



**Base Titanium Limited v Jin (Environment and Land Appeal  
4 of 2021) [2024] KEELC 14019 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14019 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND APPEAL 4 OF 2021**

**AE DENA, J**

**DECEMBER 17, 2024**

**BETWEEN**

**BASE TITANIUM LIMITED ..... APPELLANT**

**AND**

**MOHAMMED YUSUS IQBAL JIN ..... RESPONDENT**

**RULING**

- 1 The application the subject of this ruling is dated 1<sup>st</sup> July 2024. It has been filed pursuant to the provisions of Order 51 Rule 1, Order 42 Rule 6[1] of the Civil Procedure Rules 2010 and section 1A 1B,3A & 63[e] of the Civil Procedure Act Cap 21 Laws of Kenya. The Applicant seeks for the following orders before court; -
  - a. SPENT
  - b. SPENT
  - c. This honourable court be pleased to stay all proceedings in KWALE CMELC No 1 of 2021 pending the hearing and determination of the intended appeal to the court of Appeal.
  - d. The costs of this application be provided for.
- 2 The application is based on the following verbatim grounds; -
  1. The Appellant filed a preliminary objection dated 16 February 2021[the preliminary objection] challenging the jurisdiction of the honourable court in Kwale CMELC Case No 1 Of 2021
  2. On 5 May 2021 the preliminary objection was dismissed and the court in Kwale CMELC Case No 1 Of 2021 held that it had jurisdiction to determine the matter[ruling]



3. As a result of the ruling, the appellant approached the ELC Court at Kwale to appeal against the ruling
  4. On 22<sup>nd</sup> May 2024 the ELC Court at Kwale delivered its judgement dismissing the Applicants appeal challenging the ruling[judgement]
  5. The Appellant is dissatisfied with the judgement and intends to appeal to the Court of Appeal. The Appellant has already filed and served its Notice of Appeal dated 5<sup>th</sup> June 2024 and has further complied with the statutory requirements of formally requesting for copies of typed proceedings from the Deputy Registrar of this court
  6. The appeal raises a significant jurisdictional question as detailed below
    - a. Section 155v as read with sections 154,156 and 157 of the *Mining Act* No 12 of 2016[the *Mining Act*] establishes a procedural hierarchy for resolving particular disputes including claims for trespass similar to the one made by the respondent against the appellant before the Chief Magistrates Court. The said provisions call for administrative resolution by cabinet secretary for mining blue economy and maritime affairs in the first instance before resorting to the judiciary on appeal. This position has been confirmed by the environment and land court sitting in Mombasa in the decision of Peter Nzeki & 14 Others Versus Base Titanium & 4 Others [2021] eKLR
    - b. Conversely this court has upheld the ruling in Kwale CMELC No 1 of 2021 that both this court and the magistrates court have original jurisdiction to hear and determine disputes under the *Mining Act* including the present claim by the Respondent.
  7. In light of the conflicting jurisprudence between the present judgement, the ruling by the Magistrate's Court and the decision in the Peter Nzeki Case, it is imperative that the Court of Appeal settles this issue with finality and renders a binding decision that guides the superior and lower courts on the issue of procedural hierarchy for resolving disputes under the *Mining Act*
  8. The intended appeal is therefore arguable with strong chances of success. Similarly, the instant application has been filed timeously following the judgement
  9. The intended appeal is on an issue of jurisdiction and if the appeal were to be allowed, the entire proceedings in Kwale CMELC Case No 1 of 2021 will be rendered null and void ab initio. The stay orders sought will thus save scarce judicial time and resources and facilitate the just expeditious proportionate and affordable resolution of the dispute amongst the parties
  10. This application has been brought without unreasonable delay and is therefore in the interest of justice that the orders sought herein are granted.
3. The application is further supported by an affidavit sworn by Simon Wall the General Manager-external Affairs of the Appellant. The same reiterates the grounds of the application.

### **Replying Affidavit**

4. In opposing the application, the Respondent filed a replying affidavit dated 26/7/2024 and stated that it is common knowledge that the Appellant is winding up its activities in Kenya and more particularly in Kwale. That the Applicant has degenerated the property subject of this suit to the extent that the same has lost its value. The Respondent states that in the event the suit before the magistrate's court is stayed and subsequently the matter proceeds then the Respondent will be left chasing shadows in the



event that he gets judgement in his favour. The application is termed as an abuse of the court process as the same has not been brought with clean hands. The court is urged to set stringent conditions of security in the event that it is inclined towards allowing the application for stay.

### **Grounds Of Opposition**

5. The Respondent further filed grounds of opposition dated 26/7/2024 and raised the following grounds; The said application is bad in law, vexatious and an abuse of the court process. The delay in filing the current application was deliberate done by the applicant to delay the hearing and determination of the main suit currently pending before the Magistrate's Court, Kwale.

### **Further Affidavit**

- 6 The Applicant filed a supplementary affidavit in response to the averments raised in the replying affidavit and the grounds of opposition referred to hereinabove. It is averred that the Applicant is a holder of several prospecting mineral licenses in other parts of the country including Kwale. These were listed at paragraph 7 and 8 of the affidavit. Additionally, that the Applicants Likoni export facility located inside Mombasa port will continue to be owned and operated by the Applicant. The applicant states that it is currently the largest mining entity in Kenya and from its audited accounts it is able to pay its debts. The applicant states at paragraph 17 that it has annexed several photographs showing the suit property has been fully and successfully rehabilitated to the condition that it was in before. That the major aim of the stay application is to preserve the intended appeal so that the same is not rendered nugatory and a mere academic exercise. The court is urged to grant the orders sought in the application.

### **Submissions**

- 7 By an order of this court, parties filed written submissions over the application. The Respondent's submissions dated 27/9/2024 restate the respondents position in the replying affidavit and urge the court to compel the applicant to furnish security of Kshs 15,000,000/- either deposited in court or in a joint interest earning account in the name of counsels for the parties in the event that the application is allowed.
- 8 The Appellants submissions are hinged on whether the applicant has met the threshold for obtaining orders of stay of proceedings pending appeal. It is submitted that the appeal is arguable as one of its grounds is the jurisdiction of both the Magistrates court and the ELC court to determine the instant suit. Further that the instant application has been filed expeditiously and thus within a reasonable period of time which was slightly over one month after this court delivered its ruling. The Appellant concludes by submitting that it will be in the interest of justice that the court grants the orders sought.

### **Discussions And Determination**

- 9 Having looked at the application, the rival affidavits and submissions by the parties, the only issue for determination is whether the Applicant has met the conditions for stay of proceedings pending appeal.
- 10 I have noted that both parties have referred to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. Indeed, Sub-rule 1 mentions both the stay of execution and stay of proceedings. I will proceed to look at the settled principles on when proceedings may be stayed pending appeal. This has been a subject of various court decisions.



11 in *Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000* Ringera J, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

12 Justice J.M. Ngugi in *Turbo Highway Eldoret Ltd v Munini* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) while discussing the principles to be applied in staying proceedings pending Appeal cited various decisions as in the following dictum; -

‘In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR:

They laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.’



- 13 In the case of *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR, the Court of Appeal citing *Kenya Commercial Bank Ltd vs. Benjob Amalgamated Ltd & Another* [1998] eKLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.
- 14 Will the Appeal be rendered nugatory? The aspect of an appeal being rendered nugatory must be hinged on the basis of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The court should only be concerned with the question of whether or not the appeal will be rendered nugatory. An arguable appeal only needed to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed as was held in the case of *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
- 15 In the present case the matter has gone through the 1<sup>st</sup> phase where the Applicants application for stay of proceedings pending appeal before this court was dismissed by the lower court. The applicants then moved this court on appeal when on 22<sup>nd</sup> May 2024 this court upheld the ruling of the Hon Joe Mkuto (SPM as he then was) issued on 5/5/2021. The Applicant is desirous of moving to the Court of Appeal. It is submitted that the appeal is arguable as one of its grounds is the jurisdiction of both the Magistrates court and the ELC court to determine the instant suit. I have not seen the Memorandum of Appeal to the Court of Appeal but there is no doubt there will be no substantive departure from the one filed before this court. Indeed, this is clear as the Applicant herein insist that the Plaintiff in the lower court suit failed to exhaust the laid down dispute resolution mechanisms by the *Mining Act* before invoking the jurisdiction of the court. As it is there is no order staying the proceedings in the lower court.
16. Based on the above it is clear that in the event the court does not grant an order for stay of proceedings and the Appeal to the Court of Appeal is heard and was successful, the proceedings in the Magistrates court would have been rendered unnecessary and a clear waste of Judicial time which must not be wasted in proceedings that would end up being academic exercise. In this regard I'm guided by the case of *Muchanga Investments Ltd Vs Safaris Unlimited* (Africa) Ltd & 2 Others [2009] eKLR,
- 16 But what about the interests of justice noting the Respondents concerns that the Applicant is closing its operations in Kenya. The Applicant has assured through the supplementary affidavit herein which I have keenly considered. I have noted under paragraph 7 (b) thereof, license PL/2015/0042, Kwale County, valid until 4<sup>th</sup> December 2024, one further renewal under the *Mining Act* 2016 has been permitted. Paragraph 8 sets out several prospecting or mineral exploration licences in Kwale, Tana River and Lamu counties at various stages of processing for approval. At paragraph 12 it is further deponed there are still statutory obligations of restoration of the closed sites that are anticipated to be carried out for the next 3 years. Clearly this is not an entity in my view that is about to leave jurisdiction. I do not think the Respondent will be left chasing shadows.
- 17 The Respondent craves that in the event the court is inclined to grant the orders of stay of proceedings then security amounting to Kshs 15,000,000/- should be deposited by the Applicant herein. Having made a finding that there is no likelihood that the Applicant will leave jurisdiction, then this invitation cannot be considered. I will not go into the merits of whether the suit property has been fully rehabilitated and if not, how damages will be assessed and amount thereof. This is a matter for future consideration by the forum that shall be determined to have the requisite jurisdiction. But most importantly depositing security is not a prerequisite for grant of stay of proceedings. It is only a pre requisite for stay of execution of a monetary decree. Consequently, the court declines to make any orders on security.



- 19 On timeliness of the application before court, the Ruling the Applicant intended to appeal was delivered on 22/5/2024. The present application is dated 11/7/2024 one (1) month could not be said to have been inordinate. The court is thus satisfied that the present application was filed without any delay.
- 20 The upshot is that the Notice of Motion dated 6/5/2024 is hereby wholly allowed and with the following terms; -
1. That the Applicant shall file and serve its Memorandum of Appeal within thirty (60) days from the date of this Ruling.
  2. That in the event the Applicant shall default in the order given in [1] hereinabove, the order of stay of proceedings will automatically lapse and the Respondent will be at liberty to move the lower court to proceed with the instant suit.
  3. Costs of the application will abide outcome of the appeal.

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF DECEMBER 2024**

**A E DENA**

**JUDGE**

Ms. Onesmus for the Applicant

No appearance for the Respondent

Daniel Disii Court Assistant.

