

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF SHINYANGA
AT SHINYANGA**

CIVIL CASE NO. 07/2023

EMMANUEL KIDENYA.....	1ST PLAINTIFF
MANASE MAJANJA.....	2ND PLAINTIFF
JOHN LAZARO.....	3RD PLAINTIFF
SAFARI KISMAT.....	4TH PLINTIFF
RUBEN JOLAM.....	5TH PLAINTIFF
SALUM SIMA.....	6TH PLAINTIFF
HALIDY ALLY.....	7TH PLAINTIFF
ISACK NKANGA.....	8TH PLAINTIFF
FLANO MASANJA.....	9TH PLAINTIFF
GALIDI MISALABA.....	10TH PLAINTIFF
SHABAN HAMISI.....	11TH PLAINTIFF
HARUNI MADUHU.....	12TH PLAINTIFF
SAMUEL EDWARD.....	13TH PLAINTIFF
ALPHONCE PAUL.....	14TH PLAINTIFF
YUSUPH KALAMU.....	15TH PLAINTIFF
BUNDALA SHINYONGA.....	16TH PLAINTIFF
FADHILI NYAVYUMA.....	17TH PLAINTIFF
SHIGELA NKOMELA.....	18TH PLAINTIFF
SULTAN SAIMON.....	19TH PLAINTIFF

VERSUS

KIKUNDI CHA MKOMBOZI	
NYALIGONGO-MWAKITOLYO.....	1ST DEFENDANT
ALICFRA MINING CO. LTD.....	2ND DEFENDANT

RULING

7th December, 2023 & 1st March, 2024

MASSAM, J.:

This is the ruling in respect of the point preliminary objection raised by the counsel for the 2nd defendant to wit:

- i. That, the Honourable Court has no jurisdiction to entertain this case.

During the hearing of the raised point of preliminary objection, which was done by way of written submission, Mr. Phares Focus Malengo, Learned Counsel represented the 1st defendant, Mr. Angelo James Nyaoro, learned counsel represented the 2nd defendant and Mr. Geoffrey M. Tuli, and Ms Marina Mashimba learned counsels represented the plaintiffs.

Submitting in support of the point PO, Mr. Malengo submitted that as per **Section 119, 120 and 121 of the Mining Act**, Cap 123 R.E 2019 all disputes arose between the persons who are engaging in prospecting or mining operation and other third parties like the defendants here needs to be determined as an extra-judicial remedy and the same is done by Mining Commission. He submitted further that the disputed between parties herein falls under the ambit of **Section 119** of Cap 123 R.E 2019 as the dispute between the parties is on the boundaries and whether the joint venture agreement restrict the plaintiff from conducting their activities in their respective sites. He referred this court to number of cases including the case of **Parin A.A Jaffer & Another v. Abdularasul Ahmed Jaffer & 2 Others** [1996] TLR 110 and **Jerome Kessy v. Ardhi University**, Civil Appeal No. 352 of 2021, (CAT at Dar es Salaam-Unreported) where the court insisted the need of

exhausting internal remedies instead of approaching to the court. So, he prayed for the PO to be sustained and the suit be dismissed with costs.

On his side, Mr. Angelo James Nyaoro counsel for the 1st defendant added that the matter ought to be referred to the Commission for Mining Resolution before filing the same before this court. thus, as the Commission has yet determine the dispute between the parties herein, this suit is improperly before this court. He referred this court to **Section 119** of Cap 123 R.E 2019 and the cited the case of **Jumanne Leonard Nagana @ Azori Leornard Ngana & Another v Republic** (Criminal Appeal 515 of 2019) 2021 TZCA 650 (4 November 2021) where the court of appeal cited with approval its decision in **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda & 20 Another**, Civil Appeal No. 8 of 1998 (Unreported). He also prayed for the suit to be dismissed for want of jurisdiction.

Opposing the raised point of preliminary, Mr. Geoffrey Tully submitted that since it was the 2nd defendant's counsel who raised the Preliminary objection, the 1st defendant had no right to file any submission supporting the raised point as he did, he said it is improper and if he wishes to support the same he could do that when replying to the submission in chief filed by the counsel for the second defendant.

So he prayed for the same to be expunged from the record. He added by stating that the counsel for the second defendant stated that the honourable court has no jurisdiction to entertain this matter as per section 119(1) of the mining Act cap 123 R.E 2019 and the matter ought to be referred to the commissioner for mining for resolution, so the same was improperly filed to this court. He added that it is true that the dispute is between the parties engaging in mining operations but the same does not fall under **Section 119 (1)** of Cap 123 R.E 2019. He added that the dispute centred between the legality of the defendant's decision to enter into a joint venture agreement for gold mining activities with the 2nd defendant over the area owned by the 1st defendant under primary Mining Licence Number PML0064SHY entered on 3rd April 2023. This is based on paragraph 5 to 16 of the plaint.

He referred this court to the case of **Jackson Nyaachoa v. Higira Zablon and Two Others**, Civil Appeal No. 31 of 2022 quoted with approval in case of **Suzana Pius Karani v. Godisten Mbise**, Civil No. 14 of 2019 (HC at Mbeya, Unreported) where the court held that the disputed to be determined by the Commission listed under (1) (a-d) which includes disputes on boundaries or erection, cutting, construction and use of facilities listed under subsection (1) (b). Thus, he prayed for the PO to be overruled and be dismissed with costs.

Having gone through the rival submission from the counsels for the appellants and the defendants, this court will now determine the merit of the raised PO.

Starting with the issue raised by the counsel for the plaintiff that it was improper for the 1st defendant's counsel to reply on the PO raised by the counsel for the 2nd defendant and prayed for the same to be expunged from the records. With due respect, to the counsel for the plaintiff, there is no law that prohibit another counsel of the same parties to reply on the PO raised by another counsel as they were both supporting the raised PO. For that reasons prayer of expunging the submission made by the counsel for the 1st defendant is not granted.

Regarding the PO raised by the counsel for the 2nd defendant which relied on **Section 119 of the Mining Act**, Cap 119 R.E 2019 that this court has no jurisdiction to entertain the suit. The said provision provides that:

"(1) The Commission may inquire into and decide all disputes between persons engaged in prospecting or mining operations, either among themselves or in relation to themselves and third parties other than the Government not so engaged, in connection with-

(a) the boundaries of any area subject to a mineral right;

(b) the claim by any person to be entitled to erect, cut, construct, or use any pump, line of pipes, flume, race, drain, dam or reservoir for mining

purposes, or to have priority of water taken, diverted, used or delivered, as against any other person claiming the same;

(c) the assessment and payment of compensation pursuant to this Act; or

(d) any other matter which may be prescribed."

However, having revisited the plaint filed by the plaintiff herein their disputes based on the joint venture entered between the 1st and 2nd defendant without the consent of the members. For easy of reference I will quote paragraph 4 of the plaint that reads:

"That the plaintiffs' claim against the defendants is for a declaration that the first defendant's decision to enter into a joint venture Agreement for Gold mining activities in the area owned by the first defendant is unlawful. A declaration that the mining joint venture Agreement (Mkataba wa Ubia wa Uchimbaji) entered by the first and second defendants on 3 April 2023 is unlawful, and for a permanent injunction order retraining the second

defendant from conducting any mining activity on the area owned by the first defendant under Primary Mining Licence Number PML0064SHY."

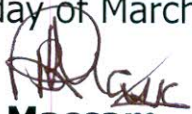
Thus, the dispute under the cited paragraph does not fall under Section 119 of the Mining Act as alleged by the counsel for the defendants. The agreement that paragraph 5 establish the issue of boundaries is an afterthought as the plaintiff were trying to explain how they will be unable to proceed with their work after the said agreement between the 1st and 2nd defendant and the same cannot establish the dispute claimed by the parties herein.

In the final analysis and for the foregoing reason, the raised PO by the counsel for the 2nd defendant is hereby overruled. The matter to proceed for hearing on merit.

It is so ordered.

DATED at SHINYANGA this 1st day of March 2024.




R.B. Massam
JUDGE
1/3/2023