

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 47 OF 2022**

**JULIUS MALEMI LUSANYIKA.....1<sup>ST</sup> APPLICANT**

**PENDO ANDREW MUSHOBOZI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**NYARUGUSU MINE COMPANY LTD .....1<sup>ST</sup> RESPONDENT**

**STANSLAUS MASUNGA NKOLA.....2<sup>ND</sup> RESPONDENT**

**BENJAMINI JOSEPH NCHORE.....3<sup>RD</sup> RESPONDENT**

**MADUHU MULOLA NKINDA.....4<sup>TH</sup> RESPONDENT**

**RULING**

**20<sup>th</sup> Sept. & 5<sup>th</sup> Oct. 2022**

**DYANSOBERA, J.:**

The two applicants, that is Julius Malemi Lusanyika (1<sup>st</sup> applicant) and Pendo Andrew Mushobozi (2<sup>nd</sup> applicant), have filed objection proceedings under O. XXI rules 57 (1) and (2), 58 and 59 of the Civil Procedure Code [Cap. 33 R.E.2019] craving for the following orders: -

- (a) That this Hon. Court may be pleased to investigate for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to pay expenses, costs incurred in acquiring the shares, government taxes and levies paid by the 1<sup>st</sup> respondent in the process of acquiring the applicant/objector's shares

- (b) That this Hon. Court may be pleased to order that the 1<sup>st</sup> respondent's shareholders and directors to transfer shares back and handing over the mine site to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents is null and void because the said shares has been improperly acquired by the 1<sup>st</sup> respondent
- (c) That we pray the deed of settlement and decree be quashed and the shares to retain to the applicants
- (d) Costs be provided for
- (e) Any other reliefs.

The respondents have resisted the objection proceedings by way of notices of preliminary objections as follows.

According to the 1<sup>st</sup> respondent, the preliminary objections are premised on the following grounds: -

- a. That the present application is misconceived and this Honourable Court is not properly moved to entertain it as it is *functus officio*,
- b. That the applicants do not have *locus standing* to maintain the present application,
- c. That this application is incompetent for failure to implead a necessary party.

In relation to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, the preliminary objections are that: -

- a. That the application before this court is incompetent for being *functus officio*,
- b. That the application is incompetent for the prayers in the chamber summons not grantable

The preliminary objections were argued by way of written submissions.

Arguing in support of the preliminary points raised by the 1<sup>st</sup> respondent, his Counsel dropped the 2<sup>nd</sup> preliminary point and argued the 1<sup>st</sup> and 3<sup>rd</sup> preliminary points. Respecting the 1<sup>st</sup> point, Mr. A.K. Nasimire submitted that the applicants have filed this application by way of objection proceedings and the application has been preferred under O. XXI rules 57 (1) and (2), 58 and 59 of the Civil Procedure Code. Counsel for the 1<sup>st</sup> respondent noted that the parties hereto were parties in Civil Case No. 20 of 2019 before this Honourable Court. The parties drew up a deed settlement on 29<sup>th</sup> September, 2021 which later on, that is on the 1<sup>st</sup> day of November, 2021, formed the basis of the decree. Counsel for the 1<sup>st</sup> respondent contends that the applicants, by way of objection proceedings, seek to undo what was decreed by this Honourable Court on 1<sup>st</sup> day of November, 2021 as the court is *functus*

*officio*. Citing the case of **Bibi Kisoko Mohammed v. Ministry for Lands, Housing and Urban Development and another** [1983] TLR 250, Mr. Nasimire outlined that it is trite law that in matters of judicial proceedings, once a decision has been reached and made known to the parties, the adjudicating officer becomes *functus officio*. He was of the view that the court had fulfilled its functions and it was known to all the parties in the case and that if the court will entertain the application, that will amount to abuse of the court process.

With respect to the 3<sup>rd</sup> ground, Counsel for the 1<sup>st</sup> respondent contended that the necessary party in this proceeding that the applicants ought to have joined is the Business Registration and Licensing Authority (BRELA) as one of the prayers, if granted, will involve the BRELA. In support of his argument, Counsel for the 1<sup>st</sup> respondent relied on the case of **Stanslaus Masunga Nkola, Benjamin Joseph Nchore, Maduhu Mulola Nkinda v. The Board of Directors, Nyarugusu Mining Company Limited and others**, (HC) Misc. Civil Cause No. 1 of 2021.

Replying to the submissions for the respondents, Counsel for the applicants made the following submission. With regard to the issue of the court being *functus officio* jointly raised by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, Mr. James Ndumbaro contended that the applicants were

not parties to Civil Case No. 20 of 2019 which was concluded by a deed of settlement and decree on 1<sup>st</sup> November, 2021 and therefore the argument that the court is functus officio is misplaced. Reliance was placed on the case of Sosthenes Bruno and another v. Flora Shauri, Civil Appeal No. 249 of 2020 on the rationale of inclusion of O.XXI in the CPC. It was the Counsel's further submission that the prayer in the chamber summons is grantable under the court's discretion and not the parties' wishes. This court was told that the cases cited by Counsel for the respondents are irrelevant to this case and distinguishable and hence incapable of supporting the objection.

On the argument that the application is incompetent, this court was told that such argument does not qualify as a preliminary point of law as it needs evidence. Counsel for the applicants was of the view that the preliminary objection on the incompetence of the application is misconceived. He emphasized the provisions under which this application has been brought allow the applicants as third party to challenge the respondents as parties to the decree which is challenged and not a stranger to the suit.

Counsel for the applicants rested his submission by expressing that BRELA was not a party to the decree as such the necessity of joining him cannot arise.

I have considered the preliminary objections raised by the respondents. I have also taken into account the affidavits on record and the submissions made by the two advocates.

As the chamber summons reveals, this application has been filed under O. XXI rules 57 (1) and (2), 58 and 59 of the Civil Procedure Code [Cap. 33 R.E.2019]. the said provisions run as follows: -

57.-(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.

58.-The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

59.Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment

The thrust of the applicants'/objectors' complaint can be gleaned from paragraphs 15, 16 and 17 of the applicants' joint affidavit.

Under paragraph 15, the applicants aver that the 1<sup>st</sup> respondent decided to sue the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as a result they entered into consent judgment (dead of settlement) which was registered as a court decree which gives powers to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to take all shares of the applicants and directorship of the company which

were irregularly obtained by 1<sup>st</sup> respondent new shareholders and directors.

The same applicants aver under paragraph 16 of the said affidavit that the settlement deed affects the applicants negatively due to the facts that they did not sell their shares as it believed by the 1<sup>st</sup> respondent new shareholders and directors.

Likewise, the applicants aver under paragraph 17 that the settlement deed affects the applicant's interests and benefits as the 1<sup>st</sup> respondent new shareholders did not fulfil the conditions as to the affected directors.

As rightly argued by the respondent in the preliminary objections, this application is misconceived and, I can observe without fear of being contradicted, the applicants have filed this application without sufficient legal grounds.

The law is clear that the provisions of O. XXI rules 57 (1) and (2), 58 and 59 of the Civil Procedure Code [Cap. 33 R.E.2019] are invoked and come into play only where there is execution of a court's decree by way of attachment, whereby, in case the court allows the application, it has to lift the attachment, release the attached property and give other ancillary orders such as ordering payments of costs of the objection proceedings and storage charges incurred on account of the attached

property. The law casts the burden on the objector to adduce evidence to show that at the date of the attachment, they had some interest in or were possessed of the property attached.

In the application under consideration, the applicants are praying this court to investigate for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to pay expenses, costs incurred in acquiring the shares, Government taxes and levies paid by the 1<sup>st</sup> respondent in the process of acquiring applicant's/objector's shares and to order the 1<sup>st</sup> respondent's shareholders and directors to transfer shares back and handing over the mine site to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents is null and void because it was improperly acquired by the 1<sup>st</sup> respondent.

Clearly, the objection proceedings preferred and the reliefs sought by the applicants do not fall within the ambit of the cited provisions. This court cannot grant what the law does not sanction. Perhaps, the applicants should revisit the Company's Articles which define the duties, rights and powers of the governing body and between themselves at large and the mode and form in which the business is carried out as well as laying down rules and regulations for the attainment of the objectives stipulated under the Memorandum and see how their rights can be pursued. Otherwise, these objection proceedings are of assistance to the applicants/ objectors.

With those observations, I find the preliminary objection on the incompetence of the applicants' prayers being not grantable in the objection proceedings pregnant of legal merit. This, in my view, disposes the whole application and discussing the other limbs of preliminary objection would be tantamount to an academic exercise, the course I decline to pursue.

I thus uphold the second limb of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' preliminary objection and strike out this application/ objection with costs to the respondents.

Order accordingly.



**W.P. Dyansobera**

**Judge**

**5.10.2022**

This ruling is delivered under my hand and the seal of this Court on this 5<sup>th</sup> day of October, 2022 in the presence of Mr. Mwanaupanga, learned Advocate holding briefs for Messrs. Ndumbaro, Nasimire and Akram, learned Advocates.



**W.P. Dyansobera**

**Judge**