

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

MISC. LAND APPLICATION REFERENCE NO. 20240109000000414

(Arising from Misc. Land Application No. 93 of 2023 at Musoma Sub- Registry)

MARTIN NYAMBOK1ST APPLICANT

ELLEN MANAE KAWIRA2ND APPLICANT

VERSUS

MAMU YASON TIENG'O MAMU.....RESPONDENT

RULING

31 January & 5 February, 2024

M. L. KOMBA

Applicant herein is seeking an order for temporary injunction restraining respondent from entering into the disputed land cutting trees for the purpose of maintaining status quo of the disputed land pending determination of the matter. Upon filling of the same, the respondent raised Preliminary Objection (PO) which pray to be heard on the date scheduled for hearing of application that;

- 1. That this court is functus officio*
- 2. Applicant has no locus to prosecute respondent.*
- 3. Affidavit of applicant is defective.*

4. *The matter is res-judicata.*
5. *The application is misconceived and bad in law.*
6. *The court was moved with wrong provision of law.*

When the matter was scheduled for hearing, applicant had a legal service of Mr. Paulo Obwana, advocate while respondent fended for himself. On consensus it was agreed PO and main application to be argued on the same date and this court will determine if PO will finalize the matter or otherwise. I first entertained PO as was in the case of **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, this court allowed the respondent to submit over the preliminary points of objection as raised.

On 1st point about *functus officio*, Respondent submitted that in 1964 there was a case, Appeal No 4 of 1964 where judgment was entered against the father of the applicant where the father of the applicant lost and paid costs of the case. He was of the position that how is it possible for this court to determine the matter which is already determined by this court. To him this court is *functus officio*.

On the second point he submitted that on 10/3/2022 applicants were appointed as administrator and administratrix respectively of the estate of

their father who is deceased but on 22/7/2023 their appointment was canceled by District court of Tarime. Since then, they have never appointed again so they lack feet to stand on in this application.

About the defectiveness of the affidavit, he submitted that, the applicant **MARTIN NYAMBOK** has sworn as an administrator of the estate of the late Rev. Manaen K. Kawira while he is not administrator. Fourth point of objection he submitted that the matter is res-judicata because it was heard at the District Land and Housing Tribunal of Tarime (DLHT) and it was adjourned to wait for the appointment of the administrator till on 22/7/2023 when it was dismissed.

On the fifth point of objection the respondent submitted that this application is bad in law because the matter was dismissed in the DLHT and therefore applicants have no locus. He defines this application as abuse of the court process and lastly, he was of the submission that the chamber summons was filled under wrong provisions of law because applicants are not administrators. He prayed this application to be dismissed with costs.

On the other hand, counsel for the applicants was of the submission that the PO must be on point of law without support of any evidence as was said in the case of **Mukisa Biscuit Manufacturing Company LTD vs West End Distributors LTD** [1969] E. A 696. He submitted that all points argued by the respondent lacks legal requirements as they need evidence.

Elaborating on his submission he begins with the first PO about *functus officio*, he said in the case of **Elly Peter Sanye vs Ester Ernes** on Civil Appeal 151 of 2018 CAT at Mbeya Justice Lila quote **Case of Kamundi** they said the Magistrate is said to be *functus officio* when the matter is decided on merit or determined over those people concerning the same matter. He was of the position that the respondent did not say when there was application for temporary injunction between the parties herein so that this court can be *functus officio*. Further, he said it need evidence to prove there was a case in those years. He found the first point to be devoid of merit and prayed to be dismissed.

On the second point of objection, he said there was a case at DLHT at Tarime without mentioning parties and it need evidence that the case must be read to see if they relate with the application at hand. In cementing his submission, he said courts are creature of law, the court which appointed

administrators is Primary court of Shirati-Rorya and cancellation should be done by the same court.

Mr. Obwana went on submitting that **MARTIN NYAMBOK** swear on behalf of another administrator as indicated in verification clause, Martin is administrator and it need evidence to prove if his appointment was cancelled. About res-judicata, counsel relied on section 9 of Civil Procedure Code, CAP 33 R.E 2019 which restrict courts to hear the matter resemble matter which was determined between the parties or parties having capacity or position on the same matter. On this point, he said there is nothing which was decided between the parties herein as applicant is applying for temporary injunction. As the point needs evidence, he prayed it be dismissed.

On the issue that application bad in law, counsel protest the assertion saying the respondent failed to explain what law was not adhered to and on the 6th point he submitted that respondent did not explain which law was not proper and where applicant went wrong. Elaborating on provision used to move this court, counsel said it is Section 95 of the CPC which vest this court with inherent powers and section 2 (3) of Judicature and Application of Laws Act, CAP 358 (JALA) where HC has powers to grant

mareva injunction. He prayed the PO to be overruled with costs as it lacks legal touch.

The issue for determination by this court is whether the Preliminary Objection as raised by the respondent is meritorious. Before determine that, let me visit and refresh over renowned decisions of various courts of law over the matter; to mention few are the case of **Mukisa Biscuit Manufacturing Company LTD vs West End Distributors LTD** (supra) **Hezron Nyachiya vs Tanzania Union of Industrial and Commercial Workers and Others**, Civil Application No. 70 of 2001 (unreported), **Tanzania Telecommunications CO. LTD vs Vedasto Ngashwa and Four others**, Civil Application No. 60 of 2009 (unreported), **Ayubu Bendera and 10 Others vs AICC**, Civil Application No. 9 of 2014 (unreported), and **Alphonse Muhatwa vs Juliet Roda Alphonse** Civil Reference No. 9/01/2016 CAT at Dar Es Salaam (unreported).

The latter case expounded the decision in **Tanzania Telecommunication case** (supra) to the effect that preliminary point of objection must meet three conditions which are; **first** the point of law raised must be pleaded or must arise as a clear implication from the proceedings. **Secondly**, it must be a pure point of law which does not require close examination or scrutiny

of the affidavit or counter affidavits. **Thirdly**, is that the determination of such point of law must not depend on court exercise its description.

The applicant herein is applying for temporary injunction restricting respondent from cutting trees in disputed land. Respondent is claiming that the matter was already decided and therefore res-judicata and this court is *functus officio*, applicants has lost their title as appointment was cancelled and therefore was not eligible to swear an affidavit. Basing on principle of preliminary objection, all assertion by the respondent need evidence, there must be a judgment or ruling showing the matter was decided and the status of the applicant was cancelled. Basing on root established in **Mukisa Biscuit Manufacturing Company LTD vs West End Distributors LTD** (supra) and elaborations in **Tanzania Telecommunications CO. LTD vs Vedasto Ngashwa and Four others** (supra) I find the PO has no merit and I hereby overrule it.

Having being done with the PO, as on 31 January, 2024 parties submitted on both PO and application, I now turn to determine on main application.

Applicants herein are seeking for an order for temporary injunction restricting respondent from cutting down trees pending determination of Misc. Land Application No. 93 of 2023 High Court-Musoma Sub Registry.

This application is filed under Section 2(3) of Judicature and application of laws [Cap 358 R.E 2019] and Section 95 of the Civil Procedure Code, [CAP 33 R.E 2019] and supported with affidavit of **MARTIN NYAMBOK**, the 1st applicant.

When this court called on for hearing of the application, applicant was represented by Mr. Paul Obwana, an advocate who was of the submission that no body between the applicants and the respondent has right of ownership over the disputed land as the matter was not decided to finality by the trial tribunal. However, he submitted that respondent is cutting trees (cashew nut and other local trees) which is 70 years old from that action by the respondent they opted for application at hand.

In support of his application, he cited the case of **Atilio vs. Mbowe** (1969) HCD 284 which set conditions for grant of the application of this nature. **First**, there must be a case in court of law with likelihood of succession. On this condition he submitted that there is application before this court scheduled for hearing on 19 February, 2024 and there is likelihood of success. **Second**, Court intervention is needed to protect the status before determination of the main suit or before determine rights of the parties.

He submitted that the second condition is qualified in the case of **Samwel Apollo Odielo vs Temeke Municipal Council**, Misc Land Application No. 87 of 2018 that there must be a proof by affidavit that any property in dispute is in danger of being damaged or alienated. He submitted further that in paragraph 9 of their affidavit they explained the action of the respondent cutting down trees which was planted 1950s will cause irreparable loss as the trees are almost 70 years old so it is difficult to replace a 70 years old tree. Further in paragraph 11 of respondent counter affidavit, the respondent admitted to cut tree in a continuous tense, that means he is still cutting.

On the third and last condition is the probability of loss to either party when the prayer is not granted should be looked upon. On this he submitted that the applicant will suffer loss as there is application pending in this court as DLHT did not determine the fate of parties as no person was declared a winner at the district land and housing tribunal. To him, he submitted that it might be the respondent has no rights that's why he decided to cut trees and is obvious on balance of probability it is the applicants who will lost if the action will be stopped.

Submitting on reply by the respondent he said in paragraph 9 of his affidavit there is an attachment of case which was corrected by hand marked "MP3". However, the attachment is the judgment of the case of 1964 which has no connection with the application at hand. Further he submitted that there is no description of land involved neither demarcation of the disputed land so as to know if it was the same area involved in this application. To bolster his submission, he cited the case of **Martin Fredrick Rajab vs Ilemela Municipal Council** and another, Civil Appeal 197 of 2019 CAT was of the position that size of the disputed land, location and boundaries should be revealed in any dispute.

Counsel prayed the attachment to be expunged or else this court to find the respondent slept over his rights as the execution was supposed to be done within 12 years but it is now 59 years since judgment. Further Mr. Bwana failed to submit on paragraph 5 of counter affidavit as he had no copy and prayed this court to read through the attachment and there is false statement or information to act on that as per law and he did not submit on dismissal as there is special application for that. While requested their affidavit to be adopted, he prayed this court to grant their prayer, to

restrict respondent from cutting trees with costs as the respondent contest the prayer.

Objecting the application, Respondent filed counter affidavit and argue on second and fifth paragraph of his affidavit he was of the submission that administratorship of the applicants were cancelled via Misc Civil application No. 12 of 2021 at Tarime District Court where applicant sued the respondent.

He further said when the judgment of the DLHT was delivered on 24/7/2023 thereafter he applied for proceedings and started to cultivate in the disputed land as the process of execution of the decree. Two months later he informed there is no case at High Court. He acknowledged that he pruned trees as part of preparation of the farm which he owned since 1964. He insisting he did not cut trees rather he was pruning them but he has stopped when he was informed there is a case at this court. Respondent further informed this court that he has cultivated all ten acres and protest to be restricted from entering into my farm to take care of his crops.

On demonstrating protest over this application, he submitted that trees were unattended since 1965 so he was attending his trees to make them produce more crops especial cashewnuts trees which need to be pruned so as to produce more cashewnuts as the trees were not attended for long time as the farm was abandoned while insisting that the areas belongs to him.

In testing the conditions as submitted by counsel for applicant he said if it will be proved that area does not belong to him, he will compensate the applicant and therefore prayed this court not to issue temporary injunction and dismiss the application with costs.

During rejoinder, Mr. Obwana said the respondent has abandoned his own affidavit and argue things which is not in his affidavit. Basing on the principle that parties bound by their pleadings, he prays this court to notice that their prayer was not objected and the respondent acknowledge that he is cutting trees and the area was abandoned.

Principle guiding issuance of injunction is propounded in the cases of **Atilio Vs. Mbowe (supra)**, **Giela vs. Cassman Brown & CO. LTD (1973) E.A**

358, and **Gazelle Trucker Ltd vs. Tanzania Petroleum Development Corporation**, Civil Application No, 15 of 2006. The said principle is:

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.

From the applicants' submission I find there is Misc Land Application No. 93 of 2023 which is scheduled for hearing on 19 February, 2024 before this court, as indicated at paragraph 7 of the applicants' affidavit and counsel's submission. As respondent has started to cut down trees in the disputed land as elaborated at paragraph 9 of the affidavit, value of the disputed land will depreciate and respondent disturb the status while there is still a matter in court of law for determination and the action by respondent is irreparable as deponed.



On the other side, respondent confirm to cut trees as he calls it pruning trees which was planted in 1965. Both of them are aware that there is a pending matter in this court. However, respondent submitted that applicants' appointment as administrator was cancelled by Misc. Civil Application No. 12 of 2021 at Tarime District Court, ruling was attached under paragraph 6. I have read the said ruling and find it has no contents of that kind. Appointment was not cancelled as presented by respondent. This court finds greater hardship may be suffered by applicants than respondent if the prayer will not succeed.

I am of the firm view that this application is fit for an order of temporary injunction to be granted for all the three elements for granting temporary injunction have been succeeded. In the event therefore, status has to be maintained, respondent is restricted from cutting down/pruning trees pending determination of Misc. Land Application No. 93 of 2023 I make no order as to costs.

It is so ordered.




M. L. KOMBA

JUDGE

05 February, 2024