



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & KARANJA, J.J.A.)

CIVIL APPEAL NO. 10 OF 2014

BETWEEN

MUTHONI KIHARA.....1ST APPELLANTS

MUTHONI KIHARA MINING COMPANY LIMITED.....2ND APPELLANTS

AND

THE COMMISSIONER OF MINES AND GEOLOGY... 1ST RESPONDENT

KUTIMA INVESTMENTS LIMITED.....2ND RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi – Judicial Review Division (G.V. Odunga, J.) on 1st November, 2013

in

Misc. Civil Application No. 84 of 2011)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (Odunga, J.) granting judicial review orders of certiorari and prohibition against the decision of Commissioner of Mines and Geology contained in a letter dated 22nd September 2011 renewing a licence to mine on the applicant's land - (**Kutima Investments Limited**).

[2] The application for judicial review was made pursuant to leave granted by the High Court on 5th October, 2011. In granting leave, the High Court declined to give an order that the grant of leave do operate as a stay of the questioned decision as the applicant had sought. However, the applicant sought orders of stay of the decision and injunction in the judicial review application pending the hearing and determination of the application, in the course of the proceedings, the court restrained the two appellants from undertaking any mining on the property owned by the applicant.

[3] By the application, the applicant sought an order of certiorari removing into the High Court and quashing the decision of the commissioner of Mines and Geology (Commissioner) contained in a letter

dated 22nd September, 2011 granting or renewing licences to Muthoni Kihara Mining Company Limited (company) to mine on the applicant's land LR No. 1219914, Taita Taveta.

The applicant also sought a second order of certiorari to quash the same decision and the certificates for renewal of licence granted to the company. The applicant further sought two orders of prohibition – the first being an order prohibiting the Commissioner and his officers from issuing prospecting or mining licences to Muthoni Kihara and the company or to any person over the applicants land without the consent of the applicant. The second order of prohibition was to prohibit Muthoni Kihara and the company and their employees from entering or remaining in the applicant's land. The application was supported by a statement and a verifying affidavit as required by the rules.

The statement contained four grounds of relief. The first ground was abuse of power and excess of power. Under this ground the applicant stated:

“The 1st respondents (Commissioner) has gravely abused and exceeded the powers conferred upon his office under the mining Act Cap 306 by purporting to issue or renew mining licences over privately owned land without the consent of the applicant contrary to express provisions of the same Mining Act, upon which he purports to base the impugned decision.”

The other three grounds on which relief was sought were flagrant breach of a court order; unreasonable, capricious and oppressive decision, and public interest.

[4] The statement summarized the grounds of the application which were verified by an affidavit sworn by **Saul Joel Mwangola (Mwangola)** the Managing Director of Kutima Investments Limited (Kutima). Muthoni Kihara the 1st interested party filed a replying affidavit sworn on 4th November, 2011.

The company - 2nd interested party filed a replying affidavit sworn by **Geoffrey Kamau Kihara** – a director of the company. The commissioner filed a replying affidavit sworn by **Moses Njiru Njeru** a Superintendent Inspector of Mines and Warden of Mines. The Managing Director of Kutima filed two further replying affidavits and Muthoni Kihara filed a further replying affidavit. The 1st interested parties and the Commissioner filed a notice of preliminary objection to the application respectively.

[5] The facts on which the application was based were briefly as follows:

The applicant is the registered proprietor of **LR NO. 1219914 Taia Taveta** known as Kutima Ranch on which it runs the business of a ranch with large herds of livestock, business of mining and prospecting minerals under a licence issued by the Commissioner and has about 200 workers on the land. The land has been the subject of previous litigation in the High Court Civil Suit No. 99 of 1999, Kutima Investments Limited versus Muthoni Kihara and Commissioner of mines and Geology.

[6] As disclosed in that suit, Kutima bought the land in May 1994. Prior to the purchase of the land, the former owners **Peter Mwamburi** and **Patrick Joel Mwangola** had entered into an agreement with **Kihara Kabugi** under which **Kihara Kabugi** was to prospect minerals on the land on certain conditions. **Kihara Kabugi (deceased)** died in about 1986 and upon his death, Muthoni Kihara, his wife and administrator of his estate claimed a right to prospect and mine minerals on Kutima's land. Between 1990 and 1993 Muthoni Kihara found minerals of a commercial quantity and has been mining minerals since then without the consent of Kutima.

In the suit, Kutima sought an injunction against Muthoni Kihara restraining her from entering or remaining on the land, accounts and general damages and as against the Commissioner, a declaration that the Commissioner had no right or power to grant any prospecting or mining licence without Kutima's consent and an injunction restraining the Commissioner from unlawfully granting such licence. On 17th January, 2000, **Ole Keiwua, J.** (as he then was) granted injunctive orders on the application of Kutima which preserved the status quo pending the determination of the suit.

On 26th April 2005 and before the hearing, Kihara Kariuki, J. (as he then was) struck out the suit on the application of the appellants, mainly on the ground that the suit was time barred under the Limitations of Actions Act. Kutima filed a notice of appeal and ultimately filed Civil Appeal in the **Court of Appeal – CA No. 117 of 2005** against the decision of **Kihara Kariuki, J.**

[7] In the meantime, on the application by Kutima, Ransley, J. on 19th September 2005 granted injunctive orders against Muthoni Kihara restraining her from entering or remaining on the land pending the hearing of the appeal and against the commissioner restraining him from granting, prospecting and mining Licences pending the hearing of the appeal. An application to set aside the orders granted by Ransley, J. was dismissed by Waweru, J. on 18th December, 2009.

[8] By a letter dated about 31st December, 1995, the Commissioner while approving application for transfer and renewal of mining locations land informed Muthoni Kihara Mining Co. Limited that the renewal was subject to the consent of the landowner. However, by a letter dated 22nd September, 2011, the Commissioner notified the company and Kutima that he had decided to cause the mining locations of the company renewed and issued two certificates of renewal valid until 19th August, 2012. When Kutima became aware of the renewal of licences, it demanded cancellation of licences and Mr. Moses N. Masibo, the Acting Commissioner and by a letter dated 26th September, 2011, suspended the licences until the matter was fully resolved, but refused to rescind the decision.

[9] Muthoni Kihara in her replying affidavit gave a detailed history of her dealings with Kutima and stated, in addition, that she is the registered owner of mining locations No. 1406, 1407, 1498, 1409 and 1439 located on Kutima's land which are distinct from Kutima's locations. She averred that before the land was sold to Kutima, the former owners had given her husband prospecting and mining rights upon which he was granted a licence by the Commissioner; that upon the death of her husband, the prospecting and mining rights were transferred to the deceased's family and she continued carrying out mining activities on the land; that after Kutima acquired the land it embarked on a scheme to coerce her to give up her rights which she refused and that Kutima has been unlawfully mining on her locations.

On its part, the company's case was briefly that it was first registered under the Business Names Act and later on 29th June, 2001 it was incorporated under the Companies Act, that it was the holder of mining locations 1406,1407,1408,1419 and 1439 on Kutima's land, that the former owners of the land had given consent to the deceased and that the deceased's family has a lawful interest in the mines.

The commissioner's case as stated in the affidavits of Moses Njiru Njeru was in essence that the original owner of the land had granted consent to the deceased on 22nd December 1985, and that upon his death the mining locations were transferred to his widow; that Kutima has registered locations numbers 1829/1-8 and 1830/1-4, while the company has registered location numbers 1406/1-10; 1407/5, 1409/1-10; 1408/1-10 and 1439/1-4 which locations are dissimilar and do not overlap; that the mining locations were pegged in 1985 in accordance with section 28 of the Mining Act. The Commissioner contended that he acted in accordance with provisions of section 79 of the Mining Act which requires the Commissioner to notify the registered owner, before renewing licences, which he did.

[10] The learned Judge considered the respective case of each party and made findings, *inter alia*, that:

(i) the principles of *res judicata* and *sub-judice* did not apply to the case

(ii) that under section 7(1) (m) of the Mining Act, private land is excluded from prospecting and mining without the consent of the land owner

(iii) that under section 7(3) of the Mining Act, where a land owner unreasonably withholds his consent the State can only resort to compulsory acquisition thereof;

(iv) whereas, the minerals found on the land are not the property of the land owner, the State cannot simply enter into private land and deprive the proprietors of his rights without following the due

process of the law;

(v) even if the person from whom the applicant obtained his title had given his consent the consent does not continue in perpetuity and upon expiry of the licence, the interested parties became trespassers, since the consent ceased to exist when the licence for which it was given expired; the respondent had no power to renew the impugned licence without the consent of the applicant;

(vi) the respondent unilaterally expanded the scope of the licence outside the scope contemplated by the parties to the consent by including the 2nd interested party who was not a beneficiary of the earlier licence.

In the end the learned judge granted the two orders of certiorari and the first order of prohibition. The second order of prohibition sought to restrain Muthoni Kihara and the company from entering and remaining on the land was not granted.

[11] The thirteen grounds of appeal are mainly against these findings. It is necessary for completeness of the record to state that, and as conceded by counsel for the respective parties, Civil Appeal No. 117 of 2005 was heard by the Court of Appeal and by a judgment delivered on 24th April 2015, the appeal was allowed, and Kutima Civil Suit No. 990 of 1999 restored to hearing.

Furthermore by the time this appeal was heard, the Mining Act (1940) had been repealed by the Mining Act No. 12 of 2016 which commenced on 27th May 2016. Therefore, any reference to the Mining Act in this judgment, necessarily refers to the repealed Act.

However, by the savings of transitional provisions in section 225 of 2016 of the Act, the regulations made under the repealed Act continue to be in force until revoked [section 225(8)] and the existing licences and locations under the repealed law continue in force until expiry by the passage of time [(Section 225(3))].

[12] It is expedient to deal first with grounds 3 and 6 of the appeal which do not relate to the merits of the decision. Ground 3 states that the judge misdirected himself in failing to appreciate that the judicial policy of avoiding multiplicity of suits applied to all matters touching on the land in the light of **HCCC No. 990 of 1999** and the pending **Civil Appeal No. 117 of 2015**. Ground 6 states that the learned Judge erred by failing to recognize that judicial review orders could not be granted where there is an alternative remedy available such as the institution of contempt of court proceedings.

In respect of those grounds, Mr. Kanjama learned counsel for the appellants submitted that the High Court erred in law in failing to consider the preliminary objection which raised the issue of the competence of the judicial review application and contended that the application was incurably defective as it simultaneously invoked judicial review jurisdiction and Civil jurisdiction and further as the matter was **res judicata**, having been decided in **HCCC No. 990 of 1999**. He submitted that the issue raised in the application was intended to re-open, and re-hear the concluded matter on the issue of the grant of consent.

Mr. Ralji, learned counsel for the 2nd respondent (Kutima), submitted in respect of issue of the preliminary objection that the hearing took place in accordance with prior directions of the court, no prejudice was suffered and all issues raised by way of preliminary objection were substantively and fully addressed by the court in its final ruling. On the question of availability of alternative remedy, Mr. Ralji submitted that the remedy of instituting contempt proceedings was not applicable. In addition, he submitted that the issues of *res-judicata* did not arise as the ruling striking out the suit was not a final decision on the merits and the prospecting and mining licence was not in existence and further that the issue has been overtaken by the decision in **Civil Appeal No. 117 of 2015**.

[13] We have considered the respective submissions. The substance of the preliminary objections raised by the Commissioner and the two interested parties in the High Court was that the issue raised in the judicial review application was *res judicata* as it was the same issue decided in HCC No. 990 of 1999

between the same parties. The commissioner further contended that the matter was *subjudice* as the appeal from the decision of the High Court was pending.

It is true that the preliminary objections were not heard and determined before the substantive application was heard. The court instead directed the parties to file written submissions which they did.

[14] The first issue that the learned judge considered in the impugned judgment is the question of *res judicata* and *sub judice*. After considering the issues at great length he concluded that the issues had no merit for the reasons that the matters the subject matter of the review application arose on 22nd September, 2011 subsequent to the striking out of the suit, that the High Court had not determined the matter on the merits, that the company was incorporated in 2001 after the decision and was not a party to the previous proceedings, that the cause of action was different, and that the doctrine of *res judicata* does not apply to judicial review proceedings.

The leaned judge also considered the objection that Kutima had invoked both judicial review and civil jurisdiction by seeking orders of injunction and made a finding that orders of injunction sought were only interim orders.

[15] Starting with the last finding, it is clear that the order for stay and injunction was sought pending the determination of the application. They were conservatory reliefs and the court on its own motion preserved the status quo. It is also true that at the time a judicial review court had no power to grant an injunction.

The law has now been reformed by section 11(1) of the Fair Administrative Action Act, 2015 which gives power to a judicial review court to grant any just and equitable relief including injunctions and declarations of rights.

It is our finding that the inclusion of relief for interim orders in the judicial review application did not render the entire application incurably incompetent.

[16] The learned Judge in his discretion decided to hear the substantive application, which raised the same issues as the preliminary objection. A court is required by the overriding objective principle to use judicial resources economically to ensure a just, expeditious and proportionate resolution of disputes. The issue raised is a procedural technicality which did not cause any prejudice as the issues raised in the preliminary objection were later comprehensively considered and determined by the court

[17] The issue of *res judicata* and *sub judice* has now been overtaken by the decision in **Civil Appeal No. 117 of 2005** and the court cannot act in vain. However, we agree with the finding of the learned Judge that at the time the decision was made, the principle of *res judicata* did not apply for the reasons that the judicial review application was of entirely different character from the previous suit. The judicial review sought public law remedies intended to check the abuse of the statutory power by the Commissioner a remedy quite different from the private rights of the primary parties in the suit.

[18] As regards the issue of availability of an alternative remedy, the learned Judge agreed that had the judicial review application been solely based on the ground of flagrant breach of court orders, which he found it was not, he could have, in exercise of his discretion, declined to grant the orders sought. This finding was in favour of the appellants.

[19] The next major ground of the appeal relates to the jurisdiction of the High Court to entertain judicial review application. This issue is raised in grounds 1 and 2 of the appeal. It is contended by counsel for the appellants that as the Environment and Land Court which has jurisdiction under Article 162(2) of the Constitution to hear disputes concerning ownership, occupation or title to land had been established by 20th September, 2012 before the judgment was delivered, the dispute should have been transferred to that court.

On the other hand, counsel for Kutima submitted that the subject matter of the application was the

administrative exercise of power under the Mining Act and there was no property dispute or ownership of the minerals or a claim concerning compulsory acquisition. In addition, counsel submitted that the Environment and Land Court was not in existence and section 22 of the Sixth Schedule to the Constitution 2010 conferred jurisdiction to the High Court.

Article 162(2)(b) of the Constitution confers power to Parliament to establish a court with the status of a High Court to determine disputes relating to the environment and the use and occupation of, and title to, land.

Section 22 of the Sixth Schedule which is a transitional provision provides:

“All Judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this constitution, or as directed by the Chief Justice or the Registrar of the High Court.”

Section 30(1) of the Environment and Land Court Act, Act No. 19 of 2011 contains similar provisions.

Section 30(2) of the Act gives Chief Justice discretion after the Environment and Land Court is established, to refer part heard cases where appropriate to the Court.

[20] It follows that where a pending judicial proceeding relates to environment use, occupation or title to land, the court seized of the matter had jurisdiction under the Constitution to determine proceedings unless the Chief Justice, in his discretion determined otherwise. It is not contended that the Chief Justice had directed that the proceedings should continue before the Environment and Land Court.

More importantly, and as we have already said, the subject matter of the judicial review application was not a dispute relating to use, occupation and title to land. It relates to judicial control of the exercise of statutory power by a public officer which jurisdiction is vested in the High Court.

Moreover, the issue of jurisdiction was not raised in the High Court. Indeed, the respective counsel continued with the proceedings without any objection to jurisdiction being raised. We are satisfied that this ground of appeal has no merit.

[21] The rest of the grounds of appeal – Nos. 5, 7, 8, 9, 10, 11, 12 and 13 concern the merits of the questioned decision of the High Court. The learned judge is faulted for failing to find that the Commissioner followed due process; for dealing with the merits of the dispute; for failing to appreciate that the Commissioner had power to renew the licence without consent of the land owner; for failing to find that the law gives the holder of a mining location a secure and protected term; for failing to appreciate that restrictive covenants on Kutima’s title safe guarded the appellants’ mining locations; for unprocedurally taking appellants’ accrued rights and for granting the orders of certiorari and prohibition.

[22] The appellants’ counsel submitted *inter alia* that:

- (i) The rights of licensee are independent from rights of land owner.
- (ii) Consent which is a prerequisite condition was granted by the former owners of the land under section 7(1) (m) of the Mining Act which accorded the appellants a right to renewal.
- (iii) No provision of law requires prior consent of a land owner as a condition for renewal of a licence.
- (iv) The Commissioner acted within the provisions of Section 76(2)(d) of the repealed Constitution and Sections 29 and 79 of the Mining Act.
- (v) If consent of land owner for renewal of a licence is required then Kutima is estopped from denying the validity of the licence by allowing appellants to work and mine for a long time.

(vi) The appellants' property rights are protected by Article 40 of the Constitution.

(vii) An order for prohibition could not issue to prohibit the Commissioner from carrying out his lawful duties.

(viii) Title of Kutima is subject to restrictive covenants and encumbrances specified in the Government Land Act and which are preserved by section 79 of the Mining Act.

[23] On the other hand, the 2nd respondent's counsel (Kutima) submitted, amongst other things, that:

(a) Kutima's land is a private property

(b) Private land is excluded from prospecting or mining except with the owner's consent under section 7(1)(m) of the Mining Act which has no exception.

(c) No consent has been granted prior to the grant of mining interest to any the appellants

(d) Any previous permission granted by Kutima's predecessor in title was for a completely different purpose, namely, prospecting for minerals and had long expired and could not be transferred or renewed in favour of any of the appellants.

(e) By sections 18(4) and 29 as read with section 7(1)(m) of the Mining Act, the Commissioner's power to grant any renewal in prospecting rights is exercisable yearly, but for a cumulative period not exceeding 5 years after the original grant and no licence or a right can survive in perpetuity in respect of private land.

(f) The last renewal having been made in 1987 during the time of Kihara Kibugi had automatically lapsed with his demise.

(g) No transfer or assignment of the expired prospecting rights of Kihara was ever done and a subsequent application made in 1995 was refused by the Commissioner on the ground that Kutima's consent was required.

(h) Section 79 of the Mining Act is not applicable. The section concerns notification to an existing holder of mining location or lease of the intention of the Commissioner of Lands to independently issue a subsequent grant in interest in land notwithstanding the existence of a mining interest, a matter not in dispute before the superior court. The section does not exclude the consent of a land owner.

(i) The issue of estoppel is not raised in the grounds of appeal nor was it a subject of finding by the superior court.

(j) The subject dispute in the superior court did not concern any abuse of power held by Kutima or the exercise of its right granted by Article 40 of the Constitution.

(k) No restrictive covenant of any kind registered against Kutima's title was established to exist and which would excuse the consent of Kutima.

[24] The Attorney-General filed written submission prepared by Kaumba Samuel Odiwuor, a litigation counsel which support the decision appealed from and which sought the dismissal of the appeal.

However, it transpired at the hearing that a different litigation counsel – Mr. Onyiso was instructed to conduct the appeal. At the hearing of the appeal, Mr. Onyiso intimated that the written submissions were filed without the Attorney-General's advice. He indicated that he was withdrawing the written submission. He then adopted the submissions made by the Attorney-General in the High Court and the submissions of the Counsel for the appellants. The result is that although the Attorney-General did not

appeal against the decision appealed from on behalf to the Commissioner, he nevertheless supports the appeal.

[25] We have considered the grounds of appeal and the submissions of the respective counsel. It was submitted by the appellants counsel that the learned Judge failed to appreciate that judicial review is concerned with the decision making process rather than on the merits of the decision and that the judge proceeded to consider substance and merits of the matter. It was further submitted that the decision appealed from determined factual and legal issues.

[26] It is true and as often said, that judicial review is concerned with decision making process and not with the merits of the decision. That is to say that the judicial review court is not supposed to usurp the powers of a decision maker and substitute its own decision for that of the decision maker. However, judicial review jurisdiction has a broader and more fundamental purpose, that of upholding the principle of legality which is one of the elements of the principles of rule of law.

Public bodies are required to exercise power donated by the law for public purposes lawfully, reasonably and a procedurally fair manner. The sphere of judicial review is the control of the exercise of executive power and duties and where power is discretionary, as in this case, to ensure that it is exercised within the legal limits.

In this case, the main ground for review was clearly identified – abuse of power by Commissioner, exceeding the power conferred by the Mining Act and renewing a licence without the consent of the land owner contrary to the provisions of the Mining Act. The determination of that ground involved the interpretation of the provisions of the Mining Act based on an undisputed fact, that the current land owner, Kutima, had not given consent before the licence was renewed. The case of the Commissioner and that of the appellants was essentially that consent was not required as a prior consent had been given by previous land owners before the land was transferred to Kutima.

[27] We have no doubt, and we find, that judicial review jurisdiction was properly invoked and the High Court had jurisdiction to determine whether or not the Commissioner has exercised his discretion lawfully.

[28] The appellants' counsel has correctly submitted that all unextracted minerals even in private land are the property of the government. This is clearly stated in section 4 of the Mining Act. Further, Section **28 of the Land Titles Act (now repealed)** and Section 83 of the **Government Land Act** provided that a certificate of title and a conveyance lease or licence respectively did not confer any right to minerals to the proprietor of the land. It follows that Kutima cannot claim ownership of the unextracted minerals subsisting on its land.

It is also correct as submitted by the counsel for the appellants, that the rights of a licensee to prospect and mine minerals on private land are independent from the rights of the proprietor of the land. If the Commissioner lawfully grants a licence to prospect and extract minerals from private land, the licensee's rights override proprietary rights of the land owner.

[29] In the High Court, Kutima relied mainly on the provisions of sections 7(1)(m), 7(3) and 18(4) of the Mining Act. Section 7(1)(m) provides that private lands are excluded from prospecting and mining except with the consent of the owner.

Section 7(3) provides:

“Where any consent required under section (1) is unreasonably withheld or the minister considers that any withholding of consent is contrary to the national interest, the Minister may take such steps as are necessary under the law relating to compulsory acquisition of the land or rights or interests in the land to vest land or area in question, or rights or interest in such land or area in the Government or on behalf of the Government and thereafter such land or area shall cease to be land excluded from prospecting and mining under subsection (1)”

Section 18(1) provides in essence that an exclusive prospecting licence shall be valid for one year subject to renewal at the discretion of the Commissioner for further terms one year each up to a maximum of five years from the date of the original grant.

[30] As the replying affidavit sworn by Moses Njiru Njeru and filed in the High Court indicates, the Commissioner justified the grant of renewal of the licence on the prior consent of the previous land owners to Kibugi Kihara and on section 79 of the Mining Act.

Section 79 provides:

“Subject to the Constitution and any other written law, any authority or duly authorized person may not withstanding the previous grant of any licence, location or lease, over any land under this Act, make any grant of such land which he is empowered by law to make; Provided that –

(i) The person to whom any such grant may be made shall not be entitled to compensation for any disturbance of his rights under the grant by reason of the exercise by the holder of any licence or location or by any lessee under this Act of any rights by such licence, location or lease.

(ii) Before making such grant, a notice shall be given to the holder of such licence or location or the lessee of intention to make the grant.

The Commissioner contended that he issued a notice before renewal of the licence to Kutima under this section. However, counsel for Kutima contended that the section is not applicable.

[31] By the plain reading of section 79, the section applied to grant of land by the Government and empowered the Government at that time to make grant to land under the Government Land Act in respect of which the Commissioner had previously granted a mining licence location or lease. By doing so, the section recognized that a licence, location or lease granted by the Commissioner did not confer proprietary rights on the land. The notice referred to in proviso (ii) related to the power to make a grant of land by the Government and not to a grant of a licence by the Commissioner. Relating to the facts of this case, the land is private land and the government was not making a grant of land on which Kibugi Kihara had been licensed by the Commissioner to undertake prospecting and mining. In any case, the notice referred to should have been directed to Kibugi Kihara or his family and not to Kutima – the land owner. Clearly, section 79 and particularly proviso (ii) did not apply to the circumstances of this case.

[32] The High Court and Kutima’s counsel relied on the judgment in **John Gitonga Kihara & 4 others v Kasigau Ranching (D.A) Limited – Court of Appeal Nairobi Civil Appeal No. 134 of 1994** (unreported) and on the Ruling in **Ranching (DA) Limited v. John Gitonga & 4 Others – Nairobi Court of Appeal Civil Application No. 105 of 1998** (unreported).

The two appeals related to the same parties and the same dispute.

Kasigau Ranching (D.A) Limited was the owner of the land situated at Taita Taveta. It had previously granted consent to John Gitonga Kihara and the four others for prospecting of minerals and precious stones on the land. The Commissioner of Mines and Geology had granted to them a licence to mine on the property but the land owner had withdrawn his consent.

[33] In the first case, the land owner wanted to sell the land to pay off a loan but the licencees refused to vacate the land to facilitate the sale. The High Court granted an interlocutory injunction restraining the licencees from entering into the land. The Court of Appeal affirmed the decision and said.

“Upon the plaintiff withholding his consent the defendants were clearly trespassers.”

[34] In the second case, it is apparent that the High Court gave judgment in favour of the licencees. The land owner appealed to the court and applied for stay of execution pending appeal. That application was

determined in favour of the land owner.

At page 2 of the Ruling, the Court of Appeal said:

“But Mr. Oluoch was at pains to argue that as the Department of Mines and Geology had granted to the respondents a licence to mine on the property of the applicant, they were entitled to carry out their mining operations regardless of the consent on the part of the applicant. He referred to section 7(1)(m) and 7(2) of the Mining Act Cap 306 (the Act) to support his argument. But that cannot be.

Section 7(1)(m) of the Act simply provides that private lands are excluded from prospecting and mining except with the consent of the owner thereof. This section does not help the respondents. On the contrary, it exempts private lands from prospecting and mining except with the consent of the owner.”

On the question whether a land owner who does not own the minerals could suffer any harm, the Court of Appeal said:

“Save for the minerals the applicant owns everything on and in the soil. If the licence to prospect is withdrawn by the land owner, the licence issued by the Commissioner of mines and Geology stands terminated. The Commissioner cannot purport to give permanent rights to prospectors to mine and Mr. Okwach’s assertion to the contrary is to say the least, baseless.”

[35] The appellants’ counsel distinguished Kasigau Ranching (D.A) Limited from this case on the grounds, *inter alia*, that the ruling was interlocutory, and Kutima is a subsequent purchaser and the original owners had given consent unlike Kasigau’s case where no consent had been granted.

It is clear from Kasigau’s case that the land owner had given consent and the Commissioner had granted a license to prospect and mine on the basis of that consent but the land owner later withdraw the consent. It is also clear that the Court of Appeal finally enunciated the applicable principles of law albeit at an interlocutory stage.

[36] By section 18(4), the licence granted by the Commissioner is an annual licence renewable at his discretion for a total period of five years. That provision as read with Section 79 supports the finding of the learned Judge and the Court of Appeal in Kasigau’s case that Commissioner cannot by the licence give permanent rights to prospectors.

[37] The Kasigau’s case was also distinguished on the ground that there was no evidence that the appellants’ rights had been extinguished by abandonment, cancellation or forfeiture. Those grounds would apply in a case were the Commissioner seeks to terminate the licence on those grounds. This is not the case in this dispute. The land owner is seeking a quashing order of the renewal of licence on ground of illegality by lack of consent of the land owner.

[38] The statutory requirement for the consent of the land owner and the nature of the licence and its term at least implies that upon the expiry of the annual licence existing at the time Kutima bought the land the consent of the land owner was required for subsequent renewals.

The evidence shows that the land owner has not given any consent since it acquired the land in December 1994 and that by a letter dated 31st December 1995 the Commissioner notified the company that the renewal of mining locations could not be effected without the consent of the land owner.

The statutory remedy for unreasonable withholding of the consent is the right by the government of compulsory acquisition of the land as provided by section 7(3) of the Act.

[39] In conclusion, we find that, the law as it existed at the time of the application of judicial review, section 79 of the Mining Act did not confer upon the Commissioner the power to renew a prospecting or

mining licence by merely notifying the land owner of the intention to renew the licence. Furthermore, where a prior consent had been granted by the owner of the land, who later transferred the land to another person, such previous consent did not empower the Commissioner to continuously renew the licence year after year without the consent of the current registered owner. The Commissioner acted beyond his powers and in breach of provisions of section 7(1) (m) of the repealed Mining Act by renewing the licences for prospecting and mining on private land without the consent of the registered owner of the leasehold interest.

In the result, we are satisfied that the learned Judge applied the law correctly and reached the correct decision.

[40] Counsel for the appellants however contended that the orders of certiorari were granted in vain as the licenses granted had a lifespan of one year which had expired by the time the decision was handed down. That is a valid point with respect to the order quashing the renewal certificates. However, the impugned decision is not limited in time and as the Commissioner has intimated that it had power to renew the licences without consent of the present owner of the land so long as it notified the land owner, the first order of certiorari was validly given. The order of prohibition being futuristic was also validly granted.

As regards the costs of the appeal, the Commissioner has not appealed though he has supported the appellants' case. It is just that the Commissioner should not benefit from the order of costs nor should costs be awarded to Kutima against the Commissioner.

[41] The result is that, and it is so ordered that, the appeal against the order of certiorari quashing the decision of 22nd September, 2011 and the order of prohibition is dismissed with costs to the 2nd respondent (Kutima) which should be paid by the appellants. The appeal against the order of certiorari to quash the renewal certificates which certificates had expired is allowed and the order is set aside.

For avoidance of any doubt, the order of prohibition as granted shall remain in force and the costs in the High Court shall be paid as ordered by the High Court.

Dated and Delivered at Nairobi this 9th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

