IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

MISC. CIVIL APPLICATION NO. 05 OF 2022

(Arising from Civil Case No. 03 of 2022 Before the High Court of Tanzania at Songea)

ALLY ALLY MCHEKANAE ..... 1ST APPLICANT

ISSA ALLY MCHEKANAE ..... 2ND APPLICANT

VERSUS

HASSADY NOOR KAJUNA ..... 1ST RESPONDENT

MBUYULA COACH MINE LTD ..... 2ND RESPONDENT

RULING

Date of last Order: *28/07/2022*
Date of Ruling: *30/08/2022*

MLYAMBINA, J.

Through chamber summons the Applicants herein are seeking for an interim order restraining the 1st and 2nd Respondent together with their agents, assignees, workmen or any person acting under their authority from using, mining, interfering, appropriating, disposing or dealing in any way with the Primary Mining Licence No. PML0311RVM in respect of the Coal Mine at Mbuyula area in Mdunduwalo Village, Mbinga District , Ruvuma Region pending the determination of *Civil Case No. 03 of 2022*. The application has been made under the provision of *Order*

XXXVII Rule 1 (a) and sections 68 (c) (e) and 95 of the Civil Procedure Code [Cap 33 Revised Edition 2019]. The application was supported with an affidavit sworn by the Applicants jointly.

The genesis of this application is *Civil Case No. 03 of 2022* which is still pending before this Court. It was contended that the Applicants entered into the agreement with the 1st Respondent concerning the mining and selling of coal at Mbinga Mbuyula within Mbinga District. The Mineral rights are over Primary Mining Licence No. PML0311RVM. The agreement was for a year beginning from 30th July, 2021 with an option of renewal. In relation to that, it was alleged that the Applicants entered into agency agreement to undertake mining activities, market, sell the product any other activities in relation to the former agreement on behalf of the Applicants.

Further, it was alleged that their agency hired various equipment, people of various category at mining area, obtaining tenders and orders from different customers. By November, 2021 the 1st Respondent and the officers of the 2nd Respondent without any legal justification started to interfere the mining activities. Since then, the Applicants have been working under difficult situation. The dispute was referred to the Resident Mining Officer (RMO) who convened a meeting. While in a

meeting, the Applicants discovered that the Respondents had entered into the agreement on the same Primary Mining Licence No. PML 0311RVM without their knowledge. Due to the refusal of the Resident Mining Officer (RMO) to register the agreement between the Respondents, the 2nd Respondent wrote a letter dated on 9th February, 2022 and promised to honour the agreement entered between the Applicants and the 1st Respondent. On that regard, on 16th March, 2022 the Resident Mining Officer (RMO) registered the transfer of the Primary Mining Licence No. PML0311RVM from the 1st Respondent to the 2nd Respondent but the Applicants were not involved in any way.

The Applicants went on to contend that, immediately after the transfer, the 2nd Respondent stopped and preventing the Applicants to undertake the mining activities at the disputed area with Primary Mining Licence No. PML0311RVM. The Applicants kept warning the 2nd Respondent that the second agreement violate the first agreement but all was in vein. On 29th March, 2022 the 2nd Respondent wrote a letter to RMO with intention to terminate the agreement which was entered between the Applicants and the 1st Respondent. RMO convened another meeting to settle the dispute but it failed once again. Meanwhile, the RMO was transferred to another station.

The Applicants were of contention that on 14th April, 2022, the new RMO wrote a letter to the Applicants to make good of technical shortcomings at the mining before he could stop the Applicants' activities at the mining site as per agreement. On 6th May, 2022 the RMO allowed them to continue with the mining activities. The 2nd Respondent did not allow them to continue with the mining activities according to the agreement. He also, prohibited them to collect the consignments of coal about 10,000 tones they had mined, as a result, the Applicants have failed to supply pending order of Lake Cement Ltd worth TZs 580,560,000/= (Five Hundred, Eighty Million, Five Thousand Sixty Hundred Tanzanian Shillings). The Applicants informed the Mining Commission the situation but no response to date. The Respondents made the implementation of the Mineral right assignment impracticable. As such, the Respondent breached the agreement.

It was deponed that the Applicants suffered a great loss due to the breach. They filed a Civil Case before this Court to challenge the said breach of contract and praying for specific performance or payment of damage. They think if the operation in the mine in dispute will proceed the prayer for specific performance shall be nugatory. The applicant's business reputation shall be badly tarnished. They further believe that if

the prayer in chamber summons will be not granted, Civil Case which is pending before this Court will be nugatory as the subject matter will have been extinguished and the business and life of the Applicants will totally be ruined.

At the hearing date the Applicants were represented by Mr. Elias Machibya, learned advocate while the 1st Respondent was represented by Ms. Mariana Medard, learned advocate and the 2nd Respondent enjoyed the service of Mr. Hilary Ndumbaro, learned advocate. The large part of the parties' submissions is amplification of what they have stated into their affidavits. Thus, to avoid the repetition, I will only analyse new facts from their submission.

There is no dispute between both parties that the conditions for either granting or refusing to grant temporary injunction were stated in the Landmark Case of **Attilio v. Mbowe** High of Tanzania at Dar es Salaam [1969] HCD No. 284. *One*, whether there is a triable issue between the parties. *Two*, whether there is irreparable loss or injury on the part of the Plaintiff. *Three*, if on the balance of convenience, the plaintiffs are likely to suffer more in case injunction is not granted.

It was Counsel Elias' opinion that the Applicants through the application, the affidavits and annextures, they have met the three

principles of granting injunction. Thus, throughout their affidavit the Applicants have indicated that there is a breach of the agreement by both Respondents which has triggered them to lodge *Civil Case No. 3 of 2022* before this Court. He referred his argument to paragraph 7 of the counter affidavit which explained that the Mining Licence was transferred from the 1st Respondent to the 2nd Respondent. They claimed to notify the Applicants and promised them that they will proceed with the 2nd Respondent who was the transferee. To the contrary, the 2nd Respondent interfered with the mining activities by engaging the security guard, the fact which was conceded at paragraph 13 of the counter affidavit.

Moreover, the Applicants claimed that there is a breach and the Respondents denied, it means the first test has been met. That, the issue is; *whether there is a breach of Contract by the first Respondent for transferring the Mining Licence to the second Respondent and the second Respondent preventing the Applicants from continuing with the mining activities.*

In his reply the Counsel for the Respondents conceded in relation to the first principle that, there is a triable issue on breach of contract between the Applicants and the first Respondent by transferring the

Mining Licence to the second Respondent and the second Respondent preventing the Applicants to continue with the mining activities.

Having heard the submission of both learned Counsel and considering the affidavit in support and in opposition of the application, this Court agrees with both parties that the issue to be determined is whether there is bona fide dispute raised by the Applicants which needs investigation and a decision on merit on facts before the Court. Further, the Applicant must further establish that on the facts before the Court there is probability of the Applicant being entitled to the relief (s) claimed by him. This condition was enunciated in the case of **Geffa v. Cassman Brown and Co. Limited** [1973] E.A. 35 where justice Sorv (as he then was) had the following to say:

> *The conditions for the grant of an interlocutory injunction are now: I think well settled in East Africa. First an Applicant must show a prima-facie case with probability of success.*

Indeed, the Court is of the position that what ought to be looked at in the first test is the existence of cause of action. This reasoning was expounded by Lord Mustill in **Channel Tunnel**

Group Ltd v. Balfour Bealty Construction Ltd [1993] AC 334 at pp 360-362 in which he said:

> *The right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which...although not invariably takes the shape of cause of action.*

Being persuaded by the above principle, it is the view of the Court that the right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. In this case, the Applicants contended that there is a breach of Contract by the first Respondent for transferring the mining Licence to the second Respondent and the second Respondent preventing the Applicants from continuing with the mining activities. The same facts are are disputed by the Respondents. Therefore, as conceded by the Respondents, there are *inter alia* serious triable issues: *One*, whether there is a breach of Contract by the first Respondent for transferring the Mining Licence to the second Respondent and the second Respondent preventing the Applicants from continuing with the mining activities. *Two,* whether the second Respondent has not been paid some amounts by the Applicants. *Three*,

whether the agreement involves only the Applicants and the first Respondent.

As regards the second condition, the Applicants contended that, if the injunction will not be granted, they are likely to suffer irreparable loss. At paragraph 14 and 15 of the joint supporting affidavit, the Applicants indicated that by time they were prevented by the second Respondent to undertake their mining business, they had more than 10,000 tons of Coal already mined and they had an order to deliver to Lake Cement Limited. Those tons are even indicated in the letter from the Regional Mining Office dated 6th May, 2022 which is annexture MPA – 6 and annexture MPA – 8. Worse, the mining coals have not been quantified. If such Coals are sold or transferred, the Applicants stand to suffer or if the mined Coal are transferred, there is a likelihood of making the trial of the main suit nugatory.

Also, in the main case, the Applicants are praying *inter alia* for specific performance. As they stated at paragraph 20 of the joint affidavit. If the second Respondent is not prevented from mining and selling, even the mined Coal, this will render the trial of the main case nugatory, bearing in mind that the minerals are perishable.

Moreso, according to the Applicants, the mining licence itself is transferable. If no order of temporary injunction is granted, the second Respondent may transfer the mining licence to another person. This also may defeat trial of the main suit. In relation to that, the Applicants hired equipments and machineries for mining Coal which is at the field, as per paragraph 3 of the joint affidavit. If no temporary injunction is granted, the second Respondent may misuse, use or transfer them, the situation which may cause multiplicity of cases by the Applicants with other vendors. Lastly, the second Respondent in its Counter affidavit has not stated any loss or inconvenience if this application will be allowed.

As to the second condition, the Counsel for the Respondents disputed that there are no mines already extracted which belong to the Applicants. And for that reason, he submitted that the trial of the main suit won't be rendered nugatory because there are no mined coals at the disputed cite belonging to the Applicants. Also, he disputed in relation to annexture seven (7) to the joint supporting affidavit. It was the Respondents' view that the Applicants had no any order to supply coal to Lake Cement Ltd as alleged but to Anim Company Ltd. as such, the Applicants have to prove the same.

Furthermore, the Counsel for the Respondents submitted that since there are no already mined Coals, there is no relief on specific performance. On the reason of transferring licence, the Applicants have mere assumption. There is no any evidence to prove that the second Respondent is attempting to transfer the licence so that injunction may be issued. He advised this Court to disregard the assumption. Also, he denied existence of any equipment and machineries properties of the Applicants at the field. It is a mere allegation because the Applicants have not mentioned in the joint affidavit as to what are those equipments. They did not attach any document or receipt to evidence hiring of such equipments.

The Counsel for the Respondents, however, agreed that the agreement between the Applicants and the first Respondent expired. He suggested that since the 2nd Respondent is not party to the alleged agreement. If the order of injunction will be granted, he will be affected at large because the life span of mining licence of the second Respondent will expire while he has paid for it.

The Counsel of the Respondent did also not object the principle that grant of injunction is discretionary powers of the Court. He asserted that it is the discretion of the Court to issue injunction though such

discretion has to be exercised judiciously. He prayed for the Court to consider paragraph twelve (12) of the joint supporting affidavit. The operation of the Applicants at the mine was stopped since March, 2022. The order for injunction will not help them now. The Counsel insisted that it has been overtaken by events. The proper prayer, if it is true, was for them to be allowed to enter at the cite and not for injunction.

In his submission, the Counsel for the Applicants told this Court that apart from the consignment of the unquantified coal, there are equipments and machineries which can be misused by the 2nd Respondent. Also, the coal is part of the evidence to the pending case before this Honourable Court.

More so, according to the Applicants' Counsel, coal is perishable good which cannot be returned after being exploited from the grounds. To the contrary, the 2nd Respondent was not party to the contract which has already expired. It was the 1st Respondent who entered into the contract with the Applicants.

I have weighed the contending submissions of the parties and the affidavits in support and opposition on whether the Applicants have satisfied the Court that they will suffer irreparable loss if injunction as prayed is not granted.

It is my considered view that grant of the injunction at this stage is likely to cause irreparable injury to the 2nd Respondent because of the following reasons: *First*, it is yet to be proved that the 2nd Respondent has breached the contract. *Second*, if it is later proved by the Applicants that either the 1st Respondent or the 2nd Respondent or both of them breached the contract, the Applicants can be restituted by way of damages or compensation. *Third*, we are told and there is no dispute that the 2nd Respondents have employed Hundreds of Tanzanians at the coal mining cite. Granting injunction therefore will cause those employees redundant from the work. It is not ideal for the Court to create unnecessary employment by way of temporal injunction unless justice compels to do so and there is no any alternative to the claimant. In this case, the Applicants can be liquidated by way of damages upon proof of their claims.

Fourth, granting injunction will paralyse the levies and taxes earned from the coal mining in dispute. *Fifth*, as replied by the Respondents' Counsel, there is no any evidence to prove that the second Respondent is attempting to transfer the licence to another person. *Sixth*, the issue whether there are mined coals at the disputed cite belonging to the Applicants cannot be dissolved at this stage. It requires

evidence. As such, non-granting of injunction cannot render the trial of the main case nugatory because parties will not be restrained from producing any kind of evidence to support the same.

Noteworthy, it has been held in times without number that, the Applicants must prove before a prayer for injunction is granted that they would suffer irreparable injury if injunction as prayed is not granted and there is no other remedy open to them by which they can protect themselves from the consequences of apprehended injury. For instance, in the case of **Tanzania Breweries Limited v. Kibo Breweries Limited and Another** (1999) IEA34 in which Kalegeya, J (as then was) while citing with approval the landmark case of **Atilio v. Mbowe** *(supra).* Lord Diplock in **American Cynamid Company v. Ethicon Ltd** [1975] AC 396 noted that:

> *The Court should first consider whether, if the plaintiff were to succeed of the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant continuing to do what was sought to be enjoined between the time of application and the time for the trial. If the damages in the measure recoverable at common law would be an*

adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should be granted, however strong the Plaintiff's claim appeared at this stage.

Similarly, in the case of **Samwel Apollo Odiero v Temeke Minicipal Council**, Misc. Land Application no. 82 of 2018, High Court of Tanzania at Dar es Salaam (unreported), the Court was of the position that; sometimes the order for temporary injunction cannot be issued where recourse can be by way of compensation of damage.

At any rate, granting of temporal injunction is possible only when it is established that the applicant will suffer irreparable loss. In the case of **Central Bank of Kenya v. Giro Commonwealth Bank Limited and Another** [2007] 2 EA 93 it was held that:

An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury and when the Court is in doubt, it will decide the application on the balance of convenience.

In the light of the foregoing analysis, I hold that; if temporal injunction is granted, the 2nd Respondent is likely to suffer irreparable injury than the Applicants.

As for the third condition regarding the balance of convenience, the Applicants claimed to be in more hardship if injunction will not be granted due to the reason that the agreement before this Court for determination expires on 29/07/2022. As such, the Applicants have no option to deal with the Respondents while their case is still pending before this Court except by temporal injunction order by this Court.

Considering of all the reasons submitted in the second condition, the Applicants alleged that they will be subjected to hardship if the temporal injunction is not granted. He supported his submission with the case of **Abdi Ally Salehe v. ASAC Care Unit Limited and 2 Others,** Civil Revision No. 3 of 2012 at Dar es Salaam (unreported) at page 8 – 9 and the case of **Kibo Match Group Ltd v. H.S. Impex Ltd** [2001] TLR at page 152 to mention the few.

In reply, it was the Respondent's Counsel thought that the Court cannot issue temporary injunction at this stage. There is nothing to restrain. If the second Respondent will be restrained, there will be other cases with his employees, the Commission of Minerals and the Clients who are being supplied by the second Respondent. Therefore, it is the second Respondent who will be in hardship because he is the one at the

site and he has paid government taxes. He prayed this application not to be granted.

Upon digesting the submissions of both parties, on the test of balance of convenience, the Court is of the findings that the convenience should be taken in parallel with rights of the parties and the legal principle, as it was decided in the case of **General Tyre EA Ltd v. HSBC Bank PLC** Misc. Civil Application No 35 of 2005 (unreported); and the case of **Agency Cargo International v. Eurafrican Bank (T),** Civil Case No. 44 of 1998, High Court of Tanzania at Dar es Salaam (unreported).

In the instant matter, if injunction is granted and the alleged triable issues turns to be in favour of the 2nd Respondent, the comparative mischief, hardship or inconvenience which is likely to be caused to the 2nd Respondent by granting the injunction will be greater than that which is likely to be caused to the Applicants by not granting it. I find the second Respondent will be in hardship because his machineries and equipments are functioning at the site. His contract has not expired while that of the Applicants has already expired. The only remedy to the Applicants, upon proving the breach is to be paid

damages and compensation, the remedy which can be granted upon conclusion of the main case only.

In the circumstances of the above, and taking into consideration that in order for the application of injunction to be granted all the three conditions in **Atilio v. Mbowe** *(supra)* must co-exist, and bearing in mind that the Applicants have failed to satisfy the Court on the second and third conditions, I find in the interests of justice, as I hereby do, dismiss this application. Costs shall follow events. It is so ordered.

Y. J. MLYAMBINA
JUDGE
30/08/2022

Ruling delivered and dated 30th August, 2022 in the presence of the Applicants, learned Counsel Neema Nyagawa holding brief of Elias Machibya for the Applicants, learned Counsel Zuberi Maulid holding brief of Mariana Medard for the 1st Respondent and Neema Nyagawa holding brief of Hilary Ndumbaro for the 2nd Respondent.

Y. J. MLYAMBINA
JUDGE
30/08/2022