

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT TANGA

MISCELLANEOUS LAND CASE APPLICATION NO. 52 OF 2013

DENWILL MINING SERVICES LTD:.....APPLICANT

VERSUS

ALLY MSAMI AND 13 OTHERS.....RESPONDENTS

RULING

Rugazia, J.

The applicant filed an application for a temporary injunction which was, however, met with preliminary objections. The said objections are that:

- 1. The affidavit in support of the application is defective as it contravenes rules on affidavit as it contains legal arguments and prayers*
- 2. The verification clause is defective*
- 3. The application is unmaintainable and it contravenes the court's procedure.*

In their submissions in support of the first preliminary objection the respondents made reference to Order XIX Rule 3(1) of the **Civil Procedure Code Cap. 33 R.E. 2002** which says

*(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted.*

Parts of the said affidavit said to contain legal arguments were highlighted as. *"illegal intruders," "contrary to the mining safety laws and explosive regulations", ".....explosive items and violation of the mining regulations" ".....two local illegal artisanal miners" ".....respondents have no rights whatsoever to invade the applicant's licensed mining area....."*

In addition to the foregoing, the respondents pointed at paragraph 11 in which, it is alleged, the applicant used legal arguments which the court should consider in granting the application. Also that, para 12 contains prayers. In view of this I was referred to the oft-cited case of **Uganda vs**

**Commissioner of Prisons ex-parte Matovu** (1966) E.A. 514 where it was stated;

*...as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statements to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion"*

It was stated by the respondents that since the affidavit is defective, it is as good as if the application is unsupported.

Submitting in respect of the second preliminary objection, it was stated that the verification clause is not dated, signed or showing the place where the verification was made contrary to the rules of pleadings. Reference was made to Order VI rule 15 (3) of the- *Civil Procedure Code, Cap. 33 R.E.*

2002 which provides for Verification to be signed by the person making it and to state the date on which and the place at which it was signed.

The respondents asserted that the affidavit in this case does not comply with the above requirements. Further submission was that the *Jurat* which is properly signed and follows immediately after the Verification is not part of it. What is meant here is the insistence that the Verification has to comply with the mandatory requirements of Order VI Rule 15 of the Civil Procedure Code.

In rebuttal, the applicant asserted that there was nothing wrong with the Verification clause because subject to the applicant's affidavit filed, all mandatory requirements under Order VI rule 15 (3) of the Civil Procedure Code have adhered (*sic*). It was contended that the deponent signed the affidavit and he shows when and where.

- This limb of the preliminary objection should not detain us longer. It is apparent that neither of the parties knows what a pleading is which could

tell us why reference was made to Order VI of the Civil Procedure Code which deals with pleadings. Affidavits are covered under Order XIX of the Civil Procedure Code and, with unfeigned respect, an affidavit is not a pleading as often confused by some of us. It has better be referred to as a document filed in court but certainly not a pleading. The definition of "*Pleading*" which curiously escaped the attention of the parties is to be found under the same Order VI rule 1 of the Civil Procedure Code it is defined as:

*"Pleading" means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII.*

Going to rule 13 of Order VIII which is referred to, you will find that what is contained there is a defence to a set-off or counter-claim and reply to the written statement of defence. Thus, as it is evident, nowhere under these two Orders i.e. VI and VIII is the Affidavit referred to.

What this means, therefore, is that the preliminary objection is misconceived having been raised under wrong premises. It is found to have no merit and dismissed.

Turning to the third preliminary objection, it was contended that the application before the court is vague and untenable as the applicant in his chamber summons is praying for an interim temporary injunction Order pending hearing and final determination of this application **ex-parte** on the one part and the court be pleased to issue a temporary injunction order against respondents pending the hearing and final determination of this application **inter-partes** on the other part. The respondents contended that before this court there is Land Case No.3 of 2013 so this application should have been made within the main case. It was finally submitted that basing on the above arguments the application be dismissed with costs.

In rebuttal in respect of the first preliminary objection, the applicant submitted that all what has been pointed out as being offensive are facts and not legal arguments. It was contended that all what is referred to as

legal arguments are statements describing what is happening on the ground and the infringement committed by the respondents. In paragraph 11 of the affidavit, it was submitted, the applicant stated a summary of five reasons that call for necessary court intervention by way of temporary injunction.

The applicant asserted that what is contained in paragraph 12 of the affidavit does not amount to prayer but makes reference to the chamber summons. It was further noted that unlike the position in *Ex-parte Matovu case (supra)*, the affidavit now before the court does not offend the law. The applicant implored the court, in the event it is found that paragraph 12 contains a prayer, to strike it out. It was pointed out that the affidavit by Abubakar Kakyma Mayanja in Matovu case contained legal arguments and it incorporated specific articles of the Constitution of Uganda as well as legislations such as the *Emergency Powers Act, 1963* and the *Emergency Powers (Detention) Regulations, 1966*. It was therefore proper for the court to consider that the deponent had made legal arguments in his affidavit. In the instant matter the applicant contended, stating that "*.....the respondents activities are contrary to the*

*mining and safety regulations.....*" is in no way legal argument but a fact. It was contended that there has been no argument or explanation in the affidavit, as to what those laws provide or the interpretation of the provisions that the respondents contravene or violate.

Turning to the third preliminary objection, the applicant submitted that the enabling provisions contained in the chamber summons are the ones which move the court to act in accordance with the law as well as any reliefs sought in the chamber summons. It was contended that the main requirement is the existence of the main suit, which there is even in this case. According to the applicant, their application is in order and there is a prayer for any other order that this honourable court may deem fit and just to grant. With this prayer, the applicant submitted that the court has powers to grant any other order which may be just not limited to grant of temporary injunction till the hearing and determination of the main case.

Let me tackle this last point of preliminary objection before I move on to the first. According to the applicant, the court has to be moved by the



enabling provisions contained in the chamber summons to grant what is sought. What this can be interpreted to mean is that there is almost no need for prayers which in my view is a misconception. It is wrong to leave it to the court to read through the enabling provisions contained in the chamber summons to grant a relief. It is upon a party to make a prayer before the court having moved it through proper provisions. It would be improper, so I think, for the court to take it upon itself and grant what has not been prayed for.

In the instant case, the applicant has prayed for a temporary injunction order pending the hearing and final determination of the application *ex-parte* and also grant of the temporary injunction order against the respondents pending the hearing and final determination of the application *inter-partes*. What this scenario means is that there will not be any temporary injunction in existence once the application is disposed of which is strange. The usual practice has always been to pray for grant of a temporary injunction pending the hearing and final determination of the main suit. I find it a new development for an applicant to pray for an injunction to last the duration of the application itself.

In view of the foregoing, I join hands with the respondents that the application is vague and it cannot be allowed to stand.

On the first preliminary objection, it is contended that the affidavit accompanying the application is defective for containing arguments and prayers. Admittedly, some of the paragraphs in the affidavit contain extraneous matters by way of arguments, opinions and conclusions. A perusal of paragraphs 4 and 5 would tend to fortify this view. Para 4 says:


*"4 That sometime in March 2011 the Respondent illegally intruded and trespassed into the Applicant's licensed area without the Applicant permission and started conducting inexpert mining activities by using explosive items contrary to the mining safety laws and explosive regulations"*

*And this is what paragraph 5 says in part;*


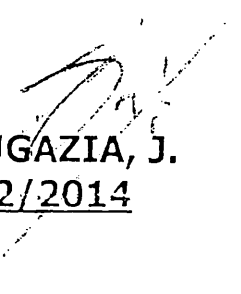
*5"5. That apart from infringing the Applicant's rights to the property, the inexperienced mining activities conducted by the Respondent have been endangering public health and security due to unskilled use of explosive items and violation of the mining safety regulations....."*

Undoubtedly, the above are arguments, opinions and conclusions. Even paragraph 7 is not spared for it says that the respondent's actions have serious impact into the applicant's business and property as they erode all the established gold reserve. Surely this is an opinion.

All in all, the said affidavit is bad in law and cannot meet the standard set out in the **Ex-parte Matovu** case (*supra*). That said and found, the application ought to and it is indeed struck out with costs.

  
**P.A. RUGAZIA, J.**  
**07/02/2014**

Ruling delivered. Mr. Mgongolwa for applicant. Respondents absent.

  
  
**P. A. RUGAZIA, J.**  
**07/02/2014**

