

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO. 70 OF 2023

(Arising from the Land Case No.19 of 2022)

BETWEEN

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 KIMUNYE 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 MSETTI WANGWE 24TH APPLICANT
ROBI CHACHA MHIRI 25TH APPLICANT
MWITA CHACHA KEGOYE 26TH APPLICANT
DANIEL ELIYA MATIKO 27TH APPLICANT
PETER MNIKO MWERA 28TH APPLICANT
WINERIDA 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

26th & 27th September, 2023

M. L. KOMBA, J.:

This is ruling against inter-party hearing as previously the applicants herein sought and was granted an ex-parte order to maintain

status quo against the respondent, its workmen, employees, agents and any other person working or acting under the authority or instructions of the respondent pending hearing and determination of the application for temporary injunction inter-parte pending determination of the Land Case No 19 of 2022. This application was filed under Section 68 (e), Order XXXVII Rule 1 (a), (b) and 2 of the Civil Procedure Code, [CAP 33 R.E 2019] and supported by joint affidavit deponed by all applicants.

Respondent too filed counter affidavit, together with, she registered a Preliminary Objection on three points of law to the effect that;

1. The counter affidavit is fatally defective for containing legal arguments, conclusions, contrary to Order XIX Rule 3 (1) of the Civil Procedure Code CAP 33 R.E 2019.
2. The Counter Affidavit is fatally defective for containing falsehood as most part of the averments therein is not personal knowledge of the deponent as it is information from respondent's lawyer who has not been named and there is not affidavit from such lawyer supporting such averments rendering the counter affidavit false and not to be acted upon by this Court.

3. The Counter Affidavit is fatally defective as the deponent has not shown in the jurat and verification if he is a Principal Officer of the Respondent able to verify facts of the counter affidavit, instead it is verified in deponent's personal name as such who is not the respondent in this application.

Yesterday (26/09/2023) around 15:00 hours both parties appeared for hearing. It was Dr. Chacha Murungu who represented applicants started to submit for his application. He prayed to abandon the PO filed for the sake of time and submitted that this being the application for interim injunction there are three conditions to be proved by applicants which are; one; existence of triable issue, two; existence of emanate danger or risk of irreparable loss, and three; the balance of convenience must require the interaction of the court is necessary to serve rights of the applicant pending determination of the main suit. He insisted that the three conditions must be made cumulatively for the order to be issued.

It was Dr. Murugu submission that the applicants have shown **the first element** in para 1 and 2 of affidavit that they said there was an order of injunction issued under the main case, at para 5 the existence of main case which is set for hearing on 11 November, 2023 and paragraph 8 that there is

triable case which is yet to be decided by this court which is scheduled to be on 7/11/2023. Submitting for the second element he said paragraph number 3 is relevant where the applicant stated that on 15/09/2023 the respondent visited the disputed land and issue oral announcement that applicants have to vacate their homes and farms and paragraph 4 which show the danger of demolishing, destroying westering and alienating property of the applicants and destruction of properties which are evidence in the main case. Moreover, in paragraph 6 there is high risk of loss of their properties if injunction was not issued as they were given short notice and failed to mitigate the risk.

Moreover, he submitted that in paragraph 10 the conduct of respondent and his agent is grave and breach of peace in existence of the court order. The last condition he submitted on balance of probability that if the application will be granted will not cause inconvenience to the respondent, then suffering to the applicants and pray for the interest of justice the order be issued to applicants in the circumstance that prevail.

Dr. Murungu expounded that they are praying for injunctive pending determination of the main case because there is eminent risk of permanently suffering irreparable loss of the properties by the applicant

because on 15/09/2023 the respondent and its agents visited the residency and properties of the applicants and issue an oral notice of less than 24 hours requiring them to vacate and respondent admitted to visit the area at para 4 and 6(2) of counter affidavit and they threatened to demolish the house in the morning of 16/09/2023 where this court rescue the situation and pray this court to issue interim order restricting respondent from interfering with the suit land pending determination of the main suit.

It was his submission that the requirement for fresh injunctive order is inevitable as according to Order XXXVII rule 3 of the CPC the initial injunction order which was issued in December, 2022 lasted for six months only and was not extended. He said in the absence of the order of injunction by this court, the applicants are justified for application of fresh injunction as the 1st injunction did not exist by operation of the law. on failure to apply for extension he submitted that the applicant could not apply for extension as there was no existing injunctive order in terms of Order XXXVII of the CPC as the injunction could only be extended if it is not expired and failure to receive the order then rights of applicants will not be protected as the threat is still continuing.

The counsel raised the issue of *functus officio* claiming that this court will not be *functus officio* if grant injunction thought as there is no existing injunction. Further he said there is no legal provision prohibiting this court to issue injunction which is sought as much as this court will have power to issue extension of the injunction similarly has power to issue injunction.

On a different note he lamented on the counter affidavit filed that there are issues which make this court not to consider it like **one**; it contain legal opinion and conclusion contrary to Order XIX rule 3 (1) of the CPC as found in para 4(1) (2) 6(1) (2) (8), 7 (4) (9) (10) (11), 8 (1) (2) (4),10,11,12, and 13. **Two**; it violate Order XXVIII rule 1of the CPC that the deponent who can verify and sign on behalf of respondent must be secretary of Corporation, Director or Principle Officer of the corporation able to depone to the facts of the case. He argued that person who verify and deponed the affidavit by the respondent did not state whether he is the principal officer or director. It was his argument that these shortcomings render counter affidavit defective not to be considered hence expunged. He finally prayed the application be granted as prayed. The former order was issued on 05/12/2022 under application no. 43 of 2022.

Respondents hired **Mr. Lubango Shiduki** an advocate to represent them who upon praying this court to adopt counter affidavit submitted on legality of the respondent affidavit that deponent explained he is the land surveyor] in the respondent Company and in verification he repeats as he was a deponent as he previously introduced himself. He referred the Notary Public and Commissioner for Oaths Act, Cap 12 about the place and date of disposition which was not challenged. He said Dr. Murungu is not party to the management of respondent so he does not know the position of the deponent although he agreed that Order XXVIII need principal officer and it was his submission that the deponent is a principal officer. As for Order XIX he submitted that Dr. Murungu did not advance any shortcoming and therefore he finds it does not contravene any rule and the paragraph are not offensive. He said in case it will be found to be defective he submitted that the remedy is to expunge specific paragraph and not rendering the whole affidavit to be defective.

While submitting on the main application counsel said he agree with applicants that the first injunctive order which was issued by this court has expired. The question now is whether this court is *functus officio* to grant application over the same matter. It was his argument that this court

cannot grant a fresh application for injunction unless it is a renewal. To boost his submission he referred this court to its previous findings (High Court at Vuga and Musoma) In **Mshelly Cleaning & Forwarding vs. VBC Ltd**, Civil Case No. 22 of 2015, **Petrolux Service Station Ltd vs. NMB Bank & Another** Misc. Land Application No. 86 of 2020 and **Finca Tanzania vs. Leonard Andrew Korogo** Misc. Civil Appeal No. 5 of 2021 that the matter at hand is res judicata and this court is *functus officio* and therefore this application is abuse of court process because the affidavit is silent on why applicant did not apply for renewal within six months. It was his submission that the only remedy applicants have to apply for renewal under Order XXXVII Rule 3 as injunctive is one time order and therefore this court cannot grant it again and so this court should rule in favour of the respondent.

On substantive party of application on three conditions necessary to grant injunction Mr. Lubango conceded on submission made by Dr. Chacha that 3 conditions must be met cumulatively but he differs on their relevancy in this application specifically on the first ground on existence of triable issue. He noted there is a case but is it triable? It was Mr. Lubango submission that the complaint by applicant should be and it is on quantum as

explained in counter affidavit paragraph 7(6) and (7) and land forms which are textures to counter affidavit. He said applicants have been paid and they don't deny but they complained on quantum and therefore it should not be a serious issue because if they will win the case, he submitted that the respondent has to adjust their calculation only and therefore the remedy is known. The issue of evidence should not worry applicants as everything was captured via valuation form No. 3 which was not contested and therefore according to him there are no triable issues.

Mr. Lubango did not end there, he further submitted that applicants have not stated the nature of the loss that they will suffer if this court denies to grant the application bearing in mind that they only claim for quantum. He said the legal principle in irreparable loss is the loss which cannot be compensated or remedied by damage or monetary terms. Because these people are claiming for compensation which will be done via re-calculation then there is no irreparable loss as explained in Annexure MLE 2 that out of 32 applicants, 14 have vacated from the suit land. Bearing in mind that they have received compensation and are claiming for additional compensation, according to him there is no irreparable loss to applicants. On the last condition on balance of convenience he said he is against the

applicant based on disposition of counter affidavit at paragraph 9 (i – xi) where the respondent state the kind of injury likely to suffer if this application granted including health risk and environment risks and economic risks at Nyabigena area as the acquired land will be used as a dump area and it will become risk to applicants who will be nearby. He said economic impact is expected including stoppage of production as there will be no dumping area. According to the counsel the balance of convenient is in favour of the respondent than applicants. He concluded by submitting that, in procedure this application is incompetent as the matter is res judicata and on merit, the three conditions have not been mate cumulatively. He prayed the application to be dismissed as is frivolous and he further prayed for costs.

During rejoinder Dr. Chacha insisted that the previous injunction expired and this court has the power to exercise its discretion to grant injunction sought as the three conditions for issuing injunctive order has been fulfilled as stated in applicant affidavit. Counsel distinguished all the three cited cases on functus officio stating that in this application there is new circumstances as explained in paragraph 3 and 4 of affidavit about the visitation of the respondent in the disputed land as admitted by respondent

in their counter affidavit, he submitted that when they visited, they issued oral announcement requiring applicant to vacate their home and house in the next day. Dr. Chacha insisted this application is proper because granting is discretion of this court as there is new circumstance.

That makes the end of submission by both parties and now it's the duty of this court to determine if the application is meritorious.

I shall start with the issue of counter affidavit as raised by the counsel for the applicant that deponent did not introduce himself as a principal officer and that it contains legal opinion which is contrary to the law. As submitted by Mr. Lubango, deponent has introduced himself as land surveyor. The fact that he did not mention to be principal officer does not mean he is not a principal officer of the respondent as Dr. Chacha is not a member of management to know the position of every person. Counsel for the applicant failed to analyse specific legal opinion found in mentioned paragraphs of counter affidavit and pray the whole affidavit to be expunged. Further in his submission Dr. Chacha relied on paragraph 4 and 6 of counter affidavit in justification of the visitation conducted by the respondent and her agents. Am wondering if I will I have to expunge counter affidavit, even his submission will lack support and therefore for

circumstance of this application and for the interest of justice I decided to keep in record all paragraphs of counter affidavit.

It is noted that both agreed that there was injunctive order which was issued in December 2022 and expired but they are in disagreement on way forward. While Dr. Chacha prays for the re issue of injunctive order as there is new circumstance, Mr. Lubango claim that this court is *functus officio* and the matter is res judicata as it has already issued the injunction and the remaining is extension and not new grant. Reading the case of **Petrolux Service Station Ltd vs. NMB Bank & Another** (supra) this court (before Kisanya, J.) ruled that;

*'...the applicant whose application for intercutory order is dismissed is not at liberty to file subsequent application for the same order on the ground that the principle of res judicata would apply if the subsequent application is based on **facts and circumstances** that were in existence at the time when the previous application was dismissed'.*

In the present application, though the application was not dismissed, the fact that it expired is just like it was dismissed and therefore for the res judicata to apply circumstances must be the same. In the current application just as submitted by Dr. Chacha, circumstances have changed

from when the previous injunctive order was issued as the respondent and his agents visited the disputed land on 15 September 2023 and provide oral announcement that applicants should vacate the premise within 24 hours the fact which was conceded by applicants as deponed at paragraph 6 (1), (2) and (3) of counter affidavit. This court finds that in this application there is new circumstances warrant re order of injunction. Why will it be issued?

Dr. Chacha submitted and Mr. Lubango agreed that there must be three elements to allow the application and that the three must be cumulative. I join hands with them as the land mark case on this matter, **Atilio Vs. Mbowe** (1969) HCD 284 elaborated the conditions to be;

- 1. That on the facts alleged there must be a serious question to be tried by the Court and a probability that the Plaintiff /Applicant will be entitled to the relief prayed for in the main suit;*
- 2. That, the temporary injunction sought is necessary in order to prevent some irreparable injury be falling Plaintiff/Applicant while the main case is still pending; and*
- 3. That, on the balance, greater hardship and mischief is likely to be suffered by the Applicant if temporary injunction is withheld than maybe suffered by the Defendant if the Order is granted.*

On the existence of the triable issue, he said there is main suit which is Land Case No. 19 of 2022 which is scheduled for hearing on 07/11/2023.

On the same condition Mr. Lubango submitted that there is a suit but it is not triable on the sense that applicants are claiming for compensation. To him if the suit will be decided in their favour what respondent will do is to adjust calculations as the issue in stake is about the amount of money paid to applicants and not otherwise. To him there is no triable issue as the remedy is known. I find the submission by the counsel for the respondent is convincing and reading paragraph 8 of counter affidavit applicants via plaint they demand for payment and not ownership of land.

On the second condition, the applicants relied on paragraph 3 and 4 of their affidavit that respondent visited the disputed land and give announcement threatening to demolish structures therein, action which will destroy evidence as they were given short notice they are in high risk of loose their properties. Respondent submitted that everything on the disputed land has been captured by form No. 3 and therefore the issue of evidence should not worry applicants as they have been already paid what is remining is additional payment and therefore there is no risk of losing

properties as irreparable loss cannot be remedied by compensation nor the monetary term.

On the last condition which is balance of convenient, Dr. Chacha submitted that if order granted will not inconvenient respondent than applicants as they are at the risk of suffering irreparable loss of their properties. Counsel for respondent argue that if injunctive order will be granted respondent will face significant and irreparable harm risk including healthy risk as the disputed land is intended to create a dump, the plan to open new mining pit will be halted which will result in shaking on revenue generated hence shaking the economy as deponed at paragraph 9 of the counter affidavit.

From the analysis of last two conditions am of the position that on the balance, the greater hardship will be suffered by respondent if injunctive order is issued than applicants who only claim for compensation which if decided in their favour, they will be paid basing on the information captured in their forms but the economic loss which respondent and the Government will suffer on revenue cannot be compensated. Applicants will not suffer illeperable loss as their claim is based on quantum, amount which will be paid depending on the decision on the main suit. The loss which is expected to occur is known and therefore there is nothing to

prevent. Thus, I find the applicants have no triable issue pending before the court.

All said and done, application lacks merit and therefore I cannot grant the injunctive order as applied. By this ruling I vacate my order issued ex-parte on 15th September 2023.

No order as to costs.

DATED at **MUSOMA** this 27th day of September, 2023.



NK
M. L. KOMBA
Judge