IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC LAND APPLICATION NO 43 OF 2022

(Arising from Land case No 19 of 2022 in the High Court of Musoma)

PENINA MHERE WANGWE .....1ST APPLICANT

MARKO CHACHA GICHERE ..... 2ND APPLICANT

HELENI DANIEL MATAIGA ..... 3RD APPLICANT

EMMANUEL AUGUSTINO WANGWE ..... 4TH APPLICANT

ALEXANDER CHACHA NYANKAIRA ..... 5TH APPLICANT

NYANGIGE NYAMARUNGU MWITA ..... 6TH APPLICANT

JOHN MENYE MWITA ..... 7TH APPLICANT

JASTINE MWITA KIMUNE ..... 8TH APPLICANT

MATIKO BISENDO MARWA .....9TH APPLICANT

DAUDI JUMA NYANKAIRA .....10TH APPLICANT

ESTER DAUDI NYANKAIRA .....11TH APPLICANT

MAKENGE DANIEL MAKENGE .....12TH APPLICANT

MATONGO JUMA NYANKAIRA ..... 13TH APPLICANT

KOROSO SASI RAGITA .....14TH APPLICANT

ALLY MUYUI CHACHA .....15TH APPLICANT

MATAIGA SAMMY DANIEL .....16TH APPLICANT

ROBIN MOTENGI MARWA ..... 17TH APPLICANT

BHOKE PETER CHACHA ..... 18TH APPLICANT

AGNES PAULO CHACHA ..... 19TH APPLICANT

MWITA CHACHA MUYUNI .....20TH APPLICANT

OTAIGO CHACHA MHIRI .....21ST APPLICANT

BEATRICE DANIEL BWANA .....22ND APPLICANT

MARIA JUMA MASEYA .....23RD APPLICANT

SIMON MSETI WANGWE .....24TH APPLICANT

ROBI CHACHA MHIRI .....25TH APPLICANT

MWITA CHACHA KEGOYE .....26TH APPLICANT

DANIEL ELIYA MATIKO .....27TH APPLICANT

PETER MNIKO MWERA ..... 28TH APPLICANT

WINFRIDA SAMWEL MOTENGI ..... 29TH APPLICANT

SAMWEL MOTENGI MARWA.....30TH APPLICANT

NICODEMAS KITUNKA JOHN .....31ST APPLICANT

GEORGE NYAMOHONO NYAMONGE .....32ND APPLICANT

VERSUS

NORTH MARA GOLD MINE LIMITED ..... RESPONDENT

RULING

1st Nov & 5th Dec, 2022

F. H. Mahimbali, J:.

Through land case No. 19 of 2022 filed and pending before this Court, the applicants are challenging their eviction and alienation from the suit land to pave way for the respondent's expansion mining activities which extends to the applicants' settlement areas. On that basis, they have been issued with the notice to vacate from the suit

place after there has been payment to the applicants in order to pave way the mining activities expanded by the Respondent's Company.

The main contest is on what has been paid by the respondent to the applicants has been considered as so minimal, thus challenging the said compensation as being not fair, prompt, just and equitable as per law.

In line with the said instituted land case, the applicants in order to safe guard their prompt eviction and alienation which then will perish the available evidence on what has been claimed as not fully compensated, have preferred this current miscellaneous application seeking for the injunctive orders of the Court pending full hearing and determination of the filed case. The said application has been resisted both on legal point and its merit by the respondent. Thus, this ruling.

On the filed legal objection, the preliminary objection is centred on the joint affidavit of the applicants, that the verification clause is defective. This is contrary to order XIX, rule 3 (1) of the CPC. On this Mr. Mchome, learned counsel for the respondent contended that as per facts in affidavit, each applicant states fact of his own. But at the verification clause it is written that: *"I/we, Penina Mhere Wangwe,*

Marko Chacha Githere ... each one of us, so hereby verity that all what was stated in paras 1,2,3,4,5,6,7,8,9,10,11,12,13,14 and 15 are true to the best of our own knowledge". He submitted that as per his understanding of this verification clause, does not correspondent to each fact deponed. This, suggests that the verification clause is in plurality while in the affidavit, each applicant stands on his own. On this, he drew support from the decision in the case of **Anatol Peter Rwebangira vs The Principal Secretary, Ministry of Defence and National Service and AG**, Civil Application NO 548/04 of 2018 at page 8. Contending that the said affidavit is bad on verification clause as it was improper for such a verification clause to embody all the facts deponed by each applicant while in fact ought to have been specifically verified by each applicant, it is then liable for being struck out as is legally defective.

On this, Dr. Chacha learned advocate for the applicants, resisted the legal objection, contending that as the affidavit in place is joint affidavit, thus, each applicant deponed on his own but jointly filed. He argued that the cited case of **Anatol Peter Rwebangira**, referred to verification clause of one single deponent, but with the current application, the deponents are many. Thus, there must be a distinction

between singularity and plurality verification clause. With the wording of the verification clause commencing: *"I/we"* means that the applicable verification clause is in singular and as the case may be, it is in plural. Therefore, there is no any confusion strictly reading the said verification clause in the joint affidavit. The wording thereof, is genetically right and has never been a confusion at all, insisted Dr. Chacha.

Dr. Chacha added that as per order XIX, rule 3 (1) of the CPC, sets the following conditions: Deponent to verify facts of his own knowledge. On this he submitted that the rule does not provide the manner and how it must look like. Therefore, as per wording of the joint affidavit, he insisted that grammatically and syntax wise is okay. The word *"our"* includes each one's knowledge. That means legally each of the mentioned deponent had verified as per law. In any event should this court be convinced by the preliminary objection by the other interpretation, Mr. Chacha prayed for an amendment instead of strike out. He relied his position in consideration of the case of **Jamal S. Mkamba and Abdalah Issa Namungu vs AC,** Civil Application No 240/01 of 2019, as it distinguished the case of **Anatol Rwebangira**. Furthermore, Dr. Chacha invited this court to invoke the provision of section 3A of the CPC and that the preliminary objection be dismissed

with costs to the applicant, insisting that, what is important, is for the applicants to comply with order XIX, rule 3 (1) of the CPC, which has been dully done with.

In his rejoinder submission on this, Mr. Mchome reiterated his earlier submission. However, responding to the position set in the case of **Jamal S. Malumba, he argued that the latter** has not declared the position in **Anatol Peter Rwembagira** as bad law, but only that each case must be decided by its own merit. Insisting that this particular wording of the verification clause is a blanket statement, he maintained that it was a defective application and that an order for an amendment will prejudice the respondent from utilizing the said land fully compensated to the original occupiers.

I have critically digested the arguments by both sides on whether or not the application is legally bad on verification clause.

In essence, both cited cases: **Anatol Peter Rwembangira** and **Jamal S. Malumba (supra),** are of the same view that where an application is bad in verification clause, it is defective. The difference between the two was on the stance taken on the consequence. Whereas in the former, the Court struck out the application, in the latter, the

Court took a liberal approach of ordering amendment. On the latter stance, the Court was not inventing the law, but just re-echoing what was once decided by the same Court when confronted in similar situation of defectiveness of the verification clause **(See DDL Invest International Limited Vs. Tanzania Harbours Authority & Two others,** Civil Application No. 8 of 2001**, Sanyou Service Station LTD V. BP Tanzania LTD (Now PUMA ENERGY (T) LTD),** Civil Application No. 185/17 of 2018, to mention but a few, all unreported**).** What good insisted in the latter case of **Jamal S. Malumba** (supra), is the cherish of legal principle that every case is to be considered in its own merits; that is having regard to all the circumstances of each particular case. Otherwise, there was no discussion how the verification clause in the joint affidavit must look like.

The important question for resolution is one, given the facts of this case, the wording in the applicants' verification clause in their joint affidavit that:

> *"I/We, Penina Mhere Wangwe, Marko Chacha Gichere, Heleni Daniel Mataiga, Emmanuel Augustino Wangwe, Alexander Chacha Nyankaira, Nyangige Nyamarungu Mwita, John Menye Mwita Kimume, Matiko Bisendo Marwa, Daudi Juma Nyankaira, Korosso Sasi Ragita, Ally Muyui Chacha, Agness Paulo Chacha, Mwita Chacha Muyuni, Otaigo Chacha*

Mhiri, Beatrice Daniel Bwana, Maria Juma Maseya, Simon Mseti Wangwe, Robi Chacha Mhiri, Mwita Chacha Kegoye, Daniel Eliya Matiko, Peter Mniko Mwera, Winfrida Samwel Motengi, Samwel Motengi Marwa, Nicodemus Kitunka and George Nyomoho Nyamonge, each one of us, do hereby verify that all what is stated in paras ***1,2,3,4,5,6,7,8,9,10,11,12,13,14 and 15*** *to the best of our own knowledge"*

Is legally defective on verification clause. Mr. Mchome says, this particular wording of the verification clause is a blanket statement. It is not clear as who actually verifies what considering that in the said affidavit each one stated his own facts. On the other hand, Dr. Chacha contends that this semantically and syntax wise on verification clause is unambiguous. As it is genetically right and has never brought any confusion at all, Dr. Chacha is persuading me to believe that the word *"our"* embodied into the verification meant including each one's knowledge. That means legally each of the mentioned deponent had properly verified as per law.

In my considered opinion, with the wording in this joint affidavit, perhaps brings a question linguistic challenge on how it ought to be verified. Is it not sufficient to state words "*I/We....*"as standing for each one's respective facts stated in the body of the said affidavit? Mr. Mchome says that is equivalent to blanket statement suggesting that

what then is deponed, is knowledgeable to all of the deponents which fact is not true. I am aware that an affidavit is in lieu of oral testimony. Therefore, each one must clearly state for his own facts. In the case of **Mulbadaw Village Council v NAFCO** (1984) TLR 15 (HC), it was held that there is no known law that one party can testify for the other. Equally, in an affidavit, each one must state his or her own facts. Where an affidavit is jointly stated, and sworn, then, the wording of the verification clause matters a lot. Where there is nothing of specific stated in the affidavit referring to a single deponent or certain deponents only, what then is verified is presumed for each one's deponent. In the current application, the applicants state that have been ordered to vacate the suit premises. The same is worded (Annexture NT9):

> *"Mwenyekiti wa Kijiji, Kijiji cha Komarela.*
>
> *Yah: NOTISI YA SIKU SABA YA KUWATAKA WANANCHI AMBAO WAMEKWISHA LIPWA FIDIA KUONDOKA KATIKA MAENEO HUSIKA KUPISHA SHUGHULI ZA MGODI".*

In the wording of this notice itself, the same is blanket notice. It does not state which ones are those persons compensated to be evicted. In my thorough reading to the said joint affidavit and supplementary joint affidavit, there is no where that a specific paragraph is making

reference to a single and specific applicant. However, in establishing what is stated therein, there are collective annexures (Eg NT8, NT7, NT6, NT5, NT4, NT3, NT2 and NT1) making reference to each one of the applicants. Thus, by stating "*I/We,..... each one of us, do hereby verify that all what is stated in paras 1,2,3,4,5,6,7,8,9,10,11,12,13,14 and 15 to the best of our own knowledge"* has served the legal purpose of the said verification clause. There is nothing of blanket statement in the circumstances of this case. Semantically, in my considered view it has sufficiently served the best legal purpose. Therefore, the drafters of the paragraphs of this joint affidavit did an excellent job in my considered view. The wording of the verification clause in the circumstances of this joint affidavit sufficiently, served the requisite legal purpose. That said the preliminary objection raised, is devoid of merits and it is hereby dismissed.

As to the merits of the application, Dr. Chacha learned advocate for the applicants, submitted that for the grant of injunction to qualify there are three conditions to be followed as stated in the case of **Atilio vs Mbowe [1969] HCD No 284**. The same has been restated in the case of **Total Tanzania limited vs River on Petroleum (T) Ltd and Salim Ali Said**.

The three conditions are:

i) There must be a serious question of fact to be alleged and the probability that the plaintiff will be entitled to the relief sought.

ii) The court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established.

iii) That on balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of injunction than will be suffered by the defendant from granting it.

As per circumstances of the case, the applicants are praying for injunctive/restraining orders of the court against the respondent and its workmen, servicemen, agent etc from wasting, demolishing, destroying, alienating applicants' lands, and requiring them to vacate from their pieces of lands, pending hearing and determination of the land case filed in this Court by the applicants. Therefore, this application is so important as there are triable issues to be determined by the court. As per paragraph 3,5,6 and 14 of the joint affidavit, details the cause of action are specified in paragraph 2 of the joint supplementary affidavit.

In paragraph 3 of the joint affidavit, the applicants claim that they have not been paid their statutory allowances such as accommodation, disturbance allowance, transport and net profit for the loss of use of their land at Komelera village. In paragraph 2 of the joint affidavit states specific issues for serious question of law. That all crops and other agricultural produce have not been paid in full, prompt and fair compensation (Annexure K1 collectively). As regards to compensation, the respondent has not compensated the existing structures there. Thus, these are triable issues (paragraph 5,6,14 and paragraph 2, 3 in supplementary affidavit). On paragraph 5, there is no compensation done by the respondent. with Paragraph 6, the respondent has been selective on what to pay.

With supplementary affidavit Paragraph 2, there are also claimable rights, while paragraph 3, there is no allowances for accommodation, transport, loss of net profit. Worse enough, notice to vacate of 7 days has been issued. Yet, there are all possible threats that the respondent is about to evict them. With this application, they are arguing that they have sound reasons/legal reasons arguable before the court.

On the second condition that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable

before the legal right is established, it has been submitted that the respondent has issued a short notice of 7 days, requiring that all applicants to vacate (See Paragraph 2 of the joint affidavit). There is eminent danger of alienating the applicants. The applicants have already suffered danger of being demolished with their homes. With paragraph 8 and 9 of the joint affidavit, each applicant claims irreparable loss and thus affecting their lives, otherwise there will be no proof. In paragraph 10, whereas if this court does not issue injunction order, the applicants will be rendered homeless. It is of importance to note that the applicants will suffer irreparable loss. With paragraph 11 of the joint affidavit, unless the court grants the sought orders, the applicants will be homeless. With paragraph 12 of the joint affidavit, if there will be alienation of land, that should be done now. As per form no 3, the figures compensated by the respondent are not filled. Therefore, it is important that the application is granted he insisted Dr. Chacha.

On the last ground/condition: That on balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from withholding of injection than will be suffered by the defendant from granting it. As per paragraph 13, in the balance of convenience, the applicants will suffer more irreparable loss than the respondent in the

event the application is not granted. In any way, the respondent in the balance of convenience will not suffer irreparable loss compared to the applicants. As there is a pending suit before this court, it has been humbly prayed that the application be granted for the interests of justice.

Resisting the application, Mr. Mchome learned advocate while adopting the counter affidavit dully filed, submitted that reading the chamber summons on the prayer by the applicants, it is not clear the restraining order prayed is from doing what. Appreciating the pre-conditions as stated in the case of **Atilio Mbowe**, he submitted that the three conditions must co – exist jointly and not disjointedly (see **Romuald Adree vs Mbeya Cit council and 18 others,** Misc. Land Application No 32 of 2021, **Mariam Christopher and Equity Bank Tanzania Ltd and Christopher Makind Edward,** Misc. Civil Application No 1070 of 2017).

Responding to the submissions by the applicants' counsel, he submitted that as per his digest of paragraph 6, 7, 8, 9, 10, 11, 12, 15.1-15.32 and 16 the respondent complied with all the conditions as per cut of date (see paragraph 7) as 28/5/2020. All that was due to the applicants, were dully paid. On this, he made reference to annexure

NM6 being relevant to the fact. He contended that, the applicants signed the memorandum of agreement. It was clarified that the respondent fully paid depending on the value and the size of the land (paragraphs 15-15(i), (ii) (iii) of the counter affidavit). Thus, there were due compensations to the applicants (Compensation Agreement). In the case of **Goldlove Ntwave vs chief Executive Officer TANROADs,** Land case No 154 of 2018, at page 18: Silence of a plaintiff on a particular matter until when emerged by the defendant, draws adverse inference against him.

As all the applicants were fully paid, refiling of this case is not a proper procedure. He submitted that even some of the memoranda of agreements and compensation were signed during the pendency of this application in court in respect of the 6th, 8th, 10th, 11th, 12th, 13th, 15th, 17th, 18th, 20th, 21st, 22nd, 25th, 27th, 28th, 29th, and 30th, applicants. All these had signed between immediately after the registration of the application and September 2022. On this fact, Mr. Mchome added that it is trite law that parties to the contract are bound by the terms of their contract (see **Lulu Victor Kayombo, vs Oceanic Bay Ltd and Mchinga Bay Limited**, Consolidated Civil Appeals No 22 and 155 of

2020, CAT at Dar es Salaam) that court cannot change terms of contract.

He added that, the assertion that these applicants are stressed, it is a mere fact which is not proved. As per counter affidavit, the 7th and 23rd applicants collected payment on 3rd of September, 2022. There has been no refusal on that.

With irreparable loss/injury, Mr. Mchome wonders how there can be irreparable loss if there is a compensation done and in the midst of the application. On the allegations that the respondent paid wrong persons, it is not the ground to seek for the restraint order.

On Balance of convenience, he contended that if this restraint order is granted, it will cause irreparable loss and hardship to the respondent as already paid all the applicants and there are due contracts and agreements on that. With all this, he has urged this Court at this juncture to ignore this application as there is nothing material challenged in the main suit, likewise this application itself. Thus, application be dismissed.

Reiterating what he submitted earlier, Dr. Chacha cemented that compensation is not a grant but rights to the affected. In the case of

Issack and Sons Co Ltd vs North Mara Gold Mine Ltd, commercial case No 3 of 2020, High Court commercial Division, Nagela J made a very good clarification on such one-sided contracts. It cannot ground denial of the parties' rights. The main issue is this, there has not been full, fair, just, and prompt compensation to the applicants and this is the point of contention in this current case. It has not been the contest that there has not been compensation, but that it was not full, fair, just and prompt.

As these subsequent payments were paid after the institution of this case, why was it then unilateral? What was that being achieved, he insisted Dr. Chacha.

On the cut-off date (28/5/2020) the relied document is not genuine. Its author is neither party to the suit nor appropriate authority, he querried.

As to why the applicants were silent on these subsequent payments as per annexure in the counter affidavit, Dr. Chacha vehemently argued that the said contracts are unilateral, and that the applicants were not privileged to own the said payment forms whose

terms were not deliberated by the applicants. All this said in paragraph 6 of the reply to counter affidavit is clear.

As per prayers in the chamber application, it is clear on inter partes application on what is being prayed as restraint order and that the applicants' application is well stated and deserves accord by this court.

On the submission that the parties are bound by the terms of their contract, he conceded on the principle but it should not be on unilateral contracts.

I have critically digested the prayers in the chamber application, the facts deponed in the respective affidavits for and against the application and the respective submissions thereof. The relevant question to ask is whether the application has met the threshold for its grant.

In essence, the main contest by the applicants is on what compensation ought to be paid has not been fair and full for the respondent to acquire their land as per law. On this, they have registered their concerns that amongst the payments done, there are several issues not considered by the respondent in effecting the said

compensation. That the respondent has just selected what to compensate and not to compensate as evidenced in annexures NT8, NT7, NT6, NT5, NT4, NT3, NT2 and NT1. As what is the basis of the said denial of effecting payments of some existing structures, planted crops etc, it has not been clear. As all these things are still there, the applicants are arguing that if eviction, alienation and demolition is allowed to be carried now at the pleasure of the Respondent, then it will erode the applicants' case as all the evidences in support of their case will be destroyed, and thus have nothing to rely as evidence on their filed case.

According to law as rightly submitted by the both counsel for the grant of injunction to qualify there are three conditions to be followed as stated in the case of **Atilio vs Mbowe.** The same has been restated in the case of **Total Tanzania limited vs River on Petroleum (T) Ltd and Salim Ali Said.**

The three conditions are:

i. There must be a serious question of fact to be alleged and the probability that the plaintiff will be entitled to the relief sought.

ii. The court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established.

iii. That on balance, there will be greater hardship and mischief suffered by the plaintiff from withholding of injection them than will be suffered by the defendant from granting it.

In my considered view, as to what has been submitted by both counsel, it is clear that there is a serious contention whether what was compensated by the Respondent to the applicants was just full and equitable as per law. The applicants are arguing that the respondent has been selective on what to compensate which is contrary to the law. Since the law is, the compensation must be fair, prompt, just and full, in the current situation it has been a reverse. On the other hand, there is evidence by the respondent effecting further payments to some applicants but uniletary (See annexure NM2).

In a total consideration of this case as per available material, there is a prima facie contentious issues between the applicants and the respondent if it is not justly and fully settled as per law. As to these contentious issues, this Court's intervention is necessary. Otherwise, it is

the applicants' who are going to suffer irreparable loss for being rendered homeless and others with no further land.

Therefore, in the circumstances of this case, a refusal to grant an injunction in spite of availability of facts, which are prima facie established by overwhelming evidence and material on record, occasions a failure of justice, and such injury to the plaintiff would not be capable of being undone. I think the legal wisdom embodied in the principles set in the case of **Atilio Mbowe** and as restated in the case of **Total Tanzania Limited vs River on Petroleum (T) Ltd and Salim Ali Said** and as enshrined under Section 68 (e) and Order XXXVII, Rule 1 (1) a, b, and (2) of the Civil Procedure Code, Cap 33 R.E 2022 suits well in the circumstances of this case. In the circumstances of this case, I am satisfied at this juncture that the application is merited as it has met the legal thresh hold, and it is hereby granted as prayed. The restraint order against the respondent is hereby issued that no any eviction, demolition, alienation or destruction of the applicants and their properties should be carried out now until the filed suit is conclusively determined by the Court or amicably settled by the parties themselves.

However, just by way of advice to the parties, I think this is the fit case in which if transparency is fully involved to all parties, this case can

be mutually and amicably settled. Parties are highly encouraged to resolve on a table of settlement. I say so because there appears to be no serious contest by both parties as there is evidence of part payment. Otherwise, I promise to assign the main case to a fast speed (Speed track one) as it involves investment project, the same be finalised in a short available of time if mediation fails or amicable settlement is not opted.

It is so ordered.

DATED at MUSOMA this 5th day of December, 2022.

F.H. Mahimbali

Judge

Court: Ruling delivered this 5th day of December, 2022 in the presence of the 2nd , 5th, 7th, 12th, 15th, 20th 26th, 31st, 32nd applicants , Mr. Mchome advocate for the respondent and Elizabeth Gwerino, RMA.

F.H. Mahimbali

Judge