

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND CASE NO. 5/2008

MUSHUTI FOOD SUPPLY CO. LTD ----- PLAINTIFF

VERSUS

CRDB BANK LIMITED

KIMBEMBE AUCTION MART

ZULFIKAR ESMAIL NANJI



----- DEFENDANTS

RULING



19/3/2018 & 18/5/2018.

Kairo, J.

This ruling resulted from the preliminary point of law raised orally by the Learned Counsels representing all of the parties with regards to the jurisdiction of this court to determine this matter. The dispute is traceable since year 2008 with a history of parading in various court registries since its institution. It appears that demon is not through yet.

It all started when the Plaintiff instituted a suit at the High Court, District Registry of Kagera at Bukoba which is land case No. 5/2008 disputing the action of the 1st Defendant to sale the mortgaged property charged as security against the loan extended to the Plaintiff by the 1st Defendant. The 1st Defendant alleged to have been exercising the right of sale under the mortgage after the Plaintiff failed to repay the extended loan. The 1st Defendant instructed the 2nd Defendant to auction the property which situate in Mwanza city and the 3rd Defendant emerged the highest bidder. For undisclosed reason, the case file was transferred to the High Court Dar es salaam (Land Division) wherein the suit was dismissed on preliminary points of objection raised. The Plaintiff was aggrieved and decided to appeal to the Court of Appeal to challenge the said decision. The Court of Appeal *suo mottu* questioned the jurisdiction of the High Court DSM (Land Division) to hear and determine the matter which was originally instituted at Bukoba High Court. After inviting the Advocates to address the court on the point, the Court of Appeal made a finding that since the proceedings of the case appealed against were conducted at the High Court (Land Division) at Dar es salaam without an order transferring the case thereto, the conduct of the case breached the provision of sub rule (4) of Rule 7 of the High Court Registries Rules: GN No. 164/1971 as amended from time to time (High Court Registries Rules), the omission which vitiated the proceedings as a result. The Court of Appeal further resolved that, the appeal was also incompetent as the notice of appeal indicated that the Appellant therein intended to appeal against the decision of the High Court (Land Division) at Dar es salaam in land case No. 5/2008 which citation was incorrect because the case retained the identification number of the High Court (Land Division) at Bukoba. The Court of Appeal thus on 29/03/2016 in exercising

its revisionary powers conferred on the court by section 4 (3) of AJA, quashed and set aside both the proceedings and the decision of the High Court (Land Division) Dar es salaam. It further ordered the record be returned to the High Court (Land Division), Bukoba for the case to proceed from the stage where it ended.

On its return, the High court Bukoba found that only Plaintiff was filed at Bukoba Registry. It thus ordered service of summons to the Defendants to enable them file their defenses. They all filed the same as ordered.

The Plaintiff was being represented by Advocate Lameck John Erasto, the 1st and 2nd defendants were jointly receiving representation services of Advocate A. Kabunga while the 3rd Defendant was being represented by Advocate Mutalemwa. When the matter was placed for mention before the presiding Judge for necessary orders, Advocate Lameck for the Plaintiff informed the court that after consultation with his fellow Advocates representing other parties, they unanimously came to the conclusion that this court is not clothed with jurisdiction to hear and determine the case concerning an immovable property situate in Mwanza city, being it within the mandate of another High Court Registry. He further told the court that he accordingly informed his client but he objected insisting that the High Court Bukoba has the jurisdiction to entertain this suit. However knowing the position of the law and being an officer of the court with the obligation to assist the court to reach at a just decision, he felt that he will not discharge the said duty nor will he do justice to his client if he continues representing him. They eventually agreed to disagree and decided to withdraw from representing him in this case and allow him to find another Advocate. He

further decided to bring the observed jurisdictional issue to the attention of the court for its determination.

The other two Advocates together with Mr. Mathias Mshuti who is a principal officer of the Plaintiff conceded to what has been submitted by Advocate Lameck to be the position. They further didn't object the prayer by Advocate Lameck to withdraw from representing the Plaintiff in this matter.

The court having heard their submission granted the prayer by Advocate Lameck to disqualify himself from representing the Plaintiff. Further it invited the parties to address the court on the point of law raised so that the court can determine as to whether or not it has jurisdiction to preside over this suit.

Advocate Mutalemwa told the court that since the question of jurisdiction is a point of law which the Plaintiff might not be in a position to address it being a lay person with no legal representation currently, he prayed the court to avail him time to find another advocate and further allow this matter be disposed by written submissions to enable the Plaintiff get legal assistance from another advocate. Both the Plaintiff and Advocate Kabunga agreed to the prayer by Advocate Mutalemwa to have this matter disposed by written submissions. The court granted the prayer and by consensus, a schedule to the filing of the written submissions on the point of law raised was drawn to which the parties adhered to accordingly.

As earlier pointed out, both Advocate Kabunga and Mutalemwa had the common view that this court has no jurisdiction to entertain this matter, as such even their submissions are almost similar and the court will illustrate them together hereunder to avoid repetition.

Advocate Kabunga argued that it is trite law that the court has to make an enquiry *suo mottu* before venturing into hearing any case so as to ascertain as to whether or not it has the jurisdiction to preside over the matter. He cited the case of *Tanzania Revenue Authority vrs Kotra Co. Ltd Civil Appeal No. 12.2009 CAT Dar es salaam* which at page 8 quoted with approval the case of *Fanuel Mantiri Ng'unda vrs Herman Mantiri Ng'unda & 20 others ; Civil Appeal No. 8/1995 CAT* (unreported) to bolster his argument.

In the same vein he invited this court to enquire as to whether the High Court of Tanzania Bukoba Registry is vested with jurisdiction to hear and determine the matter arising from an immovable property which situate in Mwanza. Both counsels were convinced that this court lacks jurisdiction to entertain the case and stated that they are so fortified by the provisions of section 14 (a) of the CPC Cap 33 RE 2002 which stipulates that suits concerning immovables shall be instituted where the subject matter situate.

Both Advocates further submitted that the reliefs prayed by the Plaintiff as per plaint (recovery of the disputed land, a declaration that the sale of the suit land was irregular and was undervalued, the order that the sale of the suit land be re-conducted at the market value or alternatively the Plaintiff be allowed to refund the purchase price and retain his property) make reference to the landed property which situate in Mwanza city, the location which is outside the local geographical jurisdiction of this court. Advocate Kabunga added that the provision used the word "*shall*" which under section 53 (2) of the Interpretation of Laws Act No. 1 RE 2002 means mandatory.

He concluded that the provision has therefore put a mandatory requirement that for the suit of recovery of an immovable property be instituted in the local limits of whose jurisdiction the property is situate. Thus this suit was to be instituted at Mwanza High Court Registry.

Advocate Mutalemwa went on to submit that though the Land Disputes Court Act Cap 216 RE 2002 doesn't have a provision for determining where the instant land case is to be instituted but section 51 (1) of the Act provides a resort to CPC Cap 33 (supra) as a fall back and that is the essence of the reliance to section 14 of the CPC. He cited the case of *Maulid Juma vrs Ismail Mrindoko Civil Application No. 198/2016 CAT AR* to back up his argument. In insisting that the proper court was High Court Mwanza Registry, Both Advocates argued that even the wording of section 18 of CPC which provides that the suit is to be instituted within the local limits where the defendant resides or works for gain, further sets a condition as it stipulates "*subject to limitation aforesaid*" which he argued to mean that section 18 must be read subject to section 14 of the CPC and thus section 14 must prevail as per principals of statutory interpretation. He also contended that he is aware that paragraph 13 of the plaint denoted "*.....the cause of action arose at Bukoba within the jurisdiction of this Hon. Court*" But argued that the said contention doesn't meet the requirement of Order 7 rule (e) of the CPC (supra) with regards to disclosing the full and sufficient facts constituting the cause of action and where the same arose so as to determine if the court has jurisdiction. As such the contents stated in paragraph 13 of the plaint are useless in law. He cited the case of *Fish Filleters (TZ) Ltd vrs Alex Trachtenberg and Capital Fish (Kenya) Ltd. Civil Case No. 30/1995 High Court Mwanza* (unreported) wherein the late Lugakingira J. (as he then was) at page 8-9 cited with approval the case of *Assanand and Sons*

(Uganda) Ltd vrs East African Records Ltd [1959] EA 360 and quoted as follows to substantiate his argument;

".....that a mere assertion by the Plaintiff that the court has jurisdiction is not enough but the facts showing that the court has jurisdiction should be stated in the pleading".

The Advocate went on to argued that this court cannot assume the jurisdiction to entertain this case in the pretext that the cause of action arose in Bukoba as per section 18 of the CPC (supra) since the section has to be interpreted subject to section 14 of the CPC which stipulates the suit for immovable properties must be instituted in the local limits of whose jurisdiction the property situate.

Rebutting the assertion of the Principal Officer of the Plaintiff that he wishes this case be tried in Bukoba and that was as per the Court of Appeal order, Advocate Mutalemwa submitted that when the matter was ordered to be returned to Bukoba for trial, the 3rd Defendant has not yet filed the WSD and that the same was filed on 17/10/2017 as such the point of jurisdiction as raised in the WSD has never been determined by this court. He went on that since the question of jurisdiction is the bedrock on which the court's authority and competency to entertain and determine the matter rests; the same can be inquired and determined at any stage of the proceedings as rightly raised by the counsels in this case. Besides the authority of a court to entertain any matter is conferred by statute and not by the wishes or willingness of the parties. Neither can the parties request for a waiver. He referred to the book by Richard Kuloba titled "Judicial Hints on Civil Procedure" 2nd Ed. Law Africa Publishing Ltd Nairobi Kenya which at page 65 stated;

“It is well established law that jurisdiction cannot be conferred on court by consent of parties and any waiver on their part make up for the lack of defect of jurisdiction”.

He concluded that since the suit land is in Mwanza city and the alleged sale was conducted in Mwanza as well, then the case be returned to the Plaintiff with the statement endorsed therein that the same be filed at the High Court of Tanzania District Registry of Mwanza as provided in Order VII R 10 (1) and (2) of the CPC (supra).

In reply Mr. Mushuti who hired the Learned Counsel Advocate J.S Rweyemamu for drawing services only submitted that the Defendants have raised three Pos in their WSD.

However I wish to point out that the court will confine to determine the question of jurisdiction of this court as earlier stated. As such the other raised POs are not within the scope of this ruling.

The Plaintiff submitted that there are two reasons as to why this case has to proceed in this court; first he argued to be the order of the Court of Appeal which was not challenged and secondly it's the requirement of the law. In amplifying the said reasons, the Plaintiff contended that the return of the record of this case to the High court Bukoba was ordered by the Court of Appeal after quashing and setting aside both the proceedings and the ruling of the High Court (Land Division) Dar es Salaam. He thus argued that it would be absurd for this court to depart from the said order of the Court of Appeal which is superior to the High Court, adding that such an intrusion had never been the custom of our courts and that the Defendants themselves would be the first to challenge if this case would be

instituted elsewhere apart from Bukoba, where the Court of Appeal ordered. He further argued that the Defendants had a chance to challenge the Court of Appeal ruling through review but did not. Besides, the Justices of Appeal were also conversant with the fact that the suit property is in Mwanza city. He also argued that, they are also aware of the meaning of section 18 of the CPC (supra) and according to his understanding, it provides that every suit be instituted within the local limits of whose jurisdiction the defendants at the time of the commencement of the suit reside or carry business or personally work for gain or where the cause of action wholly or partly arises.

He went on to argued that he is convinced that the High Court Bukoba District Registry is vested with the jurisdiction to entertain the matter as per section 18 of the CPC and that's why the Court of Appeal directed the matter be returned and proceed in Bukoba High Court.

The Plaintiff went on to argue that section 14 of the CPC on which the defendants hinged their argument has a proviso to the effect that the suit is to be instituted in the court within the local limits of whose jurisdiction the Defendant actually voluntarily resides or caries on business or personally works for gain, which again provides the institution of the case in Bukoba. The Plaintiff in further clarification of his argument submitted that the Court of Appeal having noted this requirement and further consideration to the Plaintiff who also resides in the local limits of the 1st Defendant's place of business, ordered the Land Case No. 5/2008 to proceed at the High Court Bukoba.

The Plaintiff went further to argue that section 19 of the CPC restricts the objection concerning jurisdiction not to be allowed by any appellate or revisional

court. He added that if at all the appellate or revisional court didn't entertain the question of jurisdiction as to the place of suing, what this court has to do is to implement what has been ordered to do and that is to proceed with the hearing of the case as directed by the Court of Appeal. The Plaintiff thus prayed this court to overrule the objection by the Defendants and proceed to hear this suit.

Having gone through the submissions of all of the parties, the issue for determination is whether or not this court has jurisdiction to hear and determine this suit.

It is trite law that a court before embarking on determining any matter it must ascertain itself as to whether it is vested with the jurisdiction to do so. Various cases have so decided, among them is the case of **Fanuel Mantiri Ng'unda vrs Herman Mantiri Ng'unda and others [1995] TLR 155** quoted by both counsels which held as follows;

“The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature.....the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial”.

In the matter at hand what is being disputed is the place of suing which legally is governed by section 14 and 18 of the CPC (supra). Admittedly the suit land situates in Mwanza city. The Plaintiff has argued that there are two reasons as to why this case has to proceed in this court. First the order of the Court of Appeal which was left unchallenged and secondly is the requirement of law. My ruling will traverse on these reasons of the Plaintiff starting with the 2nd reason.

Both counsels for Defendants argue that section 14 (a) which has been coined in a mandatory way has put a requirement for the suits concerning the recovery of an immovable property to be instituted where the property situates to which I agree. I wish to quote the said provision for easy reference:

section 14 *“subject to the pecuniary or other limitations prescribed by any law, suits*

a. For the recovery of immovable property with or without rent or profits.

Shall be instituted in the court within the local limits of whose jurisdiction the property is situate”.

The Plaintiff on his part has argued that section 18 of the CPC is the proper provision applicable in the circumstances of this case.

Section 18 (a) provides institution of the suit within the local limits of whose jurisdiction the defendants resides or work for gain. In the matter at hand only 1st Plaintiff can be said to reside and works for gain in Bukoba, though this is also arguable since the same has various offices within Tanzania including Mwanza. The other two Defendants reside and work for gain in Dar es salaam and Mwanza respectively.

As such section 18 (a) in my opinion is not appropriate with due respect. I am aware that section 18 (b) provides for the institution of a suit where some of the defendants do not resides or works for gain provided they acquiesce to such an institution or there is a court order to that effect. In my understanding the said condition was not met. I should hasten to add that the Court of Appeal order to return the records to Bukoba is not within the meaning of section 18 (b) of the

CPC to my understanding since the order is to be obtained before the institution of the suit and not after.

With regards to section 18 (c), the dispute arose following the sale of the disputed land which sale occurred in Mwanza. In my understanding, that's where the cause of action arises. In this regard therefore section 18 of the CPC is not applicable in determining a place to sue in this case. But further to that section 18 categorically states that its application is "*subject to limitations afore said*". Since section 14 comes before section 18, then it is among the limitations envisaged in section 18. In other words section 18 must be interpreted subject to section 14 as correctly argued by the Defendant's Counsels.

The Plaintiff has also argued that the proviso under section 14 of the CPC allows the institution of the suit in Bukoba High Court. Let me quote the said part for easy understanding;

"....shall be instituted in the court within the local limits of whose jurisdiction the property situate".

*Provided that a suit to obtain **relief respecting, or compensation for wrong to immovable property held by or on behalf of the defendant may**, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate or in the court within the local limits of whose jurisdiction the property is situate or in the court within the local limits whose jurisdiction the Defendant actually and voluntarily resides or carries on business or personally works for gain". (emphasis mine)*

Going through the plaint the reliefs sought revolve around the recovery of the suit land and not compensation. But even if it is assumed that the reliefs sought are in respect of the wrong committed on the suit land, but the same having been sold is now held by the 3rd Defendant who resides and works for gain in Mwanza. Either way the proviso has not assisted the Plaintiff in his argument.

I will now revert to discuss the 1st reason as to why the Plaintiff argues this court has jurisdiction. The Plaintiff has submitted that the Court of Appeal has ordered the hearing of this matter to proceed at Bukoba. I concede to the argument by the Plaintiff that the High Court being inferior to the Court of Appeal has to abide or rather it is bound by the decisions of the Court of Appeal. However it should be noted that jurisdiction of a court is essentially conferred by law or statute and not otherwise. For easy understanding let me quote the relevant part of the said Court of Appeal order:

"Since the omission to transfer the case vitiated proceedings conducted at Dar es salaam Registry of the High Court (Land Division), we hereby exercise powers of revision conferring on the court by section 4 (3) of the AJA and hereby quash and set aside both the proceedings and ruling of Ngwale, J. The record shall be returned to the High Court (Land Division) Bukoba for the case to proceed from the stage where it ended" (emphasis mine).

In my judicial interpretation, the quoted decision the Court of Appeal has not dealt with the jurisdiction of Bukoba High Court. The reason of its decision to return the court records to Bukoba is very clear; the same was improperly transferred to Dar es salaam High Court (Land Division) from where it was

originally instituted. So what it did was to order the file revert back to Bukoba where the court was instituted.

The Plaintiff has argued that neither Defendant has appealed against the order. However the CAT went further and ordered the matter to proceed from where it ended.

Having in mind that each court is to ascertain at the commencement of suit as to whether it has the jurisdiction to try and determine the same [**Refer the Mantiri's case supra**], the issue of jurisdiction with regards to Bukoba High Court was to be dealt by Bukoba High Court itself either *suo mottu* or upon being moved by parties as it happened herein. As such the question of appealing against the order of the Court of Appeal to return the record to Bukoba doesn't arise and in fact it would have been pre mature if it would have been raised.

The Plaintiff also argued that section 19 of the CPC disallows the raising of an objection on a place to sue by an appellate or revisional court. For easy understanding I wish to quote the aid section.

"No objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and, in all cases where issues are settled at or before such settlement and unless there has been a consequent of failure of justice".

Suffice to say that this section has been misconceived by the Plaintiff. The objection has been raised at Bukoba High Court which is the court of first instance and not an appellate or revisional court. Thus the section doesn't apply. Rather

this is a proper court for the objection to be raised. The Plaintiff also seems to argue that the Court of Appeal has considered section 14 of CPC and the fact that he is a resident of Bukoba that's why it ordered the matter to proceed in Bukoba High Court. Suffice to state that the court has above discussed section 14 of CPC at length. Further to that the legal position is to the effect that jurisdiction cannot be conferred on a court by consent of parties as such it can't be given as a favor to a party rather it is a creature of statute.

All having said and done, it is the finding of this court that the High Court, Bukoba Registry has no jurisdiction to hear and determine this matter which concern an immovable properly situate in Mwanza City and the alleged sale was conducted in Mwanza city as rightly submitted by the counsels of the Defendants. The remaining question to determine is the consequence;

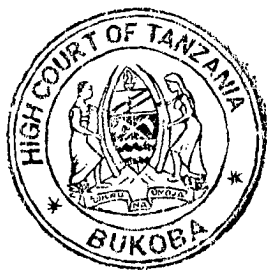
Advocate Kabunga has prayed the matter be struck out with cost. However Advocate Mutalemwa has prayed the court to return the case to the Plaintiff with the statement endorsed therein that the case be filed in High Court of Tanzania Mwanza Registry as per Order VII R 10 (1) and (2) of the CPC (supra). Both of them are right as the court can order any of the said remedies. However for the sake of limitation this court decides to exercise its jurisdiction under section 95 of the CPC and hereby orders that this plaint be returned to the Plaintiff and ordered to present the same to the High Court (Mwanza District Registry) for filing. The order is given today 18/5/2018 for the reason afore said.

Before finishing, I would like to extend my sincere gratitude to all of the learned counsels for the Respondents and the Plaintiff for their insightful and persuasive

arguments they had advanced in a move to assist the court to reach to its determination.

Order accordingly.

R/A explained.




L.G. Kairo

Judge

At Bukoba

18/05/2018

Date: 18/05/2018

Coram: Hon. L.G. Kairo, J.

Plaintiff: Present in person

1st Defendant: }

2nd Defendant: } Mutalemwa Advocate holding brief of Advocate Kabunga

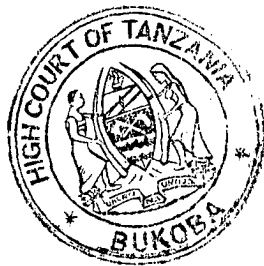
3rd Defendant: Advocate Mutalemwa

B/C: Tatu

Advocate Mutalemwa: Hon. Judge, the matter is for ruling and we are ready to receive it.

Plaintiff: I am also ready to receive it.

Court: The matter is scheduled for ruling. The same is ready and is read over before the parties as per today's quorum in open court.



L.G. Kairo
Judge

18/05/2018