stay of execution of the judgment and decree made on May 25, 2023 in Mombasa ELC Case No 423 of 2017 in so far as it ordered the 3rd respondent to make appropriate applications for mining rights in respect of Riziki mining location numbers 1979 - 1977 which belong to the Applicant, pending the hearing and determination of his intended appeal.
2. The prayers are in a Notice of Motion application dated June 15, 2023, and Applicant deponed in his affidavit in support thereof that the judgment delivered by the ELC on May 25, 2023 declared that his mining rights had expired, and proceeded to direct the 3rd Respondent to make an appropriate application to be granted the said mining right over the Applicant's mining territory. The Applicant,



being aggrieved by the said judgment lodged a Notice of Appeal dated 2nd June 2023 on June 6, 2023, and prepared his draft memorandum of appeal in which he has raised sixteen (16) grounds of appeal. The Applicant avers that the appeal is arguable with a probability of success, and unless the orders sought are granted, shall be rendered nugatory as he stands to be evicted from his mine and his investment in the mine since 1987 shall be lost thereby rendering him destitute. It is therefore, in the interest of justice that the orders of injunction and stay be granted to preserve the substratum of this appeal.

3. There was no response filed by the 1st and 2nd Respondents. The 3rd Respondent opposed the application, and filed a Replying Affidavit sworn on 4th July 2023 by James Kinusa Mwang'ombe, its legal representative. The Respondent avers that the application is not tenable as the trial Court dismissed the Applicant's suit and there are no positive orders to stay; The 3rd Respondent depones that the Applicant seeks an injunction against a non-existent property as the suit property was LR No 14206 and owned by the 3rd Respondent and was not Riziki. Further, that the Applicant got into possession of the property and licenses unprocedurally and illegally. Additionally, that the appeal would not be rendered nugatory if the injunction is not granted as the Applicant did not have ownership rights to the suit property, and with regards to loss of revenue which the Applicant might suffer if the appeal succeeds, can be compensated by way of damages.
4. A brief background to the instant application is that the Applicant filed the suit in Mombasa ELC Case No 423 of 2017 claiming to have been a licenced miner since 1987 over an area known as Riziki mining location located in Pamleso, Kasigeu location Voi Sub County in Taita Taveta County, having been so licenced initially by the County Council of Taita Taveta, and later under the [Mining Act](#) when it came into operation in 2016, and had invested in the exploration, research and mining of minerals in the location. That in September 2017 he found out that the 1st and 2nd Respondents were undertaking mining in the same area upon grant of a consent to by the 3rd Respondent. He accordingly sought orders of permanent injunction restraining the 1st to 3rd Respondents from trespassing on or carrying out mining with in his allocated location at Riziki, a declaration that they said respondents were not seized of requisite authority to apply for or confer mining rights on the state location, and damages.
5. The 1st and 2nd Respondents in their defence stated that a mining licence was granted to the 2nd Respondent, who was the 1st Respondent's wife by the 3rd Respondent. The 3rd Respondent on his part stated in its defence that it is the registered owner of the suit property and the Applicant was a trespasser thereon, and confirmed that it had granted the 1st and 2nd Respondents a consent to undertake mining on the property. The ELC (L Naikuni, J) in dismissing the Applicant's suit found that the 3rd Respondent was the legally registered owner of the land in which Riziki mining location was located, there was no evidence of issuance of mining licences to the Applicant since 2017, and that the Applicant had vacated the mining site in 2015 for two years, and that none of the parties had the requisite mining licences required by the [Mining Act](#).
6. The ELC consequently made the following orders:
 - a. That Judgement be and is hereby entered that the suit filed by the Plaintiff through a Plaint dated November 20, 2017 is unmeritorious and hence dismissed hereof.
 - b. That a declaration be and is hereby made for the mining area known as Riziki mines in locations 1970 to 1977 under the cadastral map system within suit premises belong to the National Government of Kenya in trust of the people of Kenya and shall be administered on their behalf by the National Land Commission in accordance with the provisions of Article 62 (1) (f)(3) and (4) of the [Constitution of Kenya, 2010](#) and Sections 37 (1), (2) and (3) of the [Mining Act of 2016](#).



- c. That an order of the Court be issued that for any mining activities to be undertaken on to the said Riziki location, the 3rd Defendant has to make appropriate application to the Ministry of Mining, Blue Economy and Maritime Affairs in accordance with the specific provisions of the law and in particular the provisions of Sections 37 (1), (2) and (3) and 38 of the [Mining Act of 2016](#)
 - d. That in the meantime the temporary orders granted by this Court on November 17, 2020 and February 9, 2022 having lapsed by effluxion of time now stand vacated and/or discharges (sic) under order 40 rule 6 &7 the [Civil Procedure Rules 2010](#) in essence meaning there shall be no meaning activities to be undertaken on the suit property until they above directions are fully complied with by the operation, spirit and letter of the law.
 - e. That each party to bear their own costs of the suit.
7. We heard the instant application on July 5, 2023 on the Court's virtual platform, and learned counsel Mr Gaita appeared for the Applicant and highlighted his written submissions dated June 30, 2023, while learned counsel Mr Chege Kamau appeared for the 3rd Respondent and equally highlighted written submissions dated July 4, 2023. There was no appearance for the 1st and 2nd Respondents despite their advocates having been duly served with the hearing notice.
 8. The principles that apply to the application are settled. The Applicant is required to demonstrate firstly, an arguable appeal and secondly, that unless an order of stay is granted their appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in various decisions and most notably in [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR. On the requirement of an arguable appeal, Mr Gaita referred us to the Applicant's draft memorandum of appeal to submit that the ELC ignored evidence of payments made to the Ministry of Mining up to the year 2021 and it was erroneous for the trial Judge to state that the expiry of the single business permit extinguished the Appellant's mining rights; that there was an error made by the Judge in purporting to revoke the Applicant's Mining rights without due process and directing the 3rd Respondent to apply for a mining permit, notwithstanding that it had not sought such orders, and which powers are conferred on the Cabinet Secretary and the Mineral Rights Board by the [Mining Act](#); and for misapprehending the facts and law on ownership of land on which minerals are situated.
 9. Mr Kamau on his part submitted that the grounds of appeal are on matters of fact which were determined by the trial Court and as such the appeal is not legally arguable. We need to point out that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raises only one triable issue. Mr Gaita has raised various grounds in the Applicant's appeal with respect the existence of the Applicant's mining rights, the process of determining the said rights if any, and the applicable law, which in our view merit further consideration. To this extent we find that the intended appeal is arguable.
 10. On the nugatory requirement, Mr Gaita submitted that the Applicant has been carrying out mining activities on the subject mining location since 1987 and has invested heavily in the development of the mine and has acquired heavy equipment for the work. Therefore, that if the applicant's mining rights, mine and his equipment are not preserved through stay orders and injunction orders, the Applicant's appeal shall be rendered nugatory. Mr Kamau, while citing this Court's decision in [The Public Service Commission & 72 Others vs Okiya Omtatah & 4 Others](#), Civil Appeal (Application) No E131 of 2021, submitted that there was nothing to stay as the Court granted negative orders, and that if the stay or injunction is not granted, and the Applicant is unable to continue mining, this status is reversible and any loss of revenues to the applicant can be compensated by way of damages.



11. It was held in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* (*supra*) that whether or not an appeal will be rendered nugatory depends on whether or not what is ought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In this respect, we have reproduced the raft of orders granted by the ELC, some of which required compliance and certain actions to be undertaken by the 3rd Respondent. These particular orders are therefore amenable to stay, and it is also notable that the Applicant has also sought injunction orders with respect to the effects of the ELC judgment dismissing his suit. In addition, it is not contested that the Applicant has a developed mining infrastructure including equipment on the subject location which is in need of preservation, and has been undertaking mining on the site for many years. The Applicant therefore stands to be more prejudiced in this respect, and in the event the he succeeds in his appeal, the status may be irreversible if his infrastructure is destroyed or otherwise adversely interfered with.
12. In conclusion, it is our finding that the Applicant has satisfied the requirements for the grant of an injunction and stay orders. We therefore find merit in the Applicant's application dated June 15, 2023, and order as follows:
 1. An injunction do and is hereby issued restraining the 1st, 2nd and 3rd Respondents by themselves, their servants or agents from interfering in any manner whatsoever with the Applicant's mining activities at Riziki mining location numbers 1970-1977 pending the hearing and determination of the Applicant's intended appeal.
 2. There shall be a stay of execution of the order made on May 25, 2023 in the judgment and Decree by the ELC in Mombasa ELC Case No 423 of 2017 that the 3rd Respondent herein makes appropriate applications for mining rights in respect of Riziki Mining location numbers 1979- 1977, pending the hearing and determination of the Applicant's intended appeal.
 3. The costs of the application dated June 15, 2023 shall abide the outcome of the appeal.
13. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2023.

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

