

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

LAND CASE NO. 15 OF 2017

SALUM NASSOR MATTAR

*(Administrator of the Estate of the Late Mattar Rashid Mattar, the Plaintiff).....***PLAINTIFF**

-VERSUS-

BHARAT BHAGWANJI LAXMAN.....1st DEFENDANT

ROHYT BHAGWANJI LAXMAN.....2nd DEFENDANT

RULING

Date of last order: 30/09/2022

Date of ruling: 17/10/2022

AGATHO, J.:

This ruling is prompted by the objection raised by Advocate Senguji for plaintiff to effect that Mr. Sebastian Danda, a solicitor of Tanga City Council who would be the defendants' witness is disqualified to testify and tender the WSD of Tanga City Council (a previously withdrawn Defendant) against the Plaintiff. To resolve the controversy the Court invited the learned counsel to submit on the objection. Both parties agreed to dispose the objection by oral submissions.

It was Mr. Kitambwa the Plaintiff's advocate who broke the ice by submitting his objection in two limbs: that the evidence law under Section 123 the Evidence Act [Cap 6 R.E 2022]. And that Mr. Danda is functus officio.

He submitted that the witness who the Defendants intend to bring is the Officer of Tanga City. And before, when the case was on hearing the Plaintiff brought a witness who was sent by the Commissioner for lands to testify on the case and he tendered exhibit that shows the status of land in dispute. Mr Kitambwa submitted that the existing relationship between Tanga City and the office of Land Commissioner was explained in the case of **Said Mohamed Abubakar V. Kinondoni Municipal Council, Jacob M. Ngowi and Mwanahamisi Musa, Land Case No. 81 of 2014 HCT at Dar es Salaam, at page 9.**

"As a matter of fact the Municipal Council which is the overseer of ownership and transfer of title deed on behalf of the Commissioner for Lands...."

The learned counsel argued further that the evidence which Mr. Danda intends to testify is a withdrawn written statement of

Defence (WSD) in this case in which Tanga City Council as one of the Defendants was withdrawn.

The plaintiff submitted that when the case was withdrawn Mr. Mgombela, the solicitor was representing Tanga City Council, and they agreed that Tanga City Council be withdrawn.

Mr Kitambwa argued that on the side of 1st and 2nd Defendants were present when the WSD of Tanga City Council was withdrawn (a claim against it was relinquished). The Plaintiff prayed to relinquish the claim against Tanga City Council. He protested that neither party claimed that there are triable issues against it (Tanga City). None of the parties objected removal of Tanga City Council from the case.

He invited the Court to consider the case of **Trade Union Congress of Tanzania (TUCTA) V. Engineering Systems Consultancy Ltd, Beda J. Amuli t/a Amuli Architects, Construction Management Services Ltd, Civil Appeal No. 51 of 2016 CAT at Dar es Salaam** where Section 123 of the Evidence Act [Cap 6 R.E 2019] was interpreted, that once a party by his conduct, omission or his words promises and caused another

person to believe a thing or to be true and to act upon that belief/promise neither her or his representative shall be allowed in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.

To support his submission the counsel cited another authority on promissory estoppel as the case of **Issa Athumani Tojo V. R Criminal Appeal No. 54 of 1996 Court of Appeal of Tanzania at Dar es Salaam.**

Mr Kitambwa argued that on the side of Tanga City Council and the office of Commissioner for Lands the case against Tanga City was also a case against the Commissioner for Lands and the latter came to testify. Since the Commissioner, who is the boss of Tanga City Council has testified then calling upon Mr. Danda, the solicitor from Tanga City Council is not appropriate. He submitted that to bring Mr. Danda to testify on the WSD that was part of the defence for the case relinquished is to bring Tanga City Council into this case through back door.

He cautioned the Court that if this will be allowed then the Plaintiff would not have an opportunity to react through the Commissioner for lands towards that WSD of Tanga City Council.

On this point he referred the case of **Said Mohamed Abubakar** (supra) pages 8 – 12 where Mzuna J held if there would not have been evidence of fraud then Kinondoni Municipal Council would have been estopped to transfer (to implement directives of commissioners for lands).

He distinguished that case by pointing out that in the present case the issue is double allocation. It is not fraud. He stressed that the intended witness ought to have sought permission from commissioner for lands because it is one office.

Regarding *functus officio*, Mr Kitambwa submitted that Mr.Danda was *functus officio* when the WSD of Tanga City Council was withdrawn. He was of the view that Tanga City Council when was removed from this case it left with the WSD. He emphasized that once the Tanga City Council was declared removed from the case then its WSD cannot be brought before this case any way.

To buttress what **Mr Kitambwa submitted, advocate Senguji submitted that** the Tanga City Council and the office of Commissioner for lands is one office. He stated that when the plaintiff's witness testified, he tendered documents from land commissioner's office they were with respect to the land in dispute. He submitted that one of the letters tendered was written to Tanga City Council. The copies were sent to the Defendants too.

Mr Senguji submitted that in the circumstance of this case Mr. Danda is disqualified to be called as Defendants' witness because his boss (land commissioner) has testified.

He repeated what Mr Kitambwa submitted that to bring the WSD of Tanga City Council it means that Tanga City Council is brought back into this case. He argued that the plaintiff has relinquished a claim against Tanga City Council. She is not supposed to come back to this again. He added that this Court accepted removal of the Tanga City Council. He concluded that Mr Sebastian Danda – Solicitor is disqualified.

In his reply (Mlawa Advocate for the Defendants) submitted that the Advocates for the Plaintiff are objecting the calling of Mr.

Sebastian Danda as Solicitor of Tanga City Council, and their basis is on Section 123 of Evidence Act [Cap 6 R.E. 2022].

He submitted that this provision does not apply. The said law requires a party to have said or promised something and he is disputing it. The law estops him. Mr Mlawa submitted that Mr. Danda has done or said nothing that he is now disputing. He said that the cited provision is irrelevant.

On promissory estoppel Mr Mlawa cited Sarkar on Law of Evidence page 2307 where conditions for estopped are enlisted:

- (1) There must be a representation by a person or his authorized agent to another e.g., a declaration, an act or omission.
- (2) The representation must have been meant to be relied by another person.
- (3) There must have been belief on the part of the other party in its truth.
- (4) There must have been action on the faith of that declaration, act or omission which must have actually cause another to act on the face of it.

- (5) The misrepresentation or conduct, or negligence must have been the proximate cause of leading the other party to act to his prejudice.
- (6) The person claiming the benefit of an estopped must show that he was not aware of the time state of things.

Mr Mlawa argued that looking at all the above conditions of estopped as per Sarkar on Evidence he does not see any of the above matching the claims of the Plaintiff. He said there is no declaration or act or misrepresentation by Mr. Danda. He was of the view that Section 123 of the Evidence Act does not apply in the present objection.

He added that there is not any law that he (Plaintiff) have cited that could stop or disqualify Mr. Danda as a witness.

Mr Mlawa then referred to the Evidence Act [Cap. 6 R.E 2022] Section 127 which provides that every person shall be competent to testify unless the Court considers that he is incapable of understanding the questions put to him or incapable of giving rational answers to those questions by reason of tender age extreme old age, disease of body or mind or any other similar

cause. He submitted that the intended witness (Mr. Danda), is not disqualified by this law. He is not of tender age, extreme age or of unsound mind, etc.

Mr Mlawa submitted that they have called Mr. Danda as a witness because of what he did himself and what he wrote in the document. He has stated in the document and the verification clause stated that what he stated in the document (WSD). The learned counsel was of the view that he is a competent person as the document he prepared himself.

Mr Mlawa also cited Section 115 of the Evidence Act [Cao 6 R.E 2022]. In civil proceedings when a fact or knowledge is at issue at that person has knowledge about the fact the burden of proof is upon that person. He submitted that this goes hand in hand with Section 69 of the TEA [Cap 6 R.E 2022].

The Defendants' counsel also disagreed with the submission of the Plaintiff side on the issue that the Commissioner for Land and Tanga City Council are one office. He said these are two separate institutions. They are performing different tasks. It is not one office. He also refuted the claim that the commissioner for lands is

a boss of Tanga City Council. He added that Tanga City Council is the owner of the land, within the city. He submitted that these two institutions perform different tasks. They are not one and the same office.

Mr Mlawa submitted that it is no wonder that the institutions may be called to testify as was in the criminal case No.1 of 2007 **R. V. Costa Rick Mahalu and Grace Martin**, Kisutu Resident Magistrate's Court (Ilvin Mgeta SRM as he then was). In that case **Costa Rick Mahalu** was prosecuted by the United Republic of Tanzania it was alleged that he did the act/offence when His Excellency B. W. Mkapa was the President of United Republic of Tanzania. Advocate Mlawa submitted that in Mahalu's case H.E., B. W. Mkapa appeared as (DW2) a defence witness number two. He testified against the United Republic of Tanzania. Along that line he submitted that it is unsurprising that Mr. Danda can come and testify before this Court. He argued further that the plaintiff called the commissioner for land to come to testify and Mr. Danda will come to testify for the Defendants.

He then turned to the cases cited by the Plaintiff on estoppel. On this he stated that the cases cited are irrelevant and do not apply

in this case. He said the other case cited **Mohamed Said Abubakar** is equally irrelevant as it is distinguished. He stated that that case does not disqualify a witness. Moreover, it is a High Court decision. The High Court is not bound by its own decision.

As for the question of functus officio, Mr Mlawa stated that he does not see its relevancy. His view was that functus officio applies or means when a person has performed his duties is not supposed to sit again and perform the same duty again. Mr Mlawa was of the view that he does not see what duty the witness did or what the Judge/Court did which render it functus officio. He submitted that as per the Court proceedings what happened is that the Plaintiff prayed to remove the 3rd Defendant (Tanga City Council) and it was granted. He stated that it is not true that the 3rd Defendant is being brought back into this case. What is sought by the Defendants is to bring Mr. Danda a private person to testing before this Court.

He went on submitting that the Court has no legal basis to deny Mr. Danda right to testify before this Court. He concluded by praying that the objections be overruled.

In his rejoinder (Kitambwa Advocate) stated that the case of **R V. Costa Rick Mahalu** is a decision of subordinate Court. It is not an authority to be relied upon by this Court.

He rejoined further that the Defendants' Counsel argued that the Plaintiff's counsel was pointing a gun to himself this was stated in reference to the case of **Mohamed Said Abubakar** decided by Mzuna J., and that is not true. Mr Kitambwa submitted that the Land Act mention three institutions: Commissioner, Minister, and the President. As per Section 9 of Land Act it only mentions the Minister. He submitted that the issue of lands the responsible office is the commissioner for lands. The case of **Mohamed Said Abubakar** dealt with the linkage between the Commissioner's office and the Municipal Council. They are one office in as far as land is concerned.

Regarding citing of Sarkar on Evidence, Mr Kitambwa rejoined that the counsel for the Defendants has relied on Sarkar. He submitted that he cited the cases and provisions of the law on estoppel. Therefore, he was of the view that Court should rely on them instead of Sarkar.

He further rejoined that their objection is not about Danda as such. But they are objecting on the tendering of WSD. He referred back to Section 127 the Evidence Act [Cap. 6 R.E 2022] which states and any other similar cause. He stated that in the case at hand the Court may be satisfied that the intend witness is disqualified. He added that thee WSD intended to be brought before this Court is it of Danda or Tanga City Council. He argued that Tanga City Council is sought to be brought through back. If the WSD is tendered, then Tanga City Council is as it is becoming a party to this case.

As for contention of the same office, Mr Kitamba submitted that those land officers at the Tanga City Council are there on behalf of the commissioner for lands. He is of the view that the Registrar of Titles is part of commissioner for lands office. Therefore, the Registrar of Titles is part of land commissioner's office.

He closed his rejoinder by submitting and praying this Court to disqualify Mr. Danda. And hence the objection be sustained.

The court is invited to rule whether the objection raised against Mr. Danda as a Defendants witness is founded in law? In other words, is Mr. Danda disqualified by any law to testify in the case at hand?

The central issue is on the competency and compellability of a witness.

Whether Mr Sebastian Danda is a competent witness? Whether he is disqualified to testify? In what circumstances can a witness who is otherwise a competent one be disqualified to testify?

Is the fact that Tanga City Council was withdrawn from the case bar the tendering of its WSD as evidence? In my view, since the WSD is not part of the pleading then the same is not barred from being tendered in evidence so long the said document meets the requirements of documentary evidence. This will be determined when the document is tendered.

What is the effect of withdrawing a claim or relinquish a claim against a particular party? Once the claim against a party is relinquished the documents detailing the claim in respect of that party cease to part of Court records. Such documents can be used as evidence in the same case if a party so desires to tender the same in the court.

Whether testimony of Land Commissioner bars Mr. Danda from testifying. As per Section 127 of the TEA Mr Danda is a competent

witness and he is not barred from testifying in the present case. Moreover, the testimony given by the Commissioner for land cannot estop Mr. Danda from testifying for the Defendants. In fact, his testimony like other relevant evidence may assist the Court in reaching the just decision.

Whether the office of Land Commissioner is one and the same thing as that of Tanga City Council. This is totally misguided. These are two separate offices established under different laws. Even if their operations/functions may overlap or may be collaborative that does not mean they are the same thing.

I am of the firm that Mr Danda is a competent witness to testify in the present case. There is no law which disqualifies him. Moreover, tendering of the WSD is also not barred by any law.

Mr Mlawa right submitted that Mr Danda is the competent witness as he is not disqualified by any law to testify. He is not of tender age, or extreme old age or of unsound mind. Section 127 of the Evidence Act [Cap. 6 R.E 2022] provides that every person shall be competent to testify unless the Court considers that he is incapable of understanding the questions put to him or incapable of giving

rational answers to those questions by reason of tender age extreme old age, disease of body or mind or any other similar cause.

In the case of **Serengeti Breweries Limited v Simon Pissy, Labour Revision No. 09 of 2021, HCT, Moshi District Registry**, this Court held that the Human Resource officer of the Applicant was a competent witness to testify. While the facts of this case may be distinguished but the principle remains the same that every person is competent to testify unless disqualified by the law as stipulated on section 127 of the Evidence Act. Now, regarding citation of Mahalu's case I agree with the Plaintiff counsel that decision is of subordinate Court this Court is unbound by that. However, the appearance of HE BW Mkapa as defence witness in **Mahalu's case** is clear evidence that competence of a witness is a matter of law. He was a competent witness despite being the President of the United Republic of Tanzania when the alleged offence was committed. And he testified against the government in which he was the head. What should be understood here is that HE BW Mkapa was not disqualified from testifying in the case by simply being a former President.

It should be remembered that there is a difference between a party to a case and a witness. There is no way by any stretch of imagination that Tanga City Council is being brought back into this case. After all the party who has interest to sue the same is the Plaintiff and not the Defendants. I thus find the objections are not misconceived but also misleading. Both arguments on estoppel and functus officio are misguided. And hence they are rejected.

In the end the objection raised are without merit, they are overruled with costs. It I further ordered that the hearing shall proceed from where it ended prior to the objection.

It is so ordered.

DATED at TANGA this 17th Day of October 2022.



Date: 17/10/2022

Coram: Hon. Agatho, J

Plaintiff: Present

1st Defendant: Absent, but present is Mlawa, advocate for

2nd defendant: Absent

B/C: Zayumba

JA: Ms. Husna Mwiula

Court: Ruling delivered on this 17th day of October, 2022 in the presence of the Plaintiff and, and Advocate Mlawa for the defendants.


U. J. AGATHO
JUDGE
17/10/2022

Court: Right of Appeal fully explained.



U. J. AGATHO
JUDGE
17/10/2022