IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI, & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI 119 OF 2015 (UR 95/2015)

BETWEEN

CORTEC MINING KENYA LIMITED ..... APPELLANT

AND

THE CABINET SECRETARY,

ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY ..... 2ND RESPONDENT

BASU MINING COMPANY LIMITED..... 3RD RESPONDENT

KENYA FOREST SERVICE ..... 4TH RESPONDENT

NATIONAL MUSEUMS OF KENYA ..... 5TH RESPONDENT

MSHENGA VYAA RUGA ..... 6TH RESPONDENT

BENSON KIOKO MULANGILI ..... 7TH RESPONDENT

MATHEUS MUTINDA MUTUA ..... 8TH RESPONDENT

COUNTY GOVERNMENT OF KWALE ..... 9TH RESPONDENT

(Being an application for injunction pending the determination of an intended appeal from the Judgment and/Decree of the High Court of Kenya at Nairobi

(Mutungi, J.) delivered on 20th March 2015

in

H.C.ELC NO.195 OF 2014 ***(Formerly Misc Application NO.298 of 2013)***

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RULING OF THE COURT

1. CORTEC MINING KENYA LIMITED **("the applicant")** has appealed to this Court (in Civil Appeal No.105 of 2015) against the decree ensuing from the judgment of the High Court of Kenya (Mutungi J) delivered in Nairobi on 20th March 2015 in Judicial Review Cause No.195 of 2015. The applicant had sought in the High Court (Judicial Review) proceedings an order of certiorari to quash the decision of the Cabinet Secretary, Ministry of Mining (**1st respondent**) and the Attorney General (**the 2nd respondent**) made on 5th August 2013 purporting to revoke the applicant's special (mining) Licence Number 351 issued on 7th March 2013 and appointing a Task Force to undertake a review of the applicant's licence. The applicant also sought an order of prohibition against the 1st and 2nd respondents prohibiting them from taking any steps to revoke the licence during the pendency of the said judicial review proceedings.

2. In its judgment delivered and dated 20th March 2015, the High Court held that the applicant's application for judicial review by notice of motion dated 9th September 2013 was devoid of merit and dismissed it with an order that each party would bear its own costs.

3. Aggrieved by the decision, the applicant gave notice of appeal on 23rd March 2015 pursuant to rule 75 of the Court of Appeal rules of its intention to appeal the decision. Subsequently, the applicant filed Civil Appeal No.105 of 2015 challenging the High Court judgment.

4. On 6th May 2015, the applicant made an application to this Court by notice of motion of the same date predicated on Article 23(3)(b) & (c) of the Constitution of Kenya (2010), Sections 3, 3A, and 3B of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya, and rules 1(2) & 5(2) (b) of the Court of Appeal Rules seeking an injunction order to restrain the 1st respondent from issuing to any party a mining licence or lease in respect of the land at Mrima Hill of Kwale County, Kenya, measuring approximately 142 hectares pending the hearing and determination of Civil Appeal No.105 of 2015 filed by the applicant against the 1st respondent and 9 other parties.

5.Before the applicant's said notice of motion came up for hearing on 13thJuly 2015, the 1st respondent filed **a notice of preliminary objection** through its advocates on record, Messrs Ngatia & Associates, contending that this Court has no jurisdiction to issue the injunction in judicial review proceedings and seeking an order that the notice of motion be struck out in limine.

6. When the notice of motion came up for hearing before us on 13th July 2015, learned counsel Mr. Havi appeared for the applicant while learned counsel Mr. Ngatia appeared for the 1st respondent and learned counsel Mr. Bitta appeared for the 2nd respondent. Learned counsel Messrs Gitonga, Taib, Thige, Change and Kasiani appeared for the 3rd, 4th, 5th, 6th and 10th respondent's respectively. Though served, the 7th, 8th and 9th respondents did not attend and were not represented at the hearing.

7. We decided to hear the notice of preliminary objection before hearing the notice of motion because it raised a fundamental issue, namely jurisdiction of the court. In his submissions, Mr. Ngatia commenced his presentation by making the point that the only reason the applicant sought an order for injunction in the motion is because, in his view, the judicial review proceedings having been dismissed, the applicant could not seek an order for stay under rule 5(2)(b) of the Rules of this Court as there would be nothing to stay after the dismissal of the motion.

8. Mr. Ngatia told us that he posed the question as a doctrinal issue whether an injunction can be granted by this court under rule 5(2)(b) if it could not be granted by the High Court in the Judicial Review proceedings premised under the Law Reform Act pursuant to which the only reliefs available were the

orders of mandamus, prohibition and certiorari. He pointed out that in judicial review proceedings, the High Court in Kenya can only make such orders as the High Court in England was empowered to make under the provisions of Section 7 of the Administration of Justice (miscellaneous provisions) Act, 1938 of the United Kingdom.

9. Section 8(1) (2), (3), (4) & (5) of The Law Reform Act provides:

> ***"8.(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari***
>
> ***(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.***
>
> ***(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.***
>
> ***(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.***
>
> ***(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.***

10. It was Mr. Ngatia's Submission that the law to be applied in the determination of the notice of motion before us is the law applicable in the High Court by dint of Section 3(3) of the Appellate Jurisdiction Act whose subsections (2) & (3) stipulate as follows –

> ***"S 3 (2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.***
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> ***S 3 (3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.***

11. Mr. Ngatia cited the decision of this Court in **Stanbic Bank Kenya Ltd v. Kenya Revenue Authority** (Civil Appeal No.294 of 2007 (200/2007UR)) to buttress the proposition that an injunction was not available as a relief in the judicial review proceedings in the High Court. In his view, as the law to be applied by this Court in an appeal is by dint of Section 3(3) (supra) the law applicable to the case in the High Court, this court would have no jurisdiction to grant an injunction in judicial review proceedings which the High Court was not empowered under the law to grant.

12. In the Stanbic Bank case (supra), the Bank had moved the High Court for an order of certiorari to quash letters by the Kenya Revenue Authority demanding payment of tax and for prohibition to stop the latter from demanding the tax in question or taking recovery measures. The judicial review application was dismissed by the High Court whereupon the Bank came to this Court on appeal and sought in an interlocutory application an injunction to restrain the Kenya Revenue Authority from demanding and/or

taking steps to recover the tax in question from the Bank. In its Ruling delivered on 8th February 2008, this Court held –

> "***All that the superior court did after hearing the notice of motion was to dismiss the motion with cost to the respondent. Other than an order of costs, the superior court order was negative and could not be executed by either party. That being the case, there is no order the execution of which this Court can stay as the superior court did not order any party to do anything or to refrain from doing anything that this Court can stay. This view has been taken by this Court in many decisions pronounced in the past and recent past. We need not belabor it anymore, but if there be any further need to draw the attention of the legal fraternity to some of those cases, then the recent decision of this Court in the case of Western College of Arts and Applied Sciences (Weco) vs Oranga (1976) KLR 63, where after the predecessor to this Court considered a similar application, Law V.P. stated as follows –***
>
> > ***"But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for stay, to ensue or to restrain by injunction."***
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> ***And on his part, Mustafa J.A. who was a member of that bench stated:***
>
> ***"The temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this Court has no jurisdiction to entertain it."***
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> ***"The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court."***

Likewise, in this case, the superior court did not order the respondent to collect the disputed amounts, nor did it order the applicant to pay that money. All it did was to dismiss the judicial review application for certiorari and prohibition. There is therefore no positive order it made that can be stayed even if we were minded to read the third prayer of the application before us to include prayer for stay of execution or for an order of status quo ante which we cannot do."

13. Musinga J, as he then was, stated in **Republic v. District Land Registrar Nandi & Another**, ex-Parte Kiprono Tegerei & Another [2005] e KLR

that –

> ***"...it is common knowledge that under order LIII (53) the only remedy that can be granted are orders of certiorari, mandamus, and prohibition. Injunction cannot be sought in a matter commenced as a judicial review."***

14. Mr. Ngatia also drew our attention to the decision of this court in **Mombasa Seaport Duty Free Limited V. Kenya Ports Authority** [Nbi Civil Application 242 of 2006] (UR 135/2006) and pointed out that this Court applied the decision in **Western College of Arts and Applied Sciences v. Oranga & Others** [1976] KLR 63 in which this court, following a preliminary objection, held that it had no jurisdiction in its appellate capacity to order a temporary injunction pending appeal and that there was nothing in the judgment of the High Court other than an order for costs that could be enforced. At the time, rule 5 (2) (b) had not been amended to give this court jurisdiction to grant an injunction pending appeal.

15. The decision in **Devani and 4 Others V. Joseph Ngindari & 3 Others** [Civil Application No. Nai 136 of 2004; [unreported] referred to in the **Mombasa Seaport Duty Free Ltd V. Kenya Ports Authority** (supra) was further referred to by Mr. Ngatia to re-emphasize the proposition that this court has no jurisdiction to grant injunction under rule 5(2) (b) of this Court's Rules in judicial review proceedings. In the **Devani** case (supra), an application was made under rule 5(2) (b) of this Court's Rules for an interim stay of execution of an order or decree of the High Court dismissing an application for judicial review made under Order LIII of the Civil Procedure Rules. This Court stated –

> ***"By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application. This court cannot undo at this stage what the superior court has done.***
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> ***It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable."***

16. Mr. Ngatia concluded his submissions by stating that by entertaining the application before us, this court would be reviving the judicial review proceedings in the High Court which now do not exist. He urged us to strike out the motion in limine on the ground that we have no jurisdiction.

17. Mr. Bitta, learned counsel for the 2nd respondent, associated himself with the submissions of Mr. Ngatia and pointed out that judicial review proceedings are *sui generis*; that they are not civil proceedings; that the High Court in judicial review proceedings exercises special jurisdiction which is neither criminal nor civil; that under S.16 of the Government Proceedings Act, no injunction could be granted against the 2nd respondent; that the power to grant injunction in rule 5 (2) (b) (supra) cannot override the provisions of the Law Reform Act; that the court has no jurisdiction to grant the injunction sought.

18. The 3rd respondent's counsel, Mr**. Gitonga**, was in agreement with the submissions of Mr. Ngatia which he too adopted.

19. The 4th respondent's counsel, **Mr. Taib**, concurred with the submissions of Mr. Ngatia and Mr. Bitta and adopted the same.

20. Mr. Munyasa Khasiani, learned counsel for the 10th respondent, associated himself with and adopted the submissions by Mr. Ngatia and Mr. Bitta and supported the preliminary objection and urged us to strike out the appellant's notice of motion.

21. Mr. Havi, learned counsel for the applicant, contended that the preliminary objection was not meritorious. For starters, he submitted that the applicant's notice of motion sought an order of injunction and not an order for stay. He contended that injunction was sought on the basis of this Court's original jurisdiction under rule 5(2)(b) and not on the basis of this court's appellate jurisdiction. But he was at pains to explain the import of Section 3(3) of the Appellate Jurisdiction Act which enjoins this court to aply in the appeal the law the High Court was required to apply in judicial review which restricts the grant of reliefs to only three orders, namely, certiorari, prohibition and mandamus. Mr. Havi referred us to Articles 23 (3) (b) and (c) of the Kenya Constitution (2010) which state –

> ***"23(2) In any proceedings brought under Article 22, a court may grant appropriate relief, including –***
>
> a. ***A declaration of right;***
>
> b. ***An injunction;***

c. ***A conservatory order;***

22. A look at Article 22 shows that proceedings under that Article relate to enforcement of fundamental rights and freedoms under the Bill of Rights, and therefore the invocation of the Article in the context of this matter seems misplaced not least because the instant case did not appertain to enforcement of rights and/or freedoms under the Bill of Rights.

23. Mr. Havi contended that it was in the interest of justice for the court to grant the injunction sought citing sections 3A and 3B of the Appellate Jurisdiction Act Cap 9. He contended that there is no legal basis for the contention by the 1st respondent that this court has no jurisdiction. Sections 3A and 3B of the Appellate Jurisdiction Act stipulate –

> ***"3A. (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.***
>
> ***(2) the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***
>
> ***(3) an advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court."***
>
> ***"3(B) (1) for the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –***
>
> a. ***the just determination of the proceedings;***
>
> b. ***the efficient use of the available judicial and administrative resources;***
>
> c. ***the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
> d. ***the use of suitable technology."***

24. Read in totality, these provisions, said Mr. Havi, enable the court to do justice which includes preservation of the subject matter. It was his further submission that the contention by Mr. Ngatia that this court has no jurisdiction is not founded on law as the Constitution vests power in the court to grant an injunction. Referring to this court's decision in **Bluesea Shopping Mall Ltd versus the City Council of Nairobi and 3 Others** [Nairobi CivilAppeal NO.129 of 2013, (unreported) Mr. Havi contended that this court should aim at doing justice by granting the injunction sought and should be guided by the overriding objectives in the Appellate Jurisdiction Act. In fairness to Mr. Havi, we set out hereunder what this Court stated in the Bluesea Shopping Mall case (supra) –

> ***"The Appellate Jurisdiction Act, Cap 9, confers on this court jurisdiction to hear appeals from the High Court and power, authority and jurisdiction vested in the High Court in determining appeals. Pursuant to Section 3A (1) the overriding objective of the Act is to facilitate the just, expeditions, proportionate and affordable resolution of the appeals governed by the Act. In exercising its judicial power under the Act, this Court is required to give effect to the overriding objective and to handle all matters presented before it for the purpose of attaining the just determination of the proceedings. This Court is guided by the principles enshrined in Article 159 of the Constitution which include the principle that justice shall be administered without undue regard to procedural technicalities. The policy of the Court is to hear and determine***

appeals on their merits and to eschew very rigid application of rules of procedure where such application will result in miscarriage or subversion of justice. The philosophy informing this policy is that rules of procedure, as hand-maidens of justice, are designed to help secure justice not to override it. Technical lapses therefore will in appropriate circumstances be excused to obviate injustice that may ensue therefrom."

25. We have perused the notice of preliminary objection, and the applicant's notice of motion, the 1st respondent's replying affidavit sworn on 6th July 2015 by Najib M. Balala, the Cabinet Secretary in the Ministry of Mining, and have duly considered the rival oral submissions of counsel and the authorities cited by them.

26. The facts are not in dispute. We have before us an application by notice of motion by the applicant, Cortec Mining Kenya Ltd. whose judicial review application was dismissed by the High Court. The applicant gave notice of appeal and subsequently lodged Civil Appeal No.105 of 2015. Pending the hearing and determination of the said appeal, the applicant seeks in the notice of motion an injunction to "restrain" the 1st respondent by himself, his agents, servants ..... from issuing to any party a mining licence or lease in respect of all that parcel of land situate at Mrima Hill of Kwale which was comprised in the applicant's licence that was cancelled by the 1st respondent. Counsel for the respondents led by Mr. Ngata contended that this Court has no jurisdiction to grant the injunction sought. This ruling is confined to the preliminary objection argued before us. The issue for our determination is whether, in the context of this matter, we have jurisdiction to grant the injunction sought by the applicant.

27. The application before us is predicated on Article 23 (3) (b) & (c) of the Constitution and Sections 3, 3A and 3B of the Appellate Jurisdiction Act, Cap 9, and rules 1(2) and 5(2) (b) of the Court of Appeal Rules. It was made following the notice of appeal and filing of the appeal (No. 105 of 2015) against the decision of the High Court which dismissed the judicial review proceedings instituted by the applicant seeking the orders of mandamus and prohibition as aforestated. In dismissing the applicant's judicial review notice of motion seeking the said orders, the High Court held –

"in the result, it is my determination and I hold that the applicant's notice of motion dated 9th September 2013 is devoid of merit and the same fails and is ordered dismissed.

28. As regards costs, the High Court stated, inter alia, that -

"all the parties to meet their own respective costs for the application."

29. There is no dispute that the dismissed notice of motion was a judicial review application founded on Section 8 of the Law Reform Act, Cap 26.

30. The notice of motion before us has its basis on the appeal to this Court from the impugned decision of the High Court given in the Judicial review notice of motion No.298 of 2013 (JR) on 20th March 2015. This Court, in hearing appeals from decisions made in judicial review proceedings, is enjoined to adhere to the provisions of the Appellate Jurisdiction Act, Cap 9, whose Section 3(1) & (3) stipulates -

"3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the

Court of Appeal under any law."

"3 (3) in the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."

31. It is pertinent to ascertain whether in the judicial review proceedings in the High Court, the High Court had jurisdiction to grant injunction, interlocutory or otherwise such as is now sought in the applicant's notice of motion and if it did not have, whether this Court could grant it as an interlocutory

relief pending the determination of the appeal. It was argued by Mr. Ngatia and the other counsel for the respondents that this Court cannot grant the injunction sought because it does not have jurisdiction. Counsel for the respondents postulated that as the High Court could not grant an order for injunction as it is not one of the orders it is empowered to grant under Section 8 of the Law Reform Act, and as Section 3(3) of the Law Reform Act requires that the law to be applied in hearing of an appeal before us shall be the law applicable to the case in the High Court, we would be erring firstly in giving to the applicant that which the High Court was not empowered to grant under

The Law Reform Act and secondly in failing to adhere to the provision of Section 3(3) of the Law Reform Act. Perusal of the provisions of Appellate Jurisdiction Act and the Law Reform Act shows that while the former statute governs all appeals to this Court, the latter statute focuses on civil actions and prerogative orders, to wit, orders of mandamus, certiorari and prohibition.

32. These are the only orders in judicial review that the High Court is enjoined to grant. By virtue of Article 165 (6) of the Constitution, the High Court is vested with supervisory judicial power over subordinate courts, and any person, body or authority exercising judicial or quasi-judicial function but not over a superior court. In conferring this constitutional mandate to the High Court, Parliament did not expand the amplitude of the reliefs under Section 8 of the Law Reform Act beyond the three orders and consequently the jurisdiction of the High Court in this regard remains confined to that set by Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom as stated in section 8(2) (supra).

33. There is considerable merit in the argument that judicial review proceedings are sui *generis;* that they are not criminal or civil in nature, and that they are not intended to deal with private rights. The erstwhile distinction between judicial and administration acts in the realm of judicial review no longer holds true. In general, where a matter of public law as opposed to private law is directly involved, proceedings for orders of certiorari, mandamus, and prohibition may be resorted to. It is important to appreciate that these orders are public law remedies. They issue against public officers or public bodies performing public duties. Certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body and forbids such tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for lack of jurisdiction or excess of it, but also for departure from rules of natural justice. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same (see Kenya National Examination Council [C.A.266/1996]).

34.Can this court grant an order of injunction in a judicial review matter such as this one? For starters, to grant an injunction would amount to giving a relief or remedy that was not even sought in the High Court in the first place.

The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies. But even more compelling is the fact that subsection (3) of Section 3 of the Appellate Jurisdiction Act requires this court –

> ***"in the hearing of an appeal in exercise of the jurisdiction conferred by the said Act to apply the law applicable to the case in the High Court."***

It is plain to see that in judicial review, the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.

35. As is apparent, judicial review being *sui generis* in which the only orders available are certiorari, mandamus & prohibition, the notice of motion in judicial review having been dismissed, there is nothing that can be stayed under rule 5 (2) (b). Mr. Ngatia was quite correct when he postulated this to be the reason why an order of stay was not sought.

36. In the instant case, the High Court was not legally empowered to grant the remedy of injunction. The law governing judicial review as set out in Section 8 of the Law Reform Act did not then as now permit the Court to grant an injunction. It is as plain as daylight that, an order of injunction which the High Court was not by law empowered to grant is not available on appeal from this Court.

37. Moreover, if we were to grant the injunction sought, what implications would this have? First, it would boil down to this, that although the High Court declined to issue in the notice of motion by the applicant any of the public law remedies stipulated in Section 8 of the Law Reform Act, an injunction as a private law remedy by this court would in effect, (notwithstanding that the impugned decision made in the judicial review proceedings which is now the subject of the said appeal) revive the litigation that is already determined, in a context in which such injunction would not serve as a conservatory there being nothing to be conserved after dismissal of the judicial review proceedings. Secondly, such injunction would not serve to prevent the appeal from becoming nugatory as success in the appeal would not be turned into Pyrrhic victory if injunction is not granted for the simple reason that revocation of the 1st respondent's mining licence took effect on 5th August 2013 under the provisions of the Mining Act, Cap 306 of the Laws of Kenya. Thirdly, to restrain the 1st respondent by injunction in the manner sought in the motion would also be tantamount to going against an express provision of the law (to wit Section 8 of the Law Reform Act, Cap 26) without interrogating the matter as a public law issue. Fourthly, it would be an error not least because it would violate Section 3(3) of the Appellate Jurisdiction Act. There would be no legal justification for us to grant the injunction in judicial review proceedings. In the **Bluesea case** (supra) this Court emphasized fairness and the rule of law thus –

> ***"It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people or, as Kenyans are wont to say in Kenya, from Wanjiku, by dint of Article 159***
>
> ***(1) of the Constitution which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Article 159 (2) makes it clear that in exercising judicial authority, the courts and tribunals shall be guided by the principles stated in Article 10 which include as per Article 159 (2) (d) the requirement that "justice shall be administered without undue regard to procedural technicalities." As Judicial Officers are also State officers, they are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the law or the Constitution to ensure, inter alia, that the rule of law, and equity are upheld. For these reasons, decision of the courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve the rights and obligations of the parties to the litigation and therefore relate to the interests of such parties inter se, while others may transcend the interest of the litigants and encompass public interest. In all these cases, it is incumbent upon the Court in exercising its judicial authority to ensure attainment of fairness."***

National values and principles of governance under Article 10 include the rule of law. Every person including state officers are enjoined to uphold the Constitution and to defend it.

38. Mustafa JA in Western College of Arts and Applied Sciences v. Oranga [1976] KLR 63 put the position succinctly thus -

> ***"the temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this Court has no jurisdiction to entertain it."***

39. Read in the context of Section 8 of the Law Reform Act, the statement would hold true now as it did then.

40. In **Republic v. Kenya Wild Services & 2 Others** (Civil Application No.12 of 2007 – unreported) the High Court dismissed judicial review proceedings. The applicant, aggrieved by the decision, gave notice of appeal and applied to this court under rule 5(2) (b) seeking an injunction order to restrain KWS from signing any lease of the disputed property pending the determination of the intended appeal. This Court held-

> ***"The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court."***

41. In light of what we have stated above, it is plain to see that the application for injunction is misplaced. The preliminary objection by the Mr. Ngatia has merit. Accordingly, we uphold it and consequently strike out the applicant's notice of motion dated 6th May 2015 with costs to the 1st, 2nd, 3rd, 4th, 5th, 6th and 10th respondents whose counsel appeared and argued the matter before us on 13th July 2015.

Dated and made at Nairobi this 11th *day of December, 2015*.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR