THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(HC) CIVIL CASE NO. 5/2011

FULGENCE MUNDEI JASSON & 156 OTHERS..... PLAINTIFFS

VERSUS

1. MINISTRY OF INFRASTRUCTURE DEVELOPMENT

2. ATTORNEY GENERAL.....DEFFENDANTS

RULING

18/04 & 08/05/2018

S.M. RUMANYIKA, J

When the by any stretch of the imagination backlog case was called on 16/04/2018 for a marathon hearing, Mr. Mathias Rweyemamu learned counsel for the plaintiffs, with a moderate zeal and vigor submitted that with the 06/03/2018 order of the court (S.B. Bongole, J), unless the Court of Appeal of Tanzania intervened and gave guidance, the case could not continue further. The judge, with no reasons at all having disqualified himself from conduct of the case. That the serious omission sufficiently vitiated the entire proceedings. The matter therefore would be remitted back for the judge to continue with its hearing. Counsel cited the case of **Mwita & 4 others V.R,** Criminal Revision No. 1 of 2007 (CA) at Mwanza (Unreported).

Messrs Byabato and Njoka learned counsel and State Attorney respectively for the 2nd and 1st defendants were at one. In effect, that the case of **Mwita Chacha** (Supra) and the case at hand were, by all intents and purposes distinguishable. That whereas, in the case at hand the presiding judge viewed that unless he disqualified himself he could not have observed impartiality and that one he did, judge in the other case recused himself simply for "personal reasons". To use the exact words. The two learned attorneys therefore submitted that there was nothing lawful to prevent this court from proceeding to hearing the case and finally determine the matter. I shall shortly herein after come back to this point.

May I, from the outset make myself clear (I think that one counted, among others but the major factor leading to it now being a back log case), that following the 1st presiding judge Matogolo's transfer and now the 2nd presiding judge S.B. Bongole having recused himself, the case was, by his 13/04/2018 order re-assigned to non other than S.M. Rumanyika, J. Who was then for the purposes, by letter Re. No.HA.49/127/01 "C"/18 of 07/04/2016 appointed by his lordship the Jaji Kiongozi preside over the special sessions. Hence the backlog case changed hands of judges.

Now back to the point. The issue is whether the recusal order compeled for guidance of the highest fountain of justice. The answer is in my considered view no. Much as the case of **Mwita Chacha Case** (supra) is, as correctly in my view Mr. Byabato argued, is respectfully distinguishable. The CA held inter alia:-

. . . With respect, we have identified at least five (5) erroneous orders. *First, the learned judge disqualified himself* from proceeding on

with the hearing of the case *without disclosing any reasons, second*. . . (not applicable) *third;* up to the time he disqualified himself a ruling of whether or not the accused persons had a case to answer had not been delivered, *forth* he ordered the matter to be tried afresh; and lastly; . . . (not applicable) . . .under the circumstances, we have no option but to order that the case should continue expeditiously . . .

I am now of settled mind that the two cases are both distinct and distinguishable. Reasons are mainly three (3); *one* unlike were the circumstances in **Mwita Chacha case** (supra) leave alone how, my brother Bongole disqualified himself before he arrived at its logical conclusion for observance of impartiality. But in the other case, and as said, the judge disqualified himself only for "personal reasons". I think in order for judges to demonstrate that justice was manifestly seen being done, reasons for recusal needed not be given beyond reasonable doubts. At times recusal may necessarily not be prompted by parties' complaints. Suffices that the judge had some internal prejudice on a party to the proceedings. *Two;* Unlike in the **Mwita Chacha case** (supra), case was at the time declared duly closed and defendants invited to make their case. It means a prima facie case had been made up. *Three;* Unlike in the **Mwita Chacha case** (supra), there hasn't been in the instant case a denovo trial order. *Four;* The former presiding judge doubted whether he could be bias free any further. Not only was no longer able to do justice, but also to him no justice could manifestly seen as having been done. *Five;* there wasn't in the present case any intermediate substantive or otherwise order pending for determination by the previous presiding judge.

May I also in passing hold that reasons for recusal by judges need not be express. As possibilities of embarrassing in coming judges could not be ruled out. Take example where, if at all bribing a judge was attempted but for some reasons failed. It means therefore that whomever took over and concluded the matter shall possibly suggest that the attempts were successful. Perhaps the question would now be what was it? If cash how much?

Having said all this, I will now hold that in effect there was nothing wrong with the judge's order recusing himself from conduct of the case. In other words at this stage the Court of Appeal intervention would respectfully be uncalled for.

Yet again this court *sua mottu* raised five (5) points on which the learned attorneys also were invited to address it:-

1. Whether by its order dated on 27/03/2009 in Application No. 10 of 2008 to file a representative suit (M.H.C.S Longway, J) the plaintiffs complied and instituted a land case.
2. Whether upon ordering him (Fulgence Mundei Jason) indeed the applicant (now for 76 others) publicized his intention to institute a suit. But later on with respect to another but additional 30 plus plaintiffs (Order 1 Rule 8 of the Civil Procedure Code Cap 33 RE 2002).
3. Whether upon parties agreeing, and case was by court order on 26/08/2015 assigned speed track III (ie. 14 months), parties sought extension of time, and was the previous speed track accordingly vacated.

4. Whether by its nature, cause of action was tortuous and, if so whether the case was within time instituted.
5. Whether per se there was valuation ever done to establish value and extent of loss sustained and now claimed by the plaintiffs.

Mr. Mathias Rweyemamu Learned Counsel prayed for almost a day adjournment to prepare. The defendants' attorneys did not object to adjournment and time sought. As court sessions were resumed on 17/04/2018, Mr. Rweyemamu chose to begin with the issue whether by its nature it was a tort of trespass. He submitted that in fact civil wrong as was, the cause of action arose year 2004 being dispossession (continuity of) by the 1st defendant of the disputed land. Hence a claim for compensation. That the limitation period was twelve (12) years. (Sections 6 (e) 7 and 9 (2) and Part I item 22 of the 1st Schedule to the Law of Limitation Act Cap. 89 RE. 2002 (the Act)). That as of right, they chose to plead the two causes of action. Namely recovery of the land and damages for trespass combined. That even solely cause of action was trespass, yet still the suit was within time instituted. Matter having been filed on 14/11/2011in Mwanza registry of the court. But then was transpired hereto.

With regard to compliance or non compliance with the court order for filing a representative suit, Mr. M. Rweyemamu submitted that public as it was, a notice was accordingly given, such that some new other victims of trespass (inclusive of one Suzana) by letter(s) applied and joined to the proceedings. That be as it may, suit could not be defeated for non or

misjoinder of the parties (Order 1 Rule 9 of the Civil Procedure Code Cap 33 RE. 2002 – (the code)).

As for the issue of long lapse of the speed track the case had been assigned, Mr. M. Rweyemamu submitted that upon closure of the prosecution case they sought, and court granted them extension of time.

On the issue of leave to file a representative land case having been sought and granted, but nevertheless the plaintiffs instituted the ordinary civil case, the learned counsel simply confessed but submitted that he didn't know what had actually happened. Whereas Mr. M. Rweyemamu averred that now that at the time of filing it by a Government Notice (GN) Land division of the court no longer had exclusive jurisdiction, counsel on the same breath urged the court order and return the plaint for the plaintiffs to do the needful (Order 7 Rule 10 of the Code). Counsel also cited Order 6 Rule 17 of the code). As the anomaly may have been inadvertently and more so by human error caused by advocate, having conduct of the case before. Counsel was at loss, and sought guidance on what would follow procedurally had the plaint been returned.

Questioned by court for clarification, Mr. M. Rweyemamu submitted that although limitation period was the same 12 years. The reliefs herein sought by plaintiffs were not equivalency of redemption of land.

Mr. Byabato learned advocate replied, and in a nut shell submitted that the suit was in fact hopelessly time barred. As cause of action for compensation arose year 2004 (notwithstanding declaratory orders sought). In which case therefore, matter should have been instituted in

2005 latest (Item 1 of the 1st schedule to the Act). That had there been continued trespass, one should have raised it if any, in application for extension of time. As time accrued from the date of dispossession. That it could have been a different scenario if declaratory order was the only relief herein sought by the plaintiffs. (Cited the case of **Charles Tito Nzegenuka & 106 others V. Minister for Works & another**, Land Case No. 7 of 2012 HC (unreported). That the time barred suit was u/s 3 (1) of the Act only liable to be dismissed with costs (Case of **Abdurasul Ahmed Jaffer & 2 others V. Parin A. Jaffer & Another,** Civil Appeal No. 5 of 1994).

With regard to the speed track having expired, the learned counsel submitted that extension had been sought and accordingly granted. That the plaintiffs were not to blame. That the case was both valid and properly before the court (cited the case of **Nazira Kamra V. MIC Tanzania Limited,** Civil Appeal No. 111 of 2015 (CA) – Unreported.

As for an ordinary civil case, not a representative land case having been filed, Mr. Byabato submitted that not only it wasn't that all a representative suit (no. of plaintiffs referred) but also, it was an ordinary civil case. In any case contrary to the 27.03.2009 court order (Longway, J).

With respect to the issue whether there was, or there wasn't valuation report. Mr. Byabato very shortly submitted that that one was a question of evidence by parties to be addressed and court accordingly consider it but at a later stage.

Having reiterated all what had in chief been submitted, by way of rejoinder, but additionally, Mr. Byabato submitted that in the absence of professional valuers, the plaintiffs were entitled to come up with own estimated value of property demolished by trespassing 1st defendants (undertook to bring with him copy of the authority) with a view for the court to seeing whether it had pecuniary jurisdiction. Which point of evidence nevertheless could at a later stage also be looked at. That the case of **Charles Nzeyenuka** (supra) was distinguishable. That should the plaint be returned, the plaintiffs be condemned for costs and suit be filed and entertained a fresh.

To start, with the issue is whether given its nature, or the cause of action was for a declaratory order and therefore recovery of land or compensation for trespass. Legal wrangle notwithstanding, I consider the two tortuous actions and or reliefs as one and the same by logical conclusion. Save for the duplicity. Because once, for instance the plaintiffs were in the end declared lawful owners of the disputed land, naturally and without a word the 1st defendants would always be considered as trespassers. It follows therefore that the moment the later were found trespassers the plaintiffs shall be lawful owners always. Either way. The suit therefore hinges on tortuous liability. Namely trespass by the 1st defendants. This, from day one the plaintiffs had in mind (prayer (iii) in the plaint). Now what was the limitation period available?. It was only three (3) years. As per Item 6 of the schedule to the Act. Much as the suit wasn't that of compensation or in any way for redemption of the land. The cited Items 1 and 17 not applicable.

The suit therefore was hopelessly time barred. Having been instituted say 7 years later. **Secondly**, no doubts the speed track iii according to records mutually set by the parties had long expired. Surely, like Mr. Byabato submitted correctly in my view, none of the parties was to blame for the expirely. (**Case of Nagra Kumra** (supra)). Hence the application and court granted them extension. I will therefore lay the point to rest there.

Equally so I will hold that the issue of instituting a mere civil case (Leave alone non representative) land case was fatal. This needs not to detain me for only two reasons; **One**, It abrogated an unchallenged court order Vide Misc Land. Application No. 10 of 2008 (M.H.C.S Longway, J) ***Two;*** there was at the time a specialized court in which land matters, inclusive of one at hand should have been instituted. It means therefore, that until as late as that time Land Division of this court had exclusive jurisdiction. ***Three;*** it was, and still it is trite law that; "*. . . .courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum. . . .*". See the case of **Attorney General V. Lohay Akonaay & Another (1995) TLR 80 (CA).** I entertain no doubts that the plaintiffs in the present case didn't even attempt to satisfy me that there was no appropriate remedy(s) in the specialized land court. In as much as said, the court order stood unchallenged. As it stood, a serious document as was, it reflected what had transpired in court. The order should have been seriously adhered to (See the Case of **Halfan Sudi V. Abieza Chichili** (1998) TLR 527).

It is very unfortunate that the case was admitted. It was right from the beginning incompetent for want of courts' jurisdiction. It follows therefore that the suit is respectfully out of place and is struck out.

With regard to, but contrary to court's order, the plaintiffs filling a non representative suit, at least the learned attorneys were at one. That parties were agreed and therefore sort of abandoned the court's order. What abuse of the process! Court orders are only vacated either moved by parties or *sua mottu*. Parties to case cannot, by themselves agree not to comply with the law or court orders for that matter. If such forum shopping and an uncontrolled democracy in court was permitted, one should also expect one day to see parties choosing judges. And, once that one happened, they would one day proceed to choosing court verdicts suitable for them. Nevertheless I think it is both general and spirit both of law and common sense that Order 1 Rule 8 of the Code have exception. It has never been practicable in land disputes. As each one of the plaintiffs would end of the day be required to appear. And, where applicable individually prove their titles. Unless they claimed common or joint tenancy/ownership.

Am also mindful that the issue whether or not with regard to the property there was per se valuation reports, generally it was more of evidence. However, no way the court could have turned to it completely a blind eye. Unless (whenever applicable) pecuniary value of the subject matter was in the first place, categorically not stated for the court to establish its pecuniary jurisdiction. Otherwise on that one I would agree with the learned attorneys.

With Mr. M. Rweyemamu's contention, that should the court consider the suit filed as having been in a wrong registry it be pleased to return the plaint (irrespective of the stage reached), I would have struck out the suit. In which case upon filing under Order 7 Rule 10 (1) of the Code in appropriate court, parties in my considered opinion would have by a different case number begun all over again. Save for the time barred claims.

The time barred and backlog case is in the up short dismissed with costs. It is very unfortunate that this order is made on lapse say of seven (7) good years of the pendency of the case.

Right of Appeal explained.

HIGH COURT OF TANZANIA BUKOBA

S.M. Rumanyika
Judge
18/04/2018

Delivered under my hand and seal of the court in court this 08/05/2018 in the presence of Messrs Njoka, Byabato and Mathias Rweyemamu for the defendants and plaintiffs respectively.

HIGH COURT OF TANZANIA BUKOBA

S.M. Rumanyika
Judge
08/05/2018