IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO 03 OF 2023

NEEMA NYERERE ..... 1ST APPLICANT

NYAMSERA MWITA ..... 2ND APPLICANT

PILISIKA KASHINJE ..... 3RD APPLICANT

JOSEPH KIGOPA ..... 4TH APPLICANT

MATARE SARYA ..... 5TH APPLICANT

PATRICK MAJANJARA ..... 6TH APPLICANT

JEMSI WANZAGI ..... 7TH APPLICANT

DAUDI MIRENGARE ..... 8TH APPLICANT

RASHID MBARAKA ..... 9TH APPLICANT

ABDALLA RASHIDI ..... 10TH APPLICANT

NOAH SHAGA ..... 11TH APPLICANT

ANNA AULELIYO ..... 12TH APPLICANT

SHOMA KIJA ..... 13TH APPLICANT

ABEDI BENDICTOR ..... 14TH APPLICANT

HAMIS WANANI ..... 15TH APPLICANT

KALINDO AULELIYO ..... 16TH APPLICANT

MHOJA NYERERE ..... 17TH APPLICANT

JUMA MAKUMU ..... 18TH APPLICANT

SELEMANI JAMES ..... 19TH APPLICANT

IKONGORA MGENDI ..... 20TH APPLICANT

CALOGERO DRAGO ..... 21ST APPLICANT

FATUMA MANYAKI ..... 22ND APPLICANT

PETER NAFTARI ..... 23RD APPLICANT

ISAYA JACKSON ..... 24TH APPLICANT

MANGU MAKARANGA ..... 25TH APPLICANT

WANZITA WANANI ..... 26TH APPLICANT

MKONGWE MAGESA ..... 27TH APPLICANT

JOYCE SEKENYA ..... 28TH APPLICANT

JOSEPH ANDREA ..... 29TH APPLICANT

PAUL DANIEL ..... 30TH APPLICANT

VERSUS

TANZANIA FOREST SERVICES AGENCY ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

6th & 10th Feb, 2023

F. H. Mahimbali, J:.

The applicants in this case are about to be evicted from their alleged lands on allegation that they have invaded the reserve land for forest and dam activities. To safe guard their interests against the respondents for their geared desire of evicting them from the said land, they protest the claim and maintain a position that the said land is theirs, and that have expressed their desire of suing the defendants. Thus, pending the filing and hearing of the intended suit to be filed against the respondents (upon expiration of the 90 days statutory notice), the applicants have filed this application seeking for temporary injunction orders that:

1. Status quo be maintained pending hearing and determination of the suit to be filed upon expiry of the 90 days' statutory notice.

2. Restraint order be issued against the respondents or their agents, servants or employees from doing any act, eviction or destruction into suit land pending the hearing and determination of the suit to be filed upon expiry of the 90 day's statutory notice.

The said application has been resisted by the respondents amongst others on preliminary objection that the affidavit accompanying the application is defective for being sworn by unauthorised deponent.

The hearing of the application and the preliminary objection was done simultaneously. In essence, Mr. Kitia learned state attorney for the respondents argues in his submission that, since this is a fresh application in Court (Mareva application), it was necessary for the applicants themselves to swear and file affidavits/joint affidavit in support of their application. To the contrary, as the applicants have not deponed anything in respect of their application, all that done by Mr. Cosmas Tuthuru learned advocate on their behalf is nothing but hearsay

which then cannot mount good evidence. He added that normally, a learned advocate will only swear and file an affidavit on behalf of his clients on matters of law only in which he knows. In any way, he cannot make affidavit for matters he is informed by his clients. On those facts purely known by clients, the learned advocate cannot give his affidavit but the applicants themselves. In support of his position, Mr. Kitia invited this Court to be guided by the position set in the following cases: **Lalago Cotton Ginnery and Oil Mills Ltd vs Loans and Advances Realization Trust,** Civil Application No 80 of 2022 (unreported), **Joseph Peter Daudi and Another vs Attorney General and 3 others**, Misc. Land Application No 447 of 2020, High Court Dar es Salaam at page 6 and 7, made reference to the above cited cases to maintain the legal stand.

He emphasised that the deponent of the facts must be custodian of it. In the current case, all facts not in the knowledge of the deponent must be expunged. If that is done, then the remaining task is one, whether they can make the application stand still. Going by this application paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 are facts dully owned by clients and thus hearsay to learned advocate. In the circumstances of this case the only facts in the possession of the learned

advocate are paras 13 and 14. Thus, the learned advocate was not legally justified to swear and file affidavit on behalf of his clients. This being a fresh application, the facts of the case are better known by the applicants themselves and not learned advocate. On this, the dully sworn and filed affidavit is legally defective insisted Mr. Kitia. If the vital facts are expunged, there is nothing material to hold the application. Therefore, the application be struck out with costs.

On the other hand, Mr. Cosmas Tuthuru learned advocate for the applicants classified the preliminary objection as being baseless and pre-empting to the application. In his understanding, there is no law that prohibits an advocate to swear and file an affidavit for his client and that order XIX, Rule 3 (1) of the CPC is clear on that position.

He added that this being an interlocutory application, he is confident that under order XIX, Rule 3 (1) of the CPC is supportive on what he has done. He expounded that in this affidavit he has stated what matters are in his own knowledge and what he was told by his clients (With paras 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are information obtained from his clients in which it is supplemented with the affidavit by one Hamis Wanani (applicant)). To buttress his position, he made reference to a decision in the case of **Adnan Kitwana Kondo and 3**

others vs National Housing Corporation, Civil Application No 208 of 2014, saying that the defectiveness of the affidavit was not centred by it being sworn by advocate but for non-disclosure of the source of information. Thus, with this case, he is confident that his affidavit on behalf of his clients is proper as per law and it discloses the source of information and that it is accompanied by the affidavit of material witness – Hamis Wanani (15th applicant in the case). Therefore, it is distinguishable in the circumstances of the case. The decision of Hon. Maghimbi J, in the case of J**oseph Peter Daudi and Zulf Seif Mtulia** (supra) he considered it as per incuriam decision in line with order XIX, rule 3 (1) of the CPC. Since the affidavit of Hamis Wanani is not countered, then the facts there in are deemed proved.

As to how the affidavit of the case should look like, Mr. Tuthuru made reference to the case of **Jacqueline Ntubaliwe Mengi and 2 others vs Abdiel Regional Mengi and 5 others,** Civil Application No 332/01 of 2021 at page 11, which defines an affidavit as:

> *".....statement as the deponent is able of his own knowledge to prove but in certain cases may contain statements of information and belief with grounds thereon...".*

Mr. Cosmas added that in the current application, there is nothing offensive and it is not inconsistent with any law. Therefore, this application is properly supported by a valid legal affidavit.

With the merit of the application, he prayed that what is prayed in the chamber summons be granted as per affidavits in place in which he prayed that the same be adopted by the court. In addition, he argued that what is contested is not true. Since there is no any compensation done as per law, the applicants will be landless with no home, no agricultural land and neither pastoral land.

As who is the owner of the land, he argued that the main case to be filed will deliberate on that (see **Kurindo Binyiro vs Tanzania Forest Reserves Agency and AG,** Misc. Land Application No 28 of 2022, High Court Musoma at page 7). He further added that in the case of **Theodora K. Mtejeta and 8 others vs Tanzania Sisal Board and AC**, Misc. Land Application No 32 of 2020 (at page 9) arguing that it was emphasized that what is important in such an application at this juncture is whether in the considered view of the material facts, there is a question of law for court's consideration in the pending suit. With all this he prayed that the application be granted as prayed.

In reply to the submission in opposition of the preliminary objection, Mr. Kitia argued that in a full digest of the submission and cited authorities, the circumstances of this case are different from the scenario of the cases stated by the learned advocate. He insisted that this being a fresh application for serious issues, in the circumstances of this case, the advocate ought not to have sworn such an affidavit. Where there are no case materials to read such as the current application, prudently must be fully deponed by the applicants themselves. Thus, the affidavit of Hamis alone, is deficient of material, argued Mr. Kitia.

With the cited case of **Jacqueline Mengi,** he argued that it is clear that advocate can swear and file an affidavit on behalf of his client/s but it is not an exclusive right. There are limitations as elaborated in the above cited case. Even the referred order XIX, rule 3(1) has not given an advocate such an exclusive right of swearing and filing affidavit on behalf of his clients. Therefore, this application is bad in law for want of good affidavit.

With the merit of the application, he opposed the application on the basis that the area in which the applicants have been barred from use, is legally protected as Forest Reserve since 1984. It is surveyed and

gazetted as GN. 700 of 28th August, 2020. Therefore, it is a protected area. The applicants' land as per this application is not descriptive as what part of their land is actually within the Forest Reserve.

With the affidavit of Hamis, he challenged it by not diclosing the source of his information and is irrelevant to the case at hand as to what extent has the said reserve land affected them. To the contrary, it is the applicants' human activities that extensively affect the existence of the reserved Dam for the benefit of the whole Community if left to proceed. As the said Dam serves for the three villages, these 30 applicants cannot override the rights of the rest if the villagers (in three villages).

He added that, each case must be decided by its own facts. In the cited case of **Kurindo Bunyirika vs Tanzania Forest Services Agency and Attorney General** (supra), its circumstances are different from the case at hand. Since there is no proof of anyone living there, prohibition of the applicants continue human activities at the said area is proper for the vast welfare of the area for their wellbeing and survival.

In his rejoinder submission in support of the application, Mr. Cosmas Tuthuru contested all that has been submitted by the respondents' attorney. He clarified that, all that deponed by the

respondent's officer (Hafidh) is falsity as the Government Gazzete No.35 of 2020 published on 28th August, 2020 does not contain the said Publication (He supplied the copy of it to that effect). Since any declaration of the said land as forest or reserve land ought to be in compliance with the law, there is nothing established in this application so far. On that basis, he humbly prayed that this application be allowed with costs.

In consideration of the preliminary objection raised, I will first as a matter of law deal with it before I venture into the merit of the application if need be. The important question for consideration is whether the affidavit in support of the application is valid for court's consideration. I say so, in consideration of the preliminary objection raised that so long as this is a serious application by the applicants that the said reserve land is theirs, the persons with material evidence in support of the application must be the applicants themselves and not the deponent advocate (for the applicants).

According to law, every formal application to Court must be supported by one or more affidavits of the applicant or some other person or persons who have knowledge of the fact. The important question to ask at this juncture first would be what is an affidavit?.

The Court of Appeal in the case of **Jacqueline Ntubaliwe Mengi and 2 others vs Abdiel Regnal Mengi and 5 others**, Civil Application No 332/01 of 2021 at page 11, while making references to the case of **The Director of Public Prosecutions v. Dodoli Kapufi andAnother,** Criminal Application No.11 of 2008 (unreported), gave a definition of affidavit in law as follows:

> *"A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths."* **Black's Law Dictionary, 7th Edition pg 58** or
>
> *"It is a statement in the name of a person called a deponent, by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is* ***able of his own knowledge*** *to prove but in certain cases may contain statements of information and belief with grounds thereon".* Taxman's LAW DICTIONARY,D.P. MITTAL at pg 138.

In that case, the Court went on to state the essential ingredients of any valid affidavit should include (i) *the statement or declaration of facts etc by the deponent; (ii) the verification clause; (iii) a jurat; and (iv) the signatures of the deponent and the person who*

in taw is authorized either to administer the oath or to accept the affirmation."

It should be noted that, apart from the ingredients stated above, the affidavits must be confined to facts and must be free from extraneous matters. This stance was stated in the case of **Chanda and Company Advocate v. Arunaben Chaggan Chhita Mistry and 2 Others**, Civil Application No.25 of 2013 (unreported) while adopting the decision in the case of **Uganda v. Commissioner of Prisons Exparte, Matovu** (1966) E.A. 514 where the East African Court of Appeal stated as follows:

> *"As a general rule of practice and procedure an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and the circumstances for which the witness deposes either of his own knowledge ... such affidavit should not contain extraneous matters by way of objection or prayer or legal arguments or conclusions."*[Emphasis added].

On top of that, the affidavit must be verified by the deponent on what is true based on knowledge, belief or information whose source must be disclosed in the verification clause.

These being important rules governing affidavits, the vital question now is whether an advocate can swear and file an affidavit in an

application such as this for his client/clients? In the case **Adnan Kitwana Kondo and 3 others vs National Housing Corporation**, Civil Application No 208 of 2014 while making reference to the case of **Lalago Cotton Ginnery and Oil Mills Ltd vs Loans and Advances Realization Trust**, Civil Application No 80 of 2022 the Court of Appeal of Tanzania made this finding on the position of an advocate swearing and filing an affidavit on behalf of his clients:

> *"An advocate **can swear and file an affidavit** in proceedings which appears for his client, but **on matters which are in advocates personal knowledge only**. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings."*

In my considered view, this should the correct position of the law as far as swearing of affidavits by advocates is concerned in which I must abide with by now. I say so, because in Tanzanian law, to the best of my knowledge there is no express legal provision providing or barning an advocate in swearing and filing advocates on behalf of his clients. We are thus guided by legal construction of order XIX, Rule 3 of the CPC. This is unlike other jurisdictions (such as Kenya), in which there is an

express provision stipulating for the same (see order XIX, Rule 3, 9 of the Kenyan Civil Procedure Code). Considering the nature of the current application, and the relevant paragraphs in which Mr. Cosmas Tuthuru assumes the role of a party to the application, it cannot be allowed to close legal eyes. What he did in this mareva application is beyond that is statutorily/legally allowed. Thus, he being both a hired hand and also an officer of the court, there must be a clear line of distinction between advocacy duties and client responsibility. In the current affidavit (material paragraphs 3, 4, 5, 6, 7, 8, 9, 10) in the circumstances of this case and for a fresh case, it is astonishing how an advocate could be such knowledgeable of the material facts of the case if not hearsay story or a party to the case. In his verification clause which is an important part of the affidavit, Mr. Cosmas says, I quote:

> *".....What is stated in paragraphs **1, 8, 12, 13 and 14** is true to the best of my knowledge save what is stated in paragraphs **2, 3, 4, 5, 6, 7, 9, 10 and 11** is information advised to me by the applicants which I verily believe to be true."*

Be it as it may, the strict reading of the said affidavital paragraphs, there is no any gain saying for the learned advocate to swear an affidavit in an application such as this. The legal prudence dictates in my

opinion, that an affidavit sworn by an advocate is limited only to facts which he/she is personally capable of proving on his own knowledge and does not disclose any issue necessitating his/her cross-examination is not flawed. (See **Kwacha Communication Limited and Another vs Pindorial Holdings Limited and Another Civil Appeal Case No E033 OF 2022 (2022 eKLR).** Since material facts in paragraphs 2, 3, 4, 5, 6, 7, 9, 10 and 11 is information advised by his clients, it was therefore necessary for the said applicants to swear their own affidavits. He may argue that the affidavit of Mr. Hamis Wanani supported his affidavit. I think that is a misconception. First, the affidavit of the said Hamis Wanani could not suffice the application of all the applicants as he was not suing on or for behalf of all applicants. Therefore, his affidavit if valid, only suited himself. Secondly, the said affidavit of Hamis Wanani does not legally qualify to be a valid affidavit as per law as valid affidavit must contain the following important features: (i) the statement or declaration of facts etc by the deponent; (ii) the verification clause; (iii) a jurat; and (iv) the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation (See **The Director of Public Prosecutions v. Dodoli Kapufi and Another, Jacqueline**

Ntubaliwe Mengi and 2 others vs Abdiel Regional Mengi and 5 others (supra)). In the current affidavits in dispute, there is no full compliance to the rule. I say so, because the affidavit in which the said Hamis Wanani deponed has this verification clause:

" *.....And I make this solemnly declaration conscientiously believing the same to be true and accordance with the provisions of the Oaths (Judicial Proceedings) and Statutory Declaration Act, Cap 34 R.E 2002".* I wonder if this can be said to be the valid verification clause as per law. It is a new invasion of Mr. Cosmas Tuthuru, learned advocate. So, if one is to ask where is the source of information of all that is stated in the said affidavit, the reply is: go to the provisions of the Oaths (Judicial Proceedings) and Statutory Declaration Act, Cap 34 R.E 2002. That said, the affidavit by Hamis Wanani is expunged from record for being defective, whereas that of Mr. Cosmas Tuthuru becomes insufficient of material for overstating facts which the same lack evidentiary value in legal eyes. It is merely hearsay.

All this said and done, I am satisfied that what the advocate deponed in this application is legally not backed up by any material evidence from his applicants. To say otherwise, the learned advocate assumed the role of a client in himself instead of being an advocate. As

he exceeded the limit and that is otherwise not legally backed up, the application by the applicants remains an empty shell which is devoid of any merit consideration. The application is thus dismissed with costs for want of proof.

DATED at MUSOMA this 10th day of February, 2023.

F.H. Mahimbali

Judge

Court: Ruling delivered this 10th day of February, 2023 in the presence of Neema Mwaipyana, state attorney and Mr. Kelvin Rutalemwa, RMA. Applicants are absent.

F. H. Mahimbali

JUDGE