

**THE UNITED REPUBLIC OF TANZANIA**  
**(JUDICIARY)**  
**THE HIGH COURT – LAND DIVISION**  
**(MUSOMA SUB REGISTRY)**

**AT MUSOMA**

**Misc. LAND APPLICATION No. 29 OF 2023**  
*(Arising from the High Court [Musoma Sub Registry] in  
Land Case No. 19 of 2022)*

**NORTH MARA GOLD MINE LIMITED ..... APPLICANT**

*Versus*

1. PENINA MHERE WANGWE
2. MARKO CHACHA GICHERE
3. HELENI DANIEL MATAIGA
4. EMMANUEL AUGUSTINO WANGWE
5. ALEXANDER CHACHA NYANKAIRA
6. NYANGIGE NYAMURUGU MWITA
7. JOHN MENYE MWITA
8. JASTINE MWITA KIMUNE
9. MATIKO BISENDO MARWA
10. DAUDI JUMA NYANKAIRA
11. ESTER DAUDI NYANKAIRA
12. MAKENGE DANIEL MAKENGE
13. MATONGO JUMA NYAKAIRA
14. KOROSO SASI RAGITA
15. ALLY MUYUI CHACHA
16. MATAIGA SAMMY DANIEL
17. ROBIN MOTENGI MARWA
18. BHOKE PETER CHACHA
19. AGNES PAUL CHACHA
20. MWITA CHACHA MUYUNI
21. OTAIGO CHACHA MHIRI
22. BEATRICE DANIEL BWANA
23. MARIA JUMA MASEYA
24. SIMON MSETI WANGWE
25. RHOBH CHACHA MHIRI
26. MWITA CHACHA KEGOYE
27. DANIEL ELIYA MATIKO
28. PETER MNIKO MWERA
29. WINFRIDA SAMUEL MOTENGI
30. SAMWEL MOTENGI MARWA
31. NICODEMAS KITUNKA JOHN &
32. GEORGE NYAMOHONO NYAMONGE

**RESPONDENTS**

## **RULING**

12.06.2023 & 13.06.2023

**Mtulya, J.:**

On 5<sup>th</sup> day of December 2022, this court had resolved **Misc. Land Application No. 43 of 2022** (the application) in favor of the respondents and had issued a restraint order against the applicant's activities, including eviction of the present respondents until when **Civil Case No. 19 of 2023** (the case) lodged in this court is determined to the finality. On the 3<sup>rd</sup> April 2023, the applicant approached this court praying for this court to set aside the restraint order which injuncted the applicant from facilitating the acquisition and expansion of the land for mining activities.

On the 5<sup>th</sup> June 2023, the parties were summoned in this court to register relevant materials for and against the application. However, before the contest could take its course, three (3) learned counsels for the applicant, **Dr. Wilbert Kapinga, Mr. Lubango Shiduki** and **Mr. Allen Kileo**, raised up and submitted that they have a large bundle of arsenals to register in favor of the application, but noted the law enacted in Order XXXVII Rule 3 of the **Civil Procedure Code [Cap. 33 R.E. 2019]** (the Code) provides a life span of the six (6) months period for interlocutory orders.

In support of the move, the learned counsels have produced a Judgment of the Court of Appeal in **African Trophy Hunting Ltd v. Attorney General & Four Others** [1999] TLR 407 and a Ruling of this court resolved in **Alfred Mtatiro v. Shelter Construction Limited & Two Others** [2001] TLR 206. In their opinion, the order of this court rendered down in the application on 5<sup>th</sup> December 2022 contravened provisions of the Order in the Code hence this court has the duty to pronounce the order has expired by operation of the law on 4<sup>th</sup> June 2023. On the other hand, **Dr. Chacha Murungu** and **Mr. Daud Mahemba**, for the respondents prayed for few days leave to consult authorities in favor of the Ruling of this court in the application.

For interest of justice and equality before the law in cherishing the right to be heard and escaping surprises of new issues in trials, this court had granted the respondents' learned counsels seven days leave in search of the necessary materials. Yesterday afternoon, Dr, Murungu and Mr. Mahemba entered their appearance and in brief cited two (2) decisions of this court in **Zein Mohamed Bahroon v. Reli Assets Holding Company Ltd (RAHCO)**, Misc. Land Application No. 307 of 2017 and **George A. Mwakalinga v. KBC-Community Initiative Service**, Civil Revision No. 4 of 2021.

In their opinion, the order of this court delivered on 5<sup>th</sup> December 2022 in the application is valid until when the main suit is determined to the finality and questioning the order in the present application is violation of the directive of the Court of Appeal on the principle of *functus officio* as stated in the precedent of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application no. 33 of 2012.

Rejoining the submission of dual learned counsels, Mr. Lubango thought that the precedent of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser** (supra) is not applicable in the current situation as the matter does not reach at the merit stage to determine the contents of the application. According to Mr. Lubango, the issue in current application at this stage is: *whether the injunction order of 5<sup>th</sup> December 2023 is still valid as of today.*

In his opinion, the reply is found in the precedents of this court in **Interchem Pharma Ltd (in Receivership) v. Karen Benjamin Mengi (Administratrix of the Late Millie Benjamin Mengi) & Two Others** [2015] TLR 369 and **Mery Mehi Masong v. National Microfinance Bank PLC & Eight Others**, Misc. Land Application No. 277 of 2021, which held that the statement

*pending determination of the main suit* is conditional to the renewal of the order upon expiry of six (6) months.

According to Mr. Lubango, when there are conflicting decisions of this court, the best practice is to follow the more recent conflicting decision, unless there are good reasons to decline it. In support of the move, Mr. Lubango had cited the authority of the Court of Appeal in **Ardhi University v. Kiundo Enterprises (T) Limited**, Civil Appeal No. 58 of 2018, contending that the decision of this court in **Petro Robert Myavilwa (Administrator of the estate of the late Robert Petro Myavilwa) v. Rahim A. Mchalikwao**, Misc. Land Application No. 75 of 2021, is a most recent decision hence prevails over decisions of this court cited by the respondents' learned counsels.

Finally, Mr. Lubango submitted that the respondents' learned counsels have failed to produce similar decision of the Court of Appeal in **African Trophy Hunting Ltd v. Attorney General & Four Others** (supra), which had resolved the life span of an interim order to be six (6) months.

In my considered view, before perusing the bunch of precedents registered in the present application, it should be vivid that this court is asked to change its course from determining materials related to cessation of the order of 5<sup>th</sup>

December 2022 to a declaration of the validity of the order. It is a shift from whether the present application has merit to cease the declaration of the Ruling issued on 5<sup>th</sup> December 2022 to whether the order in the Ruling is enforceable after 4<sup>th</sup> June 2023.

In my opinion, to resolve the present matter on merit, would be in conflict with the precedent **African Trophy Hunting Ltd v. Attorney General & Four Others** (supra), which stated that the matter like present one is incompetent and the decision has remained undisturbed since 3<sup>rd</sup> December 1998. The decision had touched on the meaning of temporary injunction and its associated positions, at pages 413 to 415, that:

*In Tanzania, the court's power to grant temporary injunction is provided under Order XXXVII Rule 1 of the Civil procedure Code, 1966...an order for temporary injunction is valid only for specified period...the law in Tanzania under which the relief was granted. Specifically provides for an order of this kind to be in force for a period of not exceeding six months...as there being no application made for the extension of the order before expiry of six months, the order of 13<sup>th</sup>*

*February 1995, expired on 13<sup>th</sup> August 1995, when the six months' period ended. That is by operation of the law.*

Regarding the appropriate course to take under such circumstances, the Court of Appeal thought that:

*In that situation to grant the application...it amounted to construing the order of 13<sup>th</sup> February 1995 as one still having legal force...This, with respect, was not correct. The application before the learned judge being incompetent the proper course was for the application to be struck out.*

Twenty (20) years after this thinking of the Court, no any other application was taken to the Court to test any other new developments on the subject. It was fortunate that this court on 24<sup>th</sup> August 2018 was invited in the decision of **Zein Mohamed Bahroon v. Reli Assets Holding Company Ltd (RAHCO)** (supra) to consider a situation where there is an application to summon respondent's Managing Director to appear before this court to show cause as to why he should not be convicted of contempt of court. However, the order in **Misc. Land Application No. 603 of 2016** originated from main suit, **Land Case No. 235 of 2015** was alleged to have expired despite the fact that at the end it had

the following words: *pending hearing and determination of the Land Case No. 235 of 2016.*

This court, after noting it is *functus officio* on amending the order produced by the same court, it noted at page 11 of the Ruling that:

*...by virtue of Order XXXVII Rule 3 which stipulates the life span of an order of temporary injunction to be 6 months. Honestly, I am not saying so. Can I pretend to be competent to comment on whether the order of the court dated 18/10/2016, issued by learned sister...was proper or not. It is for superior court to do so. Since no superior court has set it aside, not this court has exercised its review jurisdiction, it is only logical to conclude that, in my view, the order of this court dated 18/10/2016 is still valid in law.*

This court thought that demolition of the applicant's buildings in the case was improper for the allegation of the expiry of life span of the interim order issued in the **Misc. Land Application No. 603 of 2016**. This court finally had resolved on the way forward under the circumstances, like the present one, that: *the respondent was supposed to exhaust available*



*remedies before demolition of the houses in either to challenge the order in the Court of Appeal or file an application for review in this court to rectify the order.*

This is exactly what this court is directed to do by the Court of Appeal in the precedent of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser** (supra). On 22<sup>nd</sup> day of August 2012, the Court of Appeal had observed, at page 18 of the Ruling that:

*Although there is no statutory law which bars one Judge from setting aside a decision of a fellow Judge of competent jurisdiction, rules of practice, prudence and professional conduct impose such restrictions. A Judge of the High Court in our jurisdiction is or should know and respect that code of conduct. Failure to do so is to open up a pandemonium of unprofessionalism, hitherto unknown to our jurisdiction...the procedure adopted is very much detested. We hope that the High court leadership will see to it that it never happens again, in the interest of judicial system...the only option open to the respondent herein was to file a fresh suit appropriate to that*

*particular remedy. He did not do so. Instead, he came before the Judge by way of an application. That was not proper.*

Following the observation of the Court of Appeal, this court cannot venture into other territories before being properly moved to do so. This court is bound by its previous decisions and directives of the Court of Appeal. It will always follow the directives of the Court of Appeal and decisions of our court for want of certainty of the decisions emanating from this court and confidence building to justice stakeholders.

In the end, and having in place the directives of the Court of Appeal in the indicated precedent of **African Trophy Hunting Ltd v. Attorney General & Four Others** (supra) on appropriate remedies available in the circumstances like the present application, and being aware of the precedent of the Court of Appeal in **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser** (supra), on *functus officio*, and noting that this court in the present application cannot produce other orders to amend the order in the application delivered on 5<sup>th</sup> December 2022 for want of certainty of decision of this court in **Zein Mohamed Bahroon v. Reli Assets Holding Company Ltd (RAHCO)** (supra), and noting this court cannot grant something which was not

pleaded in the application and recognizing that an incompetent application cannot produce any other order than struck out order, I am moved to mark the present application incompetent and hereby struck out without costs. Each party shall bear its costs. The reason is vivid that the matter was competent when was filed, but was taken by event caused by busy schedules of this court. If the applicant is so wish to contest the decision of this court in the application, may do so in accordance to the law.

Ordered accordingly.




  
F.H. Mtulya

**Judge**

13.06.2023

This Ruling was pronounced in Chambers under the Seal of this court in the presence of, **Mr. Lubango Shiduki** for the applicant and in the presence of the fourth respondent, **Mr. Emmanuel Augustino Wangwe** and his dual learned counsels, **Dr. Chacha Murungu** and **Mr. Daud Mahemba**.

  
F.H. Mtulya

**Judge**

13.06.2023