THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE No. 0184 OF 2014

NILEFOS MINERALS LIMITED :::::::::::::::::::::::::::: APPLICANT

- VERSUS -

1. ATTORNEY GENERAL

2. GUANGZHOU DONG SONG ENERGY GROUP (U) COMPANY LIMITED **:::::::::::::::::::: RESPONDENTS**

BEFORE: HON.JUSTICE STEPHEN MUSOTA

RULING

This is an application by Notice of Motion for Judicial Review of the decision of the Minister of Energy & Mineral Development made on the 28th day October 2014 confirming the decision of the Commissioner Department of Geological Surveys and Mines made on 10th June 2013 where the Commissioner refused and denied the applicant the Mining Lease. The applicants are seeking for prerogative orders of mandamus, prohibition, certiorari, permanent injunction, damages and costs of the application. The application is brought under Articles 28, 42, 44(C), 26(1&2), Article 50(1&2) of the Constitution and Section 119(1&2) of the Mining Act (2003). Section 33, 36, 37 of the Judicature Act and Rules 3, 4, 6 and 8 of the Judicature (Judicial Review) Rules SI 11 of 2009.

The applicants are represented by M/s Karuhanga, Kasaijja & Co. Advocates. The 2nd respondent is represented by Ligomarc Advocates while the Attorney General's Chambers represents the 1st respondent.

Briefly the background to this application is that the applicant company held an exploration license since 2005 for three years over Sukulu Hills Area with a view of establishing the quantity of phosphate in that area and exploiting the same. On 24th June 2008 after expiry of the exploration license, they were granted a retention license over the same area because they had fulfilled the conditions of the exploration license. On 17th June 2011, the retention license was renewed. On the basis of all these licenses, the applicant company completed bulk sampling, mineral evaluation, geological analysis, metallurgical testing, market studies and pilot trials of the Sukulu Hills Minerals. All these activities involved several laboratory tests in different countries.

The applicant company established that there were 206million tones of minerals (phosphates). Through all the years, the applicant company was handling the project, they worked closely with the relevant government authorities and several meetings were held between government and the applicant on how to proceed with the project. However, one significant problem was the problem of the residents who filed a suit against the applicant company where they succeeded in obtaining an injunction stopping the applicant company from assessing the mining area.

In 2010 the permanent secretary of the Ministry of Energy and Mineral Development wrote to the applicant company's finance partners stating that the government has agreed to resettle the residents to allow the project to continue. Several meetings and negotiations on how to solve the problems that plagued the progress of the project were held between the company, government and Attorney General and other finance partners like DFCU Bank. The applicant company subsequently applied for a Mining Lease. On 18th June 2013, the applicant company through its then lawyers ABMAK Associates received a letter from the Commissioner, Geological Survey

and Mines Department rejecting the applicant company's application for a Mining Lease on the grounds of several allegations leveled against the applicant company as contained in annexture '23' of the affidavit in support.

On 19th and 27th June 2013, the then applicants company lawyers ABMAK Associates wrote to the commissioner protesting the rejection as can be seen from Annexture '24' and '25' in the affidavit in reply. On 12th July 2013, the Commissioner replied formally rejecting the application for a Mining Lease as per Annexture '26' of the affidavit in support. On 17th July 2013, the applicant company expressed intent to apply for Administrative Review under Section 118 of the Mining Act which they applied for on 9th August 2013. *(see Annexture '27').* On the same day 9th August 2013, the 2nd respondent was granted an exploration license No. EL1187 for three years over Sukulu Hills and was gazetted on the same day.

On 07th October 2013, one day before the expiry of the statutory period within which the applicants could be heard in the application for Administrative Review, the responsible Minister invited them for hearing on the application. That at the said hearing meeting, the Minister explained that since there was an application for Judicial Review by Frontier Exploration (U) Limited against the grant of exploration license to the 2nd respondent company, the matter was subjudice. That the Minister adjourned the meeting and it is alleged that one hour later returned with a ruling as per Annexture '34', '35' of the affidavit in support.

An application Misc. Cause 361 of 2013 by the applicant was filed challenging the Minister's decision in court before Hon. Justice Yasin Nyanzi who held that the Minister was right not entertain the application for Administrative Review as it was subjudice. The applicant filed a Notice of Appeal in the Court Of Appeal which at the time of Administrative Review was still pending. The applicants took issue with the manner in which the application for Mining Lease was rejected and the manner in which their application for Administrative Review was handled hence this application.

At the hearing of this application, Counsel Karuhanga Elson appeared for the applicant company, while Kabiito Karamagi for the 2nd respondent and Mr. Kallemera George (SSA) appeared for the 1st respondent during the hearing.

The grounds of the application are briefly set out in the application as follows;

1. On 28th October 2014, the Minister confirmed the decision of the Commissioner denying the applicant a Mining Lease.
2. The Minister's decision was tainted with bias, was prejudicial and prejudgmental.
3. The Minister's decision was illegal, irrational and procedurally improper.
4. The applicant has invested significant sums of money and received assurances from all levels of government and had legitimate expectation that she would be granted a Mining Lease.
5. That the 2nd respondent actively frustrated through illegal and fraudulent means the applicant's application for their own commercial benefit.

The application is supported by the affidavit of Nitin Madhivani, the Chairman of the applicant company dated 11th December 2014.

The 2nd respondent filed an affidavit in reply sworn by their country director, Young Hu and the 1st respondent filed an affidavit in reply sworn by Hon. Eng. Irene Muloni, Minister of Energy & Mineral Development.

The applicant company filed two affidavits in rejoinder dated 18th May 2015 sworn by Lexman Mendon the Company Secretary in the applicant company.

Court allowed written submissions to be filed and were filed by both the applicants and respondents' counsel.

I have considered the submissions of both parties, the affidavits on record and this is the ruling of this court.

The principles governing Judicial Review are well settled. Judicial Review is concerned with prerogative orders which are basically remedies for the control of the exercise of power by those in public offices. They are not aimed at providing final determination of private rights which is done in normal civil suits. The said orders are discretionary in nature and court is at liberty to refuse to grant any of them if it thinks fit to do so even depending on the circumstances of the case, where there has been clear violation of the principles of natural justice. This was enauciated in the case of ***John Jet Tumwebaze versus Makerere University & 2 others.***

The discretion I have alluded to here has to be exercised judicially and according to settled principles. It has to be based on common sense as well as justice. See: ***Moses Ssemanda Kazibwe Vs James Ssenyondo Misc. Application 108 of 2004***.

Factors that ought to be considered include; whether the application has merit or whether there is reasonableness, vigilance without any waver of the rights of the applicant. Court has to give consideration to all the relevant matter of the cause before arriving at a decision in exercise of the discretion. It was held in the case of ***Koluo Joseph Andrews & 2 others versus Attorney General,*** with which I agree that it is trite law that:

> ***"Judicial Review is not concerned with the decision in issue per se but with the decision making process. Essentially Judicial Review involves the assessment of the manner in which the decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner. not to vindicate rights as such but to ensure that***

public powers are exercised in accordance with the basic standards of legality, fairness, and rationality".

The purpose of Judicial Review was summed up by Lord Halsham St Marylebone in ***Chief Constable of North Wells Police Vs Evens [1982] 3 All ER*** as follows:

> ***"The purpose of Judicial Review is to ensure that the individual receives fair treatment not to ensure that the authority after according a fair treatment reaches on a matter it is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the court."***

This court agrees with the above principles. This application raises only two issues for this court's determination:

1. Whether the application raises any grounds for Judicial Review.
2. Whether the applicant is entitled to the remedies sought in the application.

I will start by resolving:

Issue 1 Whether the application raises any grounds for Judicial Review.

I agree with the submissions by counsel for the applicant and counsel for the respondents that in addition to the principles it has outlined above, there are three broad grounds for Judicial Review which court must consider and these are illegality, irrationality and procedural impropriety.

This was a position in the case of ***Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300.*** Where it was held while citing counsel of ***Civil Unions Vs Minister for Civil Service [1985]2 AC*** *and* ***An Application by Bukoba Gymkhana Club [1963] EA 478 at 479*** *that:*

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety."

Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality. It is for example illegality where Chief Administrative Officer of a district interdicts a public servant on the direction of the District Executive Committee when the powers to do so are vested by law in the District Service Commission.

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in none observance of the rules of natural justice or failure to act with procedural fairness towards one to be affected by the decision.

It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

It is also important to note that proof of one ground may be sufficient for the application for Judicial Review to succeed.

I shall deal with the grounds in the order in which they have been raised by learned counsel for the applicant starting with;

ILLEGALITY:

It is the submission of the applicant that the Commissioner acted illegally when he issued a letter giving an ultimatum within which the applicant company had to address the issues and points he identified from the application for a Mining Lease instead of giving the notice of intention to refuse the lease. Counsel also submitted that the Minister was wrong and also acted illegally in agreeing with the Commissioner's actions and procedure adopted. Learned counsel relied on Section 43(4) of the Mining Act 2003 wherein it is enacted as follows:

> ***"……..(4) The commissioner shall not refuse an application for the grant of a Mining Lease on any ground referred to in subsection (3) of this section unless the commissioner-***
>
> ***a) has given notice to the applicant of his or her intention to refuse to grant the lease on that ground.***
>
> ***b) specified in a notice, the period within which the applicant may make appropriate proposals to correct or remedy the defect or omission which forms the basis of the ground for intended refusal; and***
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> ***c) the applicant has not before the expiration of that period made the proposals".***

It was the submission of the 2nd respondent that the above section was not intended to allow time for mere proposals but was intended to make the applicant remedy the defect or omissions in the application for the Mining Lease. I do not agree with such submission. I agree with counsel for the applicant in his written submissions on this ground that the section was intended to promote fairness since at the stage of Mining Lease the applicant has made substantial investments. For

the Minister and the Commissioner to have issued the ultimatum and call it a notice of intention to reject an application for a Mining Lease is unacceptable. The law is very clear. Therefore the procedure that the Minister and the commissioner adopted was illegal and strange to the Mining Act.

The Commissioner should have issued a notice of intention to reject the application requiring the applicant company to make proposals on how to remedy the problems that had been identified and have plegued the project. Then upon receiving the proposals, the commissioner ought to have considered them and assessed the viability of the proposals and come up with the decision with sound reasons why the proposals have been rejected. It is after that the Commissioner would have proper grounds to reject the application. It was wrong for the Minister to confirm such an irregular decision making process.

Consequently I will find that the ground of illegality has been proved by the applicant.

IRRATIONALITY:

On this ground, it was the submission of learned counsel for the applicant that the use of statutory power must be reasonable. That the Minister acted unreasonably when making comments on the rule of subjudice and that by her remarks on the feasibility study, her rejection of previous government promises as well as the applicant's legitimate expectation was irrational. That when it suited the interests of the Minister she invoked the rule of subjudice but when the same rule could have favored the applicant company the Minister ignored the fact that there were court proceedings pending in the appellate court over the same Mining Lease area. Learned counsel further submitted that the conduct of the Minister was irrational, illogical and no reasonable tribunal faced with the same circumstances would have arrived at the same decision.

Finally that by the Minister considering and treating the decision of cabinet and the presidential directive as irrelevant was irrational.

In reply, learned counsel for the 2nd respondent submitted that the Minister's finding that the subjudice rule did not apply to subsequent administrative view proceedings was not irrational. That government promises relied upon by the applicant are unenforceable because they run counter to both the Mining Policy and Mining Act and Regulations.

According to the affidavit in reply by Young Hu dated 11th May 2015, he simply denies liability of the 2nd respondent company. The affidavit claims that the 2nd respondent company had no role at all in the Administrative Review. In the affidavit sworn by the Hon. Minister Eng. Irene Muloni, (para.13), she states that there has been a ruling dismissing claims that the rule of subjudice was applicable.

Irrationality is when there is such gross unreasonableness in the decision taken and act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

I agree with the submissions by learned counsel for the 2nd respondent on the issue of subjudice. According to learned counsel for the applicant, since the Minister declined to hear the Administrative Review proceedings on 7th October 2013 on account of the pending court proceedings in the frontier case, she ought to have ruled the same at the subsequent proceedings on account of the applicant's pending appeal and application for an injunction in the Court of Appeal. However the two scenerios are remarkably different. The situation presented by the frontier case is of a third party. The third party had taken the Commissioner to court claiming that they were entitled to grant of an exploration license over the same area where Nilefos wanted the Minister to order the Commissioner to grant a Mining Lease and the Administrative

Review proceedings. The Minister declined to conduct the Administrative Review because she thought her orders could contradict the orders of the High Court if the high court were to order the commissioner to grant an exploration license to Frontier. Nilefos challenged the Minister's decision in High Court Misc. Cause No.361 of 2013. The High Court dismissed the application and held that the Minister could not be faulted for having waited for the proceedings by Frontier to be concluded. In the subsequent review proceedings that resulted into filing the Judicial Review application now under consideration. The Minister ruled that the subjudice rule did not apply because there was no parallel proceedings by third party.

Further to this the High Court had directed the Minister to conduct the Administrative Review. The applicant's request to the Court of Appeal against the decision of the High Court in Misc. Cause 361 of 2013, had been dismissed and the court of appeal directed the applicant to return to the Minister and be heard on the Administrative Review. Therefore the Minister's finding that the subjudice rule did not apply to the subsequent Administrative Review proceedings was not irrational.

PROCEDURAL IMPROPRIETY:

It was the submission of the applicant that the Minister conducted the hearing in a prejudicial and prejudgmental manner. It is further submitted that the right to be heard, the rule against bias, the right to know the evidence against the applicant and the procedural safeguards in the mining act were disregarded by the Minister and her decision should be quashed because the proceedings were procedurally improper. Learned counsel for the applicant further submitted that the applicant was entitled to the celebrated principles of natural justice which include obeying the rule against bias, the right to allow the applicant cross examine all his accusers, the right of the applicant to comment on all the evidence against him and the procedural safeguards set out under the Mining Act Section 43(4). Further that the Minister heard one party secretly and returned with a decision and as such that was unfair and procedurally improper. That the hearing of 27th and 28th October 2014 was unfair and it was unfair for the Minister to issue a Mining Lease

before the application for Administrative Review was disposed off which violated the tenets of natural justice.

In reply, learned counsel for the respondent asserts that the applicant's assertions are mere speculation. They deny that any secret meeting was held by the Minister. That she only withdrew to write a ruling. Further that the list of attendees in the Minister's record of proceedings shows that experts from the ministry attended the review proceedings. That this having been an inquiry, it would not have been handled like a civil litigation where cross examination is a must. That failure to cross examine did not amount to denial of natural justice.

I am in agreement with learned counsel for the respondents that an Administrative Review should not be conducted as if the Minister is conducting civil suit litigation. Normally reviews are handled by public institutions by simply reviewing documentations of the valuation and contract committees to ensure that the procurement guidelines have been dully followed.

Rarely do hearings take place. When I perused the record of proceedings annexed as 'P' to the affidavit in reply, all parties were given opportunity to participate and raise concerns about the process. I will therefore find that this ground of procedural impropriety has not been proved.

REMEDIES:

It is trite law that Judicial Review orders are discretionary in nature and court is at liberty to refuse to grant any.

In this application, the applicant sought for the following reliefs:

1. An order of certiorari quashing the decision of the Minister of Energy and Mineral Development made on the 28th day of October 2014 confirming the decision of the Commissioner Department of Geological Survey and Mines made on 10th June 2013, refusing and denying the applicant a Mining Lease.

2. A permanent injunction restraining the 2nd respondent from carrying out any mining activity in respect of the mineral deposits in Sukulu Hills mining area.
3. An order of mandamus directing the 1st respondent to grant the Mining Lease.
4. An award of damages for the loss suffered by the applicant.
5. Provision of costs to the applicant.

I am unable to grant the orders sought by the applicant because of the hardship it will occasion to the 2nd respondent who had no hand in the actions of the Minister in awarding the Mining Lease to it. It is several years since this was done and therefore granting an injunction will be meaningless and practically unenforceable since the 2nd respondent is already performing its part of the 3 year exploration license.

However, since I have found that the issue of illegality has been proved, then the applicant would be entitled to award of damages but these cannot be sufficiently assessed in an application for Judicial Review. Like it was held in the case of ***Rosemary Nalwadda versus Uganda AIDS Commission Misc. Cause 45 of 2010***, the applicants may take any further steps it deems fit against the other parties after this ruling.

This application will be allowed to the extent I have done so. the applicant shall get the costs of the application.

Stephen Musota

J U D G E

29.02.2016

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