IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB- REGISTRY OF MWANZA

AT MWANZA

MISC. LAND APPLICATION NO. 48 OF 2023

(Originating from Land Case No. 29 of 2023)

JOEL NYAMAGENI KISIBIKE---------- 1ST APPLICANT

MWANDU JOHN MATENDELE----------2ND APPLICANT

MASANJA SONDA (REPRESENTED BY

DAUDI SIMON MABENGA----------3RD APPLICANT

BRUNO MAKOJA JANGU----------4TH APPLICANT

RAMADHANI YAHYA MWESIGA----------5TH APPLICANT

NGULU LUNEGEJA SENI----------6TH APPLICANT

Versus

JULIUS NYAGA NJOLOLO----------1ST RESPONDENT

SANDU MBOJE----------2ND RESPONDENT

LUTONJA MASHILINGI----------3RD RESPONDENT

RULING

July 24th & 31th, 2023

Morris, J

The application by six applicants above does not seem to commence with a smooth take off. While the counsel for 1st respondent filed two grounds preliminary objection (PO); the 2nd respondent's advocate raised three grounds of PO. However, each of the objectors abandoned one respective ground. One of the retained grounds was

common for both respondents. That is, the application was supported by defective affidavit which contains hearsay facts. The remaining ground raised by the 2nd respondent is that this court lacks jurisdiction to entertain the present application. Consequently, the court was invited to determine only two limbs of the PO: defective affidavit and lack of court's jurisdiction.

I ordered both the PO and the application to be argued simultaneously for the Court to determine the objection first before embarking on the latter, where necessary. Fredrick Kakurwa & Godchile Chilale, learned advocates represented the applicants. The 1st and 2nd respondents were represented by Bakari Chubwa and Amos Gondo, learned Counsel respectively. The 3rd respondent appeared in person, unrepresented.

Regarding the PO, I will consider the submissions for the parties in the course of determining the respective grounds. Ultimately, I will answer the questions whether the affidavit is defective; and if this Court is clothed with requisite mandate to determine the present matter.

For the objection that the affidavit contains hearsay facts; it was the submissions of Mr. Gondo that, the application is full of hearsay facts.

He hastily mentioned paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the affidavit. I was also referred to the holding in ***Jacqueline Ntuyabaliwe Mengi & 4 Others v Abdiel R. Mengi and 5 Others***, Civil Application No. 332/2021 (unreported) at pages 21-25 to the effect that the consequences of hearsay paragraphs into the affidavit is to expunge them from such affidavit. The same remedy was being sought hereof.

In the same regard; it was the submissions of Mr. Chubwa that the deponents, though they indicate to be knowledgeable with facts deposed; the subsequent paragraphs are to the effect that the depositions are referring to the "applicants". Hence, the averments are not specific as from whom they come. To him, the operational word should have been "We" as per paragraph 1. He also contended that the affidavit makes reference to other villagers' facts without such villagers' affidavits. Reference was made to the case of ***Sabena Tech. Dar Ltd v Michael J. Luwunzu***, Civil Application No. 451/18 of 2020 (unreported). That after expunging hearsay facts, in effect the application will lack legs to stand on. The 3rd respondent had nothing to say on raised POs.

In reply, it was the submissions of Mr. Kakurwa that, the joint affidavit of the applicant is specific. The operating paragraph is

introducing the 6 applicants who identify themselves and state that they collectively depose. It is true that the subsequent paragraphs refer to the "applicants". Hence, faulting the paras on argument of hearsay is totally misplaced. No hearsay is apparent on affidavit. Paras have contained details of what applicants collectively aver. Hence, the PO should be overruled for want of merit.

Mr. Chilale added that the cited case (***Jacqueline Ntuyabaliwe's***) is distinguishable because the affidavits therein were specifically mentioning that the person deposing had been told by another. He, thus, prayed for the PO to be overruled.

In rejoinder, it was submitted that no affidavit from third person stated therein. That hearsay facts are not admissible. The phraseology used in the affidavit does not reflect the deponents.

I have keenly considered the submissions of parties. As it was correctly submitted for the 1st and 2nd respondents, the remedy available for the hearsay paragraphs in the affidavit is to expunge them. See the case of ***Msasani Peninsula Hotels Limited and 6 others v Barclays Bank Tanzania Ltd and 2 Others***, Civil Application No. 192 of 2006

(unreported) and ***Jacqueline Ntuyabaliwe Mengi & 4 Others v Abdiel R. Mengi and 5 Others*** (*supra*).

In the matter at hand, I will determine whether the joint affidavit by the Applicants contains hearsay facts. In their joint affidavit, the deponents averred in the 1st paragraph that they are conversant with the facts deposed in the subsequent paragraphs. Therefore, the remaining paragraphs 2 to 11 are from their own knowledge as verified by them accordingly. It is only the 9th paragraph which contains information of other villagers whose affidavit(s) is/are missing.

It is the law that an affidavit which mentions another person is hearsay unless that other person swears an affidavit. See, for instance, cases of ***Suzan Ng'onda v Anna Samwel Urassa***, Civil Application No 606/01 of 2021; and ***Benedict Kimwaga v Principal Secretary, Ministry of Health***, Civil Application No. 31 of 2000 (both unreported).

In this matter at hand, the impugned paragraph states;

> *"That this application is made on the basis that continuous use of the suit land but the 1st respondent has increasingly raised* ***anger to the villagers*** *especially the respondents (sic) who are victims of the 1st respondent intervention over the suit land and now they are getting less tolerant seeing the respondents*

benefiting from the land that rightful owned by the applicant and wrongfully acquiring by the 1st respondent."

That paragraph mentions villagers without their description but reaffirms that the applicants are the most angered. In the case of ***Phantom Modern Transport (1985) Ltd v D.T. Dobie (Tanzania) Limited***, Civil References Nos. 15 of 2001 and 3 of 2002 it was held inter that; "*..it seems to us that where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged* ***or overlooked leaving the substantive part of it intact so that the court can proceed to act on it"*** (Emphasis added).

Guided by above holding I find the defect in the said paragraph to be trivial. I will forthwith, as I hereby do, condone it for the application to be determined on merit; subject to Court's findings regarding the 2nd limb of PO.

With regard to the next limb of PO is that this court lacks jurisdiction. It was the submissions by Mr. Gondo that; principles governing jurisdiction of courts are to the effect that if a matter was determined previously by the court, the same court cannot determine it again. Such court becomes *functus officio*. In this matter, the main case was decided by High Court

at Shinyanya in Misc. Land Appeal No. 1 of 2021; which arose from Land Appeal at District Land and Housing Tribunal (the DLHT) Appeal No.27/2019. The trial proceedings were by the Nyakafuru Ward Tribunal (application no. 20/2029).

According to record of such cases, the land in dispute formed the basis of the present case. That is, the suit land in the three previous cases, is the exact property in the present matter. That is, the present case is not an appeal, revision or review against the High Court (at Shinyanga) decision. It is a fresh case. And so long as there is a court decision to such effect, this court cannot entertain a fresh case thereof. Reference was made to the case of ***Petrolux Service Station Ltd v NMB Bank PLC & Adili Auction Mart***; HC Misc. Land Appl. No. 86/2022 (unreported) which cited the case of ***Kamundu v R*** [1973] EA to the effect that a finally determined matter cannot be entertained by another court of same rank. That when the court is *functus officio* it accordingly lacks jurisdiction. Consequently, this application should be dismissed.

In reply it was submitted by Mr. Kakurwa that; the present application is different from the previous matter. That this application involves 6 applicants against 3 respondents. Parties in this case are

completely different. Further, the property in question is different. It is true the main suit is not appeal or revision but these arguments have nothing to do with the present application. Even if the matter is to attract reference to previous proceedings, this court is still having jurisdiction to determine it as it involves different parties, different property and different cause of action. To him, the cited case of ***Petrolux*** (*supra*) is contested as per page 9 thereof it relates to *res-judicata* not *functus officio*. That the doctrine of *functus officio* as defined by ***Black's Law Dictionary*** is not applicable in this matter. The PO thus fails and should be overruled with costs.

In addition, Mr. Chilale submitted that for the doctrine of *functus officio* to apply, both cases must have same parties, same cause of action and court of same jurisdiction, among others. In the present case all these items are fresh. No previous case has been entertained on the stated aspects.

In rejoinder Mr. Gondo maintained that this court has no jurisdiction. Respondents' argument is not *res-judicata* or *res-subjudice* but *functus officio*. Hence, argument of the difference in parties would be valid if the PO was on *res-judicata/subjudice*. The applicants do not

indicate how the property is different from the one in the previous proceedings.

I have considered the submissions by both parties. Mr. Gondo is contending that like matter was decided by this Court at Shinyanya in Misc. Land Appeal No. 1 of 2021. That the land in dispute in the subject appeal forms the basis of the present case. On their part, the applicants differentiate this matter because the previous proceedings involved different parties, the applicants were not parties thereto, the cause of action is different and the property in question is different.

Indeed, it is trite law that when a court finally disposed of a matter it ceases to have jurisdiction over it. The judicial officer also becomes *functus officio* to determine on matters conclusively determined by another judge. See the case of ***Leopold Mutembei v Principal Assistant Registrar of Tittles, Ministry of Land, Housing and Urban Development and Another***, Civil Appeal No. 57 of 2017; ***The International Airlines of the United Arab Emirates v Nassor Nassor***, Civil Appeal No. 379 of 2019; and ***Maria Chrysostom Lwekamwa vs. Placid Richard Lwekamwa and another***, Civil Application No. 549/17 of 2019 (all unreported).

However, the matter before me is temporary injunction pending determination of matters in controversy in main case. What was determined by the High Court (Shinyanga) was an appeal not an application of this nature. Parties thereto are different and it is still contentious whether the proceedings which resulted into the appeal in the subject registry involved the land in dispute. Even then, to establish such resemblance or differences will certainly involve evidence. Consequently, arguments thereof will overstep precepts of POs [***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors*** [1969] EA 696; and ***Ali Shabani and 48 Others v TANROADS and AG***, CoA Civil Appeal No. 261 of 2020 (unreported) followed].

Therefore, the 2nd point of preliminary objection also lacks merit. I disallow it. In the upshot, I overrule the whole 1st and 2nd respondents' PO.

I now turn to the merit of the application. Mr. Kakurwa prayed to adopt the filed joint affidavit and submitted that, applicants are seeking injunctive orders pending hearing and determination of Land Case No. 24/2023. The application is made under section 68(e) and Order XXXVII Rule 1 (a) of ***the Civil Procedure Code***, Cap 33 R.E. 2019. The

respondents are alleged to have trespassed on the suit land (details purportedly given in the main suit).

The injunction is being sought by the applicants on the basis that the suit land is the source of income for them. They allege further that, since applicants cannot no longer access it due to the alleged 1st respondent's trespass, their sources of income and livelihood are at stake. To them, the latter earns a lot of income therefrom at the expense of the applicant's justice. Thus, this injunction is sought to protect each party's interest.

Mr. Chilale added that, pursuant to section 2 of ***the Judicature and Application of Laws Act*** (JALA), this court enjoys inherent powers. It may, thus, take facts of the main suit regarding identification of the suit land. That is, in the interest of justice, each party should be prevented from using the suit land until the main suit is determined. He insisted that the application meets all criteria in the case of ***Atilio v Mbowe*** [1969] HCD No. 284. Hence, the application should be granted.

In reply it was the submissions by Advocate Chubwa that; the application lacks merit. He argued that in the affidavit, the suit land is not described. He stated further that, all what the chamber summons and

affidavit state is that the property is "subject of main suit" but in the application the said property is not described. He did not find justification for invocation of section 2 of ***JALA***. Accordingly, he argued that the said provision is misplaced as no *lacuna* appropriate law enough to warrant invocation of inherent powers of this Court under ***JALA***.

Further, he submitted that the allegations that the applicants have been using the suit land for economic benefits which have now been curtailed by the 1st respondent; are not in the affidavit. That is, the affidavit does not contain depositions to prove how applicants have been or are being prejudiced. Mr. Chubwa also attacked the averments in paragraphs 9-11 of joint affidavit. He said the same indicate that the 1st Respondent's trespass is raising anger of the villagers has no merit as the said villagers was undisclosed.

Moreover, he submitted that the applicants seek the injunctive reliefs in order to maintain peace and harmony of the society. To him, such ground is not one of factors to be considered in granting temporary injunction. He, argued that according to ***Atilio v Mbowe*** (*supra*), there must be triable issue in suit; and that the applicants should stand to suffer irreparable loss that respondents. All these attributes should be met

cumulatively for injunction to issue. To him, the applicants do not show how the use of land by the 1st respondent is causing hardship to them-specifically. That, regarding prayer that both parties should be injuncted to use the suit land it is against the prayer in the chamber summons.

Further that, under paragraph 4 of the affidavit, applicants state that the 1st respondent trespassed on the suit land since 2018. But paragraph 6 thereof alleges that the said respondent has accumulated over 1.6 billion shillings. Consequently, to him, the applicants are failing to meet the condition of irreparable loss. And that, if the decree is to be in their favor, the applicants will be able to recover the loss. I was further referred to the case of ***Valence S. Matunda (Power of Attorney) v Sadala P. Ndosi & 2 others***, Misc. land Application No. 55/2019 (unreported).

On his part, Mr. Gondo submitted in reply that ***Atilio's case*** (*supra*) and principles laid therein have not been complied with by applicants. To him, there is no serious question for determination shown in the affidavit. The loss is reparable. Implication of the present injunction is likely to affect the respondents most than applicants. The 1st respondent has been

on site for long. Any claims against him may be adjudicated in suit than preventing him to produce as he does currently.

In rejoinder it was briefly submitted that, the ***Mbowe's* case** (*supra*) principles are met. First principle is under para 3 of affidavit. The 2nd principle is under para 7; and the 3rd principle is on para 6. On balance of convenience basis, the respondents are placed in no disadvantageous state if injunction is granted than it is for the applicants. He concluded by stating that the injunction for both parties is an alternative remedy not in the chamber application. He reiterated the applicants' prayer that the application has adequate merit.

Having considered submissions of parties, the Court is called upon to determine whether or not the application has merit. In law, temporary injunction is not an automatic right. It is only granted when ends of justice so dictate. Accordingly, the court exercises its discretion toward granting temporary injunction provided three conditions are met cumulatively. The conditions were stated in the celebrated case of ***Atilio v Mbowe*** (*supra*) and followed in a number of cases including the case of ***Stambic Bank Tanzania Ltd. v Kiribo Ltd and Others***, HC Misc. Land Application No. 17/2023 (unreported). These conditions are: -

i. *That, on the facts alleged, there must be a serious question to be tried by the court and a probability that the plaintiff will be entitled to the reliefs prayed for (in the main suit);*

ii. *That, the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the Plaintiff while the main case is still pending; and*

iii. *That, on the balance of convenience greater hardship and mischief is likely to be suffered by the Plaintiff if temporary injunction is withheld than may be suffered by the Defendant if the order is granted.*

Stating with the first condition, I am mindful that, at this stage, I should refrain from overreaching to the merit of the pending land case (No. 24 of 2023). It is undisputed that the stated case is pending before this Court for determination. As for the second condition, the applicants need to prove that it is necessary to grant the reliefs sought to prevent some irreparable injury to them. It was stated in the affidavit that intervention by this court is necessary as the applicants are getting less tolerant seeing respondents benefiting from the suit land allegedly owned by them. Also, it is clearly deposed that the 1st respondent has

accumulated a total sum approximately to Tshs. 1,613,000,000/= from the suit land while the applicants and their families are suffering.

It was the submissions for the 1st and 2nd respondents that the criteria in ***Atilio's case*** (*supra*) have not met in this regard. It was submitted that the applicants will be able to recover the loss and that peace and harmony does not feature in the conditions for granting the relief sought. It is cardinal law under this condition that the injury which the applicant shall suffer must be irreparable. That is, which cannot be atoned by award of damages. See, for instance, the case of ***America Cyanamid v Ethicon Limited*** [1975] AC 396.

In the matter at hand, the applicants averred under paragraph 6 of their affidavit that the approximate earnings accumulated by the 1st respondent to the tune of around 1.6bn/= On such basis, the injury allegedly suffered by applicant is capable of being recompensed monetarily. Further, as correctly argued by Mr. Chubwa, the anger of applicants (and rather forcefully, of villagers if any) does not prejudice them rather it may be effectuated against the respondents. Therefore, the second condition is lacking in this application.

Regarding the third and last condition, the applicants are enjoined to prove that, on balance of convenience; they stand to suffer greater hardship and mischief that the respondents. From the affidavit and submissions of the applicants it is deposed that the applicants have lost their daily earning. In reply it was submitted that the balance of convenience is advantageous to the applicants than respondents.

I have keenly traversed the affidavit by the applicants. In paragraph 4, they averred that the 1st respondent herein trespassed to the suit land sometimes in 2018. It was not disclosed as to why they remained silent until 2023 to file the pending main case. Seemingly, the claimed inconvenience to them has come after lapse of 5 years since the alleged trespass. In all fairness, this condonation beats logic of having aggrieved parties resolve their disputes timely. The is no reason(s) in the affidavit to substantiate what prevented the applicants from coming to Court much earlier for redress.

I was, nevertheless, invited to have a look on facts stated in the main suit as I determine this application. With adequate respect, I am inclined to refuse such invitation on a trio-reason stance. **One,** the plaint/pleadings were not attached to the joint affidavit of the applicants

to form part thereof. As such, the Court is not expected to do the scavenging exercise in other proceedings searching for what is relevant to the application. Lest, it poses to be unjustifiably partisan. In addition, submissions are not evidence. Thus, facts outside the affidavit are ectopic. They cannot be evaluated as other depositions in the affidavit.

Two, the pleadings are not documents which the Court can take judicial notice of under sections 58, 59 (1) (c) and (e) and 89 (1) of ***the Evidence Act***, Cap 6 R.E.2022. **Three**, pleadings contain matters of fact that need to be proved by adducing further evidence. Consequently, even if I would take a look at them, they will still be allegations which cannot be used to determine the present application.

This is not to mention that, though this application emanates from the main suit, it is a set of autonomous proceedings of this Court. Each is determinable distinctly.

Therefore, save for the first condition, the present application fails to meet the major conditions for this court to exercise its discretion to grant the reliefs sought in the chamber summons.

Henceforth, the application is barren of merit. It is accordingly dismissed. Costs to follow the outcome of the main case. It is so ordered.

C.K.K. Morris

Judge

July 31st, 2023

The ruling is delivered this 31st day of July 2023 in the presence of the 1st and 5th applicants; Advocate Fred Kakurwa for all applicants; Advocate Bakari Chubwa representing the 1st respondent and holding brief of Advocate Gondo who appears for the 2nd Respondent. Mr. Lutonja Mashilingi, the 3rd respondent is also in attendance.

C.K.K. Morris

Judge

July 31st, 2023