Copper Hill Explorations and Mining Resources Company Limited v Sharif & 3 others (Environment and Land Appeal E007 of 2024) [2024] KEELC 6870 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6870 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E007 OF 2024

M SILA, J

SEPTEMBER 30, 2024

BETWEEN

COPPER HILL EXPLORATIONS AND MINING RESOURCES COMPANY LIMITED ..... APPELLANT

AND

MOHAMED SHARIF ..... 1ST RESPONDENT

ABDULLA AHMED ADURAHAMAN ..... 2ND RESPONDENT

BISHAR ALI ..... 3RD RESPONDENT

GEORGE OTIENO ONYANGO ..... 4TH RESPONDENT

(Being an appeal against the orders issued on 18 March 2024 by Hon. CN. Ndegwa and extension of interim orders on 9 April 2024 by Hon. N. Wairimu in the case Migori CMCC/ELC No. E015 of 2024)

JUDGMENT

(Appellant arguing that the court was wrong in issuing ex parte orders on 18 March 2024; the ex parte orders being orders to stay orders of injunction issued; court not persuaded of any error as this was exercise by the trial court of its discretion; principles to consider when appellate court may interfere with discretion of a trial court; court not convinced of any error on the part of the trial court that would warrant the appellate court to set aside the orders; extension of interim orders beyond 14 days prescribed in Order 40 Rule 4 (2); circumstances may occur that call for extension beyond 14 days; appeal dismissed)

1. Through a plaint filed on 21 February 2024, the appellant sued the 1st respondent claiming that the 1st respondent has trespassed into its mining area identified as ISO1

in Old Macalder mines measuring approximately 0.3347 square kilometers delineated in Macalder Sheet 129/2. The alleged trespass was said to have begun in the month of January 2024. In the suit the appellant wished to have the 1st respondent permanently restrained from this mining area, mesne profits, costs and interest. Together with the plaint, the appellant filed an application dated 19 February 2024 for interlocutory injunction to have the 1st respondent restrained from the disputed mining area pending hearing of the suit. That application came up for inter partes hearing before Hon. C.N Ndegwa on 29 February 2024. The appellant's counsel was present but there was no appearance for the 1st respondent. Counsel submitted that the application had been served without any response being filed and asked that the application be allowed. The court obliged and proceeded to allow the application ex parte. The trial court then fixed the case for pretrial on 4 June 2024.

2. On 8 March 2024, an application of even date was filed by the appellant. In that application the appellant sought orders to have the respondent and three of his agents cited for contempt of the orders issued on 29 February 2024. Those three other persons are the 2nd – 4th respondents in this appeal. That application was again placed before Hon. C.N Ndegwa who directed that it be served for inter partes hearing on 21 March 2024.

3. Before 21 March 2024, the 1st respondent came with an application dated 14 March 2024 inter alia seeking ordes for a stay of execution of the orders of injunction and an order to review and set aside the proceedings and the ex parte orders issued so that the appellant's application for injunction can proceed inter partes. Inter alia the 1st respondent contended that the appellant had no locus standi to file the suit as her mining permit had been revoked on 12 September 2023 and was no longer allowed to carry out mining activities. Within that application the 1st respondent denied being served with the appellant's application for injunction and stated that he only came to learn of the matter when he was served with the orders of injunction on 5 March 2024. He wished to cross-examine the process server on the issue of service. He further deposed that his livelihood was dependent on mining and was prejudiced in the manner that the matter was heard. The application was placed before Hon. C.N Ndegwa on 18 March 2024. He certified it as urgent and issued a temporary stay of execution of the orders of injunction which restricted the respondent from mining until the application was heard inter partes. He gave 21 March 2024 for inter partes hearing of this application as well.

4. On 21 March 2024, when the file was first called out, neither counsel for the appellant nor counsel for the respondents appeared in court. The court gave directions that the matter be mentioned on 16 April 2024. Subsequently at 10.00am, after the court had made these orders, Mr. Kisia, learned counsel for the appellant, made appearance in court. He submitted that the matter was coming up for his application dated 8 March 2024 and that he had served the application and received no response. He prayed that the application be allowed. The court was persuaded to allow the application and issued warrants of arrest to the respondent and his associates to be executed by the OCS Macalder. He further ordered that once arrested they should be presented to court for the court to impose the appropriate punishment.

5. What followed is that the 2nd – 4th respondents (named as 1st – 3rd interested parties in the suit and alleged contemnors) filed an application dated 21 March 2024 which was

placed before Hon. C.N Ndegwa on 25 March 2023. They sought review of the orders of 21 March 2024 and reinstatement of the interim orders issued on 18 March 2024. The application was grounded on the argument that the suit was not cause listed on 21 March 2024 and their calls to the customer care call number at Migori was unsuccessful as the calls went unanswered. It was added that counsel tried to log in to the virtual platform but was not let in. The court certified the application as urgent and issued temporary stay of execution of the warrants issued on 21 March 2024 pending inter partes hearing. The court further directed that the application be heard inter partes on 9 April 2024.

6. The record for 9 April 2024 shows that the trial court was not sitting and a date of 6 June 2024 was given in the registry. Mr. Oyoo, learned counsel for the interested parties thereafter appeared before Hon. N. Wairimu Senior Principal Magistrate, and sought extension of the interim orders issued on 25 March 2024 and the court obliged. It would mean that interim orders were extended to 6 June 2024.

7. This appeal was subsequently filed on 15 April 2024. The Memorandum of Appeal shows that the appellant is aggrieved by the orders issued by Hon. C. N Ndegwa on 18 March 2024 and extended by Hon. Okuche (sic) on 9 April 2024. The following grounds of appeal are raised :

    1. The learned trial magistrate erred in law and in fact in granting the respondents orders of injunction allowing the respondent to carry out mining activity and or dealing in ore in appellant's mining jurisdiction when the respondents never annexed any evidence of licence from the Ministry of Mining, Blue Economy and Maritime Affairs.

    2. The learned trial Magistrate (Hon. Okuche, standing for Hon. Ndegwa) erred in law and in fact in extending ex parte injunction orders on 9 April 2024 beyond statutory limit period.

    3. That learned trial Magistrate erred in law and in fact in awarding orders of injunction to the respondents in clear violation of principles for award of injunction orders as were set out by this Honourable Court in Giella v Cassman Brown.

    4. The learned trial Magistrate erred in law and in fact in validating the respondent's illegal activities vide court process in clear violation of provisions of the *Mining Act* and legal principle.

    5. In all circumstances of the case, the orders of the learned Magistrates are insupportable in law or on the basis of the evidence adduced.

8. The appellant proposes to ask the court that the appeal be allowed; that the ex parte orders of injunction issued on 18 March 2024 and extended on 9 April 2024 be set aside and vacated; and costs.

9. I directed that the appeal be heard by way of written submissions and I have taken note of the submissions filed.

10. It will be observed that what the appellant is aggrieved with is the orders of 18 March 2024 and those of 9 April 2024. It will be recalled that the orders of 18 March 2024 were ex parte orders lifting the orders of injunction earlier issued to the appellant. The

orders of 9 April 2024 were orders extending interim orders staying the warrants of arrest which interim orders were made on 25 March 2024.

11. I see no merit in this appeal.

12. On the orders issued on 18 March 2024 staying the earlier orders of injunction, it was within the mandate of the court to issue such stay orders if it deemed it fit. The 1st respondent had come to court and gave reasons why the orders of injunction ought to be stayed pending hearing of his application to be heard on the substantive motion for injunction. It was within the discretion of court to either issue interim orders or not issue them.

13. In Mbogo & Another v Shah, [1968] EA 93, Sir Charles Newbold (P) was elaborated how an appellate court should deal with the issue of discretion of a trial court. He stated as follows at page 96 :

> " We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."
>
> Madan JA, in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] KLR 898 at page 908 and 909, observed as follows regarding an appellate court interfering with the discretion of a trial court :
>
> "The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."
>
> The Supreme Court in the case of Kibir*a v Independent Electoral & Boundaries Commission & 2 Others, (Petition 29 of 2018*) [2019] KESC 62 (KLR) (Election Petitions) (18 January 2019) (Judgment) held as follows:
>
> 39. We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand

Supreme Court case of Kacem v Bashir [2010] NZSC 112; [2011] 2 NZLR 1 (Kacem)where it was held [paragraph 32]:

" In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

"We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v. Bashir [2010] NZSC 112; [2011] 2 IVZLR 1 (Kacem) where it was held:

"In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (l)error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

14. Taking the above into consideration, in my view, an appellant when appealing against the exercise by a judicial officer of his discretion needs to convince court that :

    i. The trial court was plainly wrong in its appreciation of the law or wrong in principle;

    ii. The trial court misapprehended the facts;

    iii. The trial court took account of considerations which it should not have taken into account or failed to take into account relevant considerations;

    iv. The decision, albeit a discretionary one, is so plainly wrong, so manifestly unjust, and clearly repulsive to any sense of justice that it cannot be allowed to stand.

15. I have not seen any misdirection in law on the part of the trial court. Neither have I seen any error in the apprehension of the facts. Indeed the trial court was alive to the fact that it had issued orders of injunction. The respondents came with their own applications seeking that the said orders be stayed. It was within the court's power to temporarily stay the order of injunction for the court is empowered under Order 40 Rule 7 to discharge, vary or set aside an order of injunction. That rule is drawn as follows :

    7. An order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.

16. If a court has power to set aside its own orders of injunction then it follows that it can temporarily issue an order to stay an injunction pending hearing of a substantive application for setting aside the said orders.

17. I have also not seen, nor been pointed at any address, where the court took into account irrelevant factors or failed to take into consideration something that was put to it and was relevant. There is nothing that appears to me to be plainly wrong and unjust and which is repulsive to any sense of justice. There were two parties to the case and the court was trying its best to balance their interests in so far as the injunction was concerned.

18. I absolutely see no reason why I should interfere with the exercise of the discretion of the court in this instance in issuing stay orders.

19. The other issue in the appeal is the extension of the interim orders on 9 April 2024. To put the record straight, the extension was by Hon. Wairimu and not Hon. Okuche as claimed in this appeal. In his submissions, Mr. Kisia submitted that the interim orders were extended indefinitely. I do not buy this position because the matter had the date of 6 June 2024 and it would mean therefore that interim orders were extended to that date which is a definite date. It cannot be that the interim orders were extended indefinitely as contended.

20. Mr. Kisia also made reference to Order 40 Rule 4 (2) which provides as follows :

> (2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.

He urged now (recall that it was earlier urged that the injunction was indefinite) that the injunction was for more than 2 months and 8 days.

21. In an ideal scenario interim orders would be extended only within the periods prescribed but there can be special circumstances that invite the court to extend the interim orders beyond the specified time. Order 40 Rule (4) (2) would of course be the provision to be followed unless there are special circumstances as I have said that would interfere. Be that as it may, Order 40 Rule (4) (2), being subsidiary legislation, cannot override Section 63 of the Act which states as follows :-

> 63. Supplemental proceedings
>
> In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—
>
> a. issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;
>
> b. direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
>
> c. grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

d. appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

e. make such other interlocutory orders as may appear to the court to be just and convenient.

22. It will be observed that the court is vested with wide discretion to make orders that would prevent the ends of justice from being defeated including issuing injunctions (c) and making such interlocutory orders as may appear to the court to be just and convenient (e).

23. We also need to be alive to Section 3A of the *Civil Procedure Act*, which provides as follows :

3A. Saving of inherent powers of court

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

We must also recall the provisions of Article 159 (2) (d) of *the Constitution*, that justice shall be administered without undue regard to procedural technicalities.

24. In all cases, courts must endeavour to do justice. The rules of procedure are of course a good guide as to where justice is most likely to lie. However, in so far as extension of interim orders is concerned, at times, justice may demand that interim orders be extended beyond the 14 days prescribed in Order 40 Rule (4) (2). Each case must be considered on its own merits and on account of its special circumstances.

25. The court was certainly vested with discretion to extend interim orders. The record in our case shows that the trial court was away and that is why the matter could not be attended to on 9 April 2024. I cannot tell for how long the trial court was going to be away but it would appear that this may have impacted on the decision of the court. It is probable that the next earliest date was 6 June 2024. If the appellant thought that the interim orders were extended for too long a time which would prejudice her, nothing stopped the appellant from making an application of her own for consideration. I am not persuaded that for every extension of interim orders beyond the limits placed in Order 40 Rule 4 (2) then a party ought to present an appeal. Such party should first approach the trial court if he/she feels that the extension of interim orders beyond the time limits is going to cause her pain. As I have said an appellate court would not know why a trial court has extended the time beyond the prescribed time in the rules. I do not see any error in the extension that would invite this court to interfere on appeal as the court was exercising its discretion and was never moved thereafter to address the length of extension of the interim orders.

26. The only thing that I may have an issue with the trial court is that the court ought not to have entertained Mr. Kisia on 21 March 2024. He had not appeared in time and the court had already made orders to have the matter mentioned on 6 April 2024. If the court was to recall the file then it would have needed both counsel to be present or reasons be given why the court was persuaded to review its order to have the matter mentioned on 6 April 2024 and instead hear Mr. Kisia on his application. The court issued warrants of arrest while at the same time it still had the application, dated 14 March 2024, of the respondents, pending and the interim orders were not vacated. It would have been prudent for the trial court to make clear that the interim orders are vacated and the court is persuaded to allow the application dated 8 March 2024 by the appellant and was moved to issue the warrants of arrest. In fact if the court thought that counsel for the respondents had absented himself with no good reason, the most reasonable step to have taken on the day was to dismiss the application for non-attendance. I have already said that it was irregular to hear Mr. Kisia, when the court had already given a new date of 6 April

2024, but if the court thought that there was good reason to proceed with Mr. Kisia's application, then as a corollary the court ought to have similarly dealt with the respondents' application and dismiss it for non-attendance, or vacate the interim orders, rather than leave it hanging and still allow Mr. Kisia's application. Mr. Kisia did not deserve the orders that he got on 21 March 2024 as I have explained above and I am moved to vacate the said orders in the interests of justice. As I have said there is nothing on record to show why Mr. Kisia was heard ex parte after the court had already dealt with the matter and given it a fresh date. What this means is that the application dated 8 March 2024 by the appellant is yet to be heard.

27. This is an appeal on an interlocutory order. Apart from the appellate jurisdiction this court also has supervisory jurisdiction and in exercise of that jurisdiction I am persuaded that the court can issue directions and orders that it deems fit and which go towards achieving the overriding objectives set out in Sections 1A (1), of the *Civil Procedure Act*, that is to facilitate a just, expeditious, proportionate and affordable resolution of the civil disputes governed under the Act. It concerns me that there are already too many applications yet the core issues in the case are the injunction and the main suit. There are too many orders and counter-orders. I think to put some order in the case, it is best that all other applications be stayed until the application to set aside the order of injunction is heard first. I therefore hereby issue an order of stay of all applications pending hearing of the application to set aside the order of injunction which is the application dated 14 March 2024. After that is disposed of the trial court can then deal with any other pending application (if there would be need to hear them). Pending hearing of that application to set aside the orders of injunction the status quo be maintained.

28. The file is otherwise remitted back to the lower court to proceed to the logical conclusion subject to the above directions.

29. The last issue is costs. The appeal had no merit and is dismissed with costs to the respondent.

DATED AND DELIVERED THIS 30 SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MIGORI

Delivered in presence of :

Mr. Ochieng ' – Court Assistant

Mr. Kisia for appellant – Absent

Mr. Oyoo for respondents – Absent