



REPUBLIC OF KENYA

COURT OF APPEAL

AT NAIROBI

CORAM: O'KUBASU J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 33 OF 2000

BETWEEN

MUTHONI KIHARAAPPLICANT

AND

KUTIMA INVESTMENTS LTD

COMMISSIONER OF MINESRESPONDENTS

**(Being an application for stay of execution of the High
Court Order/Ruling (Hon. Justice Moijo Ole Keiwua)**

dated 17th January, 2000

in

H.C.C.C NO. 990 OF 1999)

R U L I N G

This matter came before me for inter partes hearing on the question of urgency. The jurisdiction of the court on the matter is donated by rule 47 of the Court of Appeal Rules, which in provides that:

"47(1) Any application which the applicant desires to set down for hearing as a matter of urgency shall be accompanied by a certificate of urgency signed by the applicant or his advocate supported by an affidavit setting forth the matters upon which the applicant relies as showing that his application should be heard without delay.

There is an affidavit sworn by Dr. J.M. Khaminwa the applicant's advocate in which he sets out the background to this matter showing that the matter is indeed urgent. When the matter came up for hearing on 30th March, 2000, I heard counsel appearing for the parties.

The dispute herein relates to mining on private land. It has been argued that the applicant had the consent of the original owner of the land and the original owner sold the land to the 1st respondent. The applicant was then declared a trespasser. Mr. Ngeno for the applicant informed the court that the consent to mine by his client had been obtained from the Commissioner of Mines (2nd respondent). In Mr. Ngeno's view, the issue is whether consent of the Commissioner of Mines overrides the consent of the

owner. That is a point of law which will be coming up for interpretation by this court.

Mr. Ngeno informed the court that the respondents had obtained leave to commit the applicant to civil jail and that the hearing of that application is coming up for hearing on 10th April, 2000, and hence that makes this application very urgent. Mr. Rachuonyo for the 1st respondent saw no urgency in this matter. He pointed out that the applicant had refused to obey a court order. He went on to state that the owner of the land swore an affidavit that he never gave any consent.

Mr. Rotich for 2nd respondent stated that the licence had expired in 1997 and it has not been renewed to date because of squabbles on the land. Mr. Rotich informed the court that the Commissioner of Mines was waiting for the court to resolve the matter before issuing any licence.

As already stated, the dispute herein relates to mining on private land. It would appear that the applicant had been mining on this land with the consent of the original owner and/or the Commissioner of Mines. This land was then sold to a new owner who has declared the applicant a trespasser. The issue of consent is crucial. As already stated by both Mr. Ngeno for the applicant and Mr. Rotich for 2nd respondent the Commissioner of Mines is waiting for the decision of the court.

The applicant has filed a Notice of Appeal and would be asking for stay of execution of the orders of the superior court. The applicant has heavy machinery on site which may take sometime to remove. In view of the fact that the applicant had been on this land for sometime before this dispute and as the matter calls for urgent decision so that the dispute may be resolved once and for all this, in my view, is a good enough and sufficient reason for treating this application for stay of execution as urgent. I accordingly certify it as such. The costs of the inter-partes hearing on urgency to abide the outcome of the application.

Dated and delivered at Nairobi this 7th day of April, 2000.

E. O. O'KUBASU

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JUDGE OF APPEAL